NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY,

Complainant,

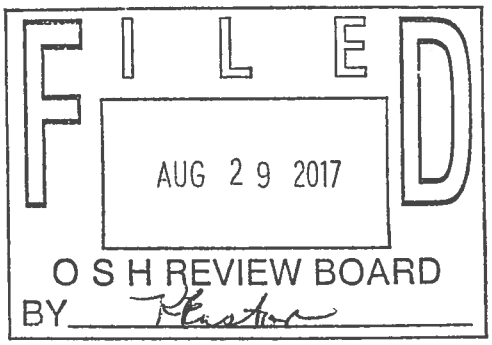
vs.

JETSTREAM CONSTRUCTION, INC.,

Respondent.

_____/

Docket No. LV 17-1889



DECISION

This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced Thursday, July 13, 2017, in furtherance of notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations** (OSHA). MR. TROY McKNIGHT, appearing on behalf of Respondent, **Jetstream Construction, Inc.**

Jurisdiction in this matter has been conferred in accordance with Chapter 618 of the Nevada Revised Statutes.

The complaint filed by the OSHA sets forth allegations of violation of Nevada Revised Statutes as referenced in Exhibit "A", attached thereto.

Citation 1, Item 1, charges a violation of 29 CFR 1926.501(b)(4)(i)

which provides in pertinent part:

> Holes: Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

Complainant alleged:

> Jetstream Construction, Inc. Employees were observed installing drywall near holes without being protected from falls at the Arville Mesa Verde Elementary School project located at 7950 Arville Street, Las Vegas, Nevada 89139.

OSHES alleged:

> "Twenty (20) holes, ten (10) with rectangular dimensions of 1 foot, 4-3/4 inches by 2 feet 9-13/16 inches and ten (10) with rectangular dimensions of 2 feet by 2 feet, 9-13/16 inches inside rectangular curbs approximately 18 inches high were created by a sub-contractor (creating employer) for the HVAC equipment that they were scheduled to install. They were cut, curbed and covered with thin plastic sheets marked with words "Hole" and "Danger". They were not covered with plywood or other material that is capable of supporting without failure to at least twice the weight of employees, equipment, or materials that may be imposed on the cover at any one time. The holes exposed employees to possible falls of 14 feet to the ground below which could cause serious injuries such as contusions, fractures, and even death."

The citation was classified as Serious. The proposed penalty was in the amount of $800.00.

Citation 1, Item 2, charges a violation of 29 CFR 1926.501(b)(14) which provides in pertinent part:

> "Wall openings." Each employee working on, at, above, or near wall openings (including those with chutes attached) where the outside bottom edge of the wall opening is 6 feet (1.8 m) or more above lower levels and the inside bottom edge of the wall opening is less than 39 inches (1.0 m) above the walking/working surface, shall be protected from falling by the use of a guardrail system, a safety net system, or a personal fall arrest system.

Complainant alleged:

> "At the second floor, building 4 of Arville Mesa Verde Elementary School project located at 7950 Arville Street, Las Vegas, Nevada 89139, Jetstream Construction, Inc. employees were installing drywall in one of the classrooms near and around wall openings without being protected from falls. The height of the wall openings were measured to be 32 inches high. Four (4) wall openings measured to be 7 feet 4 inches wide and 6 feet 8 inches high did not have additional guardrails to meet the minimum height requirement of 39 inches for protection. The employees were exposed to a fall of approximately 12 feet to the ground below which could cause serious injuries such as contusions, fractures and even death."

The citation was classified as Serious. The proposed penalty was in the amount of $800.00.

Citation 2, Item 1, charges a violation of 29 CFR 1926.403(b)(2) which provides in pertinent part:

> Installation and use. Listed, labeled, or certified equipment shall be installed and used in accordance with instructions included in the listing, labeling, or certification.

Complainant alleged:

> "At the Arville Mesa Verde Elementary School project located at 7950 Arville Street, Las Vegas, Nevada 89139, building 4, first floor hallway, electrical equipment was not used in accordance with instructions included in the listing, labeling or certification. An energized relocatable power tap (RPT) was used to charge power tool batteries. The relocatable power tap was connected to a spider box. The relocatable power tap (RPT) were used at this construction site outside of its labeling, listing or certification, which states relocatable power taps are not intended to be series connected (daisy chained) to other relocatable power taps or extension cords, and are not intended for use at construction sites and similar locations."

The citation was classified as Other with no proposed penalty.

Counsel for the complainant and respondent stipulated to the admission of evidence at complainant Exhibits 1 through 3. Respondent

Exhibit A, 1-18.

Counsel for the Chief Administrative Officer presented witness testimony and documentary evidence with regard to the alleged violations.

Compliance Safety and Health Officer-Safety Specialist (CSHO) Mr. Renato Magtoto testified he conducted a **programmed** inspection of a construction job site where an elementary school was being built located at 7950 Arville Street in Las Vegas, Nevada. CSHO Magtoto referenced his opening conference summary and narrative report in evidence at Exhibit 1, pages 29 through 33. He identified the project general contractor **in control** of the site as Core Construction Services of Nevada, Inc. and found seven (7) subcontractors also performing work at the job location. Based upon the number of employers and employees on the job site, CSHO Magtoto conducted the inspection under the OSHA **"Multi-Employer Citation Policy"**.

During the **"walk around"** inspection CSHO Magtoto observed six employees working near and around **floor holes without fall protection.** He determined two employees of the respondent, Jetstream Construction, Inc., were installing drywall near four floor level hole openings. CSHO Magtoto referenced his report in evidence at Exhibit 1, page 4, identified photographic exhibits, and testified particularly as to the hazard exposures depicted in photos at pages 98 through 119. He observed the photographed holes, which varied in size, to have been made as "roof curbs" for heating and ventilation systems that MMC Contractors West, Inc., another subcontractor, was preparing to install. The hole openings and roof curbs were covered with thin plastic sheeting marked with the words "hole" and "danger". He testified from his observations and the photographs that the holes were not covered with plywood or

other materials capable of supporting without failure at least twice the weight of an employee, equipment, or materials that may come in contact with the cover at any one time. He determined the conditions were in violation of applicable OSHA standards because respondent employees were exposed to fall hazards of 14 feet to the level below.

Mr. Magtoto referenced his investigative report in evidence at Exhibit 1, page 30, and testified general contractor job superintendent, Mr. Larry Taylor, confirmed the height of the roof holes to the surface below as fourteen (14) feet. He further reported through Mr. Taylor that subcontractor MMC Contractors West was in the process of moving plywood to cover the holes from building four (4) to the subject area one (1) when the inspection was conducted. The procedure was that after vent ductings were punched, curbs were installed and covered with plywood. Superintendent Taylor advised that subcontractor MMC Contractors West, Inc. was **responsible** for the holes. Mr. Taylor and Scott Free, Safety Manager for MMC Contractors West, Inc. reported that ". . . once they cut the hole, they own it . . .." MMC Contractors West did not do what they were supposed to do in area 1." CSHO Magtoto reported that MMC Contractors West would be recommended for a citation as a **creating and correcting employer**. He testified ". . . Jetstream Construction, Inc., the respondent herein, as well as Western Singly Ply, LLC would be cited as **exposing (employees) (sic) employers**. . . ."

CSHO Magtoto continued his testimony with regard to Citation 1, Item 2, referencing 29 CFR 1926.501(b)(14). He observed two employees of respondent performing drywall work near wall openings. He identified the photographic evidence at Exhibit 1, page 111, depicting employees of Jetstream engaged in work around an opening. The height of the wall at the opening was measured at 32 inches high, and 6 feet 8 inches wide.

He referenced Exhibit 1, page 31 in evidence and testified ". . . the existing guardrails that were initially installed by the general contractor were removed probably to facilitate installation of drywall. . . . The employees were exposed to possible fall hazards . . . depicted in photos. . . . The top of the top rail of guardrail was not 42" (+ or - 3") above the walking/working level." Mr. Magtoto reported general contractor superintendent Taylor confirmed the employees likely removed the top rails and did not re-install them after they finished hanging the drywall. CSHO Magtoto testified the respondent herein is a drywall contractor; and based upon investigative information does not engage in either cutting openings, covering them, nor related type work outside of the drywall field.

Mr. Magtoto referenced interview statements at Exhibit 1, pages 36 through 50.

He testified that respondent foreman Mr. Hugo Navarrete reported he told the respondent employees to "watch for the edges" on the roof. He further testified foreman Navarrete was on the roof at the time the employees were working although not depicted in any of the photographs.

Respondent employee Mr. Armando Ocon reported at Exhibit 1, page 37 in his written statement that foreman Navarrete had directed him to perform drywall work on the roof. Employee Luis Escobedo reported in Exhibit 1, page 38 that ". . .they thought the wall was high enough to protect them . . ."

CSHO Magtoto continued his testimony with regard to Citation 2, Item 1. He observed an energized relocatable power tap (RPT) being used to charge batteries at building four (4) near the second story hallway. There were four (4) battery chargers owned by another contractor plugged into the RPT at the time of the inspection. He reported foreman

Navarrete acknowledged that one of his employees brought the power strip to the job site; but he (Navarrete) was not aware of it until discovery during the inspection. Employee Edwin Baide admitted at Exhibit 1, page 40 in his witness statement to bringing his own power strip to the job site; and reported ". . . I don't think my company knows . . ."

CSHO Magtoto concluded his investigation and informed respondent he would recommend Jetstream be cited under the OSHA **multi-employer worksite policy** as an **exposing employer**, while the general contractor Core Construction cited as **controlling employer** and MMC the **creating employer**.

On cross-examination, CSHO Magtoto testified he did not conduct any tests to determine whether the plastic covers could carry an employee's weight. He observed the plastic material to be non-compliant with the specific standard requirements, and confirmed same through general contractor superintendent Taylor. He testified superintendent Taylor informed him ". . . whoever opens the hole is responsible . . ." CSHO Magtoto testified that Jetstream is merely a drywall contractor and not responsible for **controlling**, **creating**, **covering**, or otherwise barricading the hole openings.

Complainant presented witness testimony from Mr. Nicholas LaFranz, identified as a Nevada OSHES CSHO supervisor. He testified as to the Exhibit 1 inspection worksheet and confirmed the OSHA violative conditions found at the worksite referenced in Citation 1, Items 1 and 2. He also testified specifically on proof elements of **employer knowledge**, **plain view**, **hazard exposure** and **serious** classifications. Mr. LaFranz testified with regard to the NVOSHA **multi-employer worksite** citation policy. He reviewed and explained the employer categories for citation as **creating**, **controlling**, **exposing and correcting**. He

testified on the analysis and designation for penalty assessments; and explained the injuries that could reasonably be incurred by employees from a fall through the floor and wall openings.

Mr. LaFranz further testified as to Citation 2, Item 1 involving respondent employee use of an unlisted certified relocatable power tap RPT for battery charging. He described the injuries that could reasonably be expected to occur and testified not likely to result in death or serious injury, but rather minimal employee injuries. He explained the rationale and OSHA policy in for citing the employer for an **"other than serious"** violation. He testified on the evidentiary proof element of **employer knowledge** at Citation 2, Item 1. He referenced the labeled restriction and OSHA enforcement guidance that a reasonably prudent employer must be aware of the **certified listing** capabilities of any power cord for safe use, rather than mere reliance on a label. He testified the employer is required under OSHA general industry standards to assure equipment utilized by employees at worksites is fully compliant with the applicable safety standards.

Respondent presented witness testimony from Mr. Hugo Navarrete, identified as the respondent foreman at the job site on the day of the inspection. Mr. Navarrete testified as to the company safety policy including his having provided fall protection and safety meetings to the respondent employees. He identified and explained the meeting topics relating to fall protection and equipment utilization. Mr. Navarrete testified that contrary to the testimony of CSHO Magtoto, he was not on the subject roof at all on the day of the OSHA inspection. He testified that when he directed employees to work at the roof height levels, he assumed the employees would be wearing the appropriate fall protection under the company safety policy. He further testified that he assumed

the roof was safe for drywall, based upon instructions he received, that ". . . everything is covered up . . .." He also testified "Jetstream is not authorized to cover holes or any other employer's work . . .." Mr. Navarrete testified ". . . did not know Edwin (employee Baide) was using his own RPT on the job site or that it was not certified as safe . . .."

On cross-examination Mr. Navarrete testified as to the Citation 1, Item 2, wall opening citation. He did not evaluate the roof for any hazards in existence prior to sending employees to perform work there. When asked why he warned the employees about being careful at the edges, Mr. Navarrete responded he did so just as a safety precaution. "They were supposed to be wearing fall protection." Mr. Navarrete admitted he knew there were hole openings on the roof, but believed they were covered.

On redirect examination, Mr. Navarrete testified he observed metal cross members under the plastic covers when he viewed a floor opening from below as depicted in photographic Exhibit 1, page 101.

At the conclusion of presentation of testimony and documentary evidence, counsel conducted closing arguments.

Plaintiff asserted the first two violations charged at items 1 and 2 of Citation 1 were established by the evidence. The fall protection hazards were observed, photographed, undisputed, and confirmed in the work areas of respondent employees. There was no evidence the plastic covering was compliant with the applicable OSHA standard to support a man's weight if a fall occurred. There was no evidence presented that the hole openings were properly covered in accordance with the standard. General contractor superintendent Taylor reported the responsible contractor MMC failed to properly cover hole openings with plywood. The

testimony and reports showed MMC did not have a forklift available on the inspection day to transport plywood covers for required installation. Counsel argued that all three employers identified by CSHO Magtoto were equally cited in their respective roles under multi-employer worksite policy as creating, controlling and, in the instance of respondent, an exposing employer. There was no evidence to establish the respondent or foreman personally checked the roof for safety requirements before sending employees to work on the roof. **Employer knowledge** can be imputed through the foreman. ". . . The floor and wall holes were subject of a warning by the foreman to the employee and in **plain view** for anyone inspecting the work area from the roof, or from the side as to the wall openings . . .."

At Citation 2, Item 1, counsel asserted defensive argument that the employer was not aware of the RPT brought to the job by an employee is not enough to avoid a "plain site" violation. The respondent employer had a duty to assure all hazard exposures were protected. Employee Baide reported the employer ". . . doesn't always provide equipment . . .."

Counsel concluded by arguing there was insufficient evidence to support an employee misconduct defense to rebut the prima facie case of violation. No proof to support the recognized defense of employee misconduct was offered including "adequate communication, meaningful enforcement and specific training." Without the established elements based upon preponderant evidence, the law does not recognize the affirmative defense of employee conduct to satisfy the respondent burden of proof.

Respondent provided closing argument. Counsel asserted Exhibit A, pages 1 through 18 admitted in evidence contained all the recognized

requirements to support the employee misconduct defense. Counsel argued the exhibits were subject of stipulation and provided documentary proof of training meetings, including tail gate talks, attendance records of involved employees; requirements for daily visual inspection of safety equipment as provided in the employee training packet and related safety policies. Counsel asserted the evidence supports a defense of employee misconduct.

Counsel argued employees of the respondent are drywall workers and not responsible for the job of covering the openings nor trained to test floor covers or to provide markings on the covers alerting employees to the existence of floor holes. Counsel argued at Citation 2, Item 1, there was no direct evidence of employer knowledge of the RPT brought to the site by an employee; and no legal basis to support imputation for violation.

In reviewing the testimony, documents and exhibits including arguments of counsel, the Board is required to weigh the competent evidence under required elements to establish violations under occupational safety and health law based upon the statutory burden of proof.

> In all proceedings commenced by the filing of a notice of contest, the **burden of proof rests with the Administrator.** (See NAC 618.788(1). (emphasis added)
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> All facts forming the basis of a complaint must be proved by a **preponderance** of the evidence. See *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973). (emphasis added)
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> **Preponderance** of the evidence means evidence that enables a trier of fact to determine that the existence of the contested fact is more probable than the nonexistence of the contested fact. NRS 233B, Sec. 2. *Nassiri v. Chiropractic Physicians' Board of Nevada,* 130 Nev. Adv. Op. No. 27, 327 P.3d 487 (2014) (emphasis added)

A **"serious"** violation is established in accordance with NRS 618.625(2) which provides in pertinent part:

> . . . a **serious violation** exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists or from one or more practices, means, methods, operations or processes which have been adopted or are in use at that place of employment **unless the employer did not and could not, with the exercise of reasonable diligence, know the presence of the violation.** (emphasis added)

An **"other than serious"** violation is defined as:

> If **a direct or immediate relationship does exist but** there is still **no probability of death or serious physical injury**, then an **"other-than-serious"** designation is appropriate. *Pilgrim's Pride Corp.*, 18 O.S.H. Cases 1791 (1999). (emphasis added)
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> To establish a **prima facie case**, the Secretary (Chief Administrative Officer) must prove the existence of a violation, the exposure of employees, the reasonableness of the abatement period, and the appropriateness of the penalty. *Bechtel Corporation*, 2 OSHC 1336, 1974-1975 OSHD ¶18,906 (1974); *Crescent Wharf & Warehouse Co.*, 1 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972). (emphasis added)
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> To **prove a violation** of a standard, the Secretary must establish (1) the applicability of the standard, (2) the existence of noncomplying **conditions**, (3) employee exposure or access, and (4) that the **employer knew or with the exercise of reasonable diligence could have known of the violative condition.** See *Belger Cartage Service, Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003). (emphasis added)

A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;

2. The situation was in compliance; or lack of access to a hazard. See *Anning-Johnson Co.*,

4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

3. Proof by a preponderance of substantial evidence of a recognized defense.

OSHA's **multi-employer citation policy** describes four classes of employers that may be cited: **exposing, creating, correcting, and controlling.** A "controlling" employer is an employer that could reasonably be expected to prevent or detect and abate the violative condition by reason of its control over the worksite or its supervisory capacity. The reasonable efforts that a controlling employer must make to prevent or detect and abate violative conditions depend on multiple factors, including the degree of its supervisory capacity, its constructive or actual knowledge of, or expertise with respect to, the violative condition, the cause of the violation, the visibility of the violation and length of time it persisted, and what the controlling employer knows about a subcontractor's safety programs. It does not depend on whether the controlling employer has the manpower or expertise to abate the hazard itself. *IBP, Inc. v. Herman,* 144 F.3d 861 (D.C. Cir. 1998); *Marshall v. Knutson Constr. Co.,* 566 F.2d 596, 6 OSH Cases 1077 (8th Cir. 1977). *See Blount Int'l Ltd.,* 15 OSH Cases at 1899-1900; *Sasser Elec. & Mfg. Co.,* 11 OSH Cases 2133 (Rev. Comm'n 1984); *Grossman Steel & Aluminum Corp.,* 4 OSH Cases 1185 (Rev. Comm'n 1976) *Marshall v. Knutson, 566 F.2d at 601. McDevitt Street Bovis,* 19 OSH Cases 1108 (Rev. Comm'n 2000); *David Weekley Homes,* 19 OSH Cases at 1119-20; *Centex-Rooney,* 16 OSH Cases at 2130. *R.P. Carbone Constr. Co. v, OSHRC,* 166 F.3d 815, 18 OSH Cases 1551 (6th Cir. 1998). *Blount Int'l Ltd.,* 15 OSH Cases 1897 (Rev. Comm'n 1992) (citing Red Lobster Inns of Am., Inc., 8 OSH Cases 1762 (Rev. Comm'n 1980)). *IBP Inc.,* 144 F.3d at 867, 18 OSH Cases 1353. *United States v. MYR Grp. Inc.,* 361 F.3d 364, 20 OSH Cases 1614 (7th Cir. 2004); *cf. Reich v. Simpson, Gumpertz & Heger, Inc.,* 3 F.3d 1, 16 OSH Cases 131 (1st Cir., 1993) (same holding based on 29 CFR §1910.12). *See, e.g. Summit Contractors Inc.,* 20 OSH Cases 1118 (Rev. Comm'n J. 2002), Homes by Bill Simms, Inc., 18 OSH Cases 2158 (Rev. Comm'n J. 2000). Occupational Safety and Health Law, 3rd Ed., Dale & Schudtz. (emphasis added)

In construction industry cases, several courts have, to one degree or another, held that general contractors or certain higher level subcontractors may in some circumstances be cited under Section 5(a)(2) **even if the exposed employees are not**

> **theirs**. *Secretary of Labor v. Trinity Indus.*, 504 F.3d 297 (3d Cir. 2007); *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 728-31, 18 OSH Cases 1769 (10th Cir. 1999); *United States v. Pitt-Des Moines Inc.*, 168 F.3d 976, 18 OSH Cases 1609 (7th Cir. 1999); *R.P. Carbone Const., Co. v. OSHRC*, 166 F.3d 815, 18 OSH Cases 1551 (6th Cir. 1998); *New England Tel. & Tel. Co. v. Secretary of Labor*, 589 F.2d 81, 81-82 (1st Cit. 1978); *Equip. Leasing Inc. v. Secretary of Labor, 577 F.2d 534, 6 OSH Cases 1699 (9th Cir. 1978); Marshall v. Knutson Constr. Co., 566 F.3d 596, 6 OSH Cases 1077 (8th Cir. 1977); Brennan v. OSHRC (Underhill Constr. Corp.)*, 513 F.3d 1032, 1038, 2 OSH Cases 1641 (2d Cir. 1975). Occupational Safety and Health Law, 3rd Ed., Dale & Schudtz. (emphasis added)

The elements of proof to establish violation of the cited standard at Citation 1, Item 1 were met by a preponderance of evidence. It was unrefuted the standard was **applicable** to the facts in evidence. Respondent employees were working without fall protection near floor holes/openings and subject to unprotected fall hazard. There was no evidence or rebuttal to support claims the holes were properly covered by use of plastic material to meet the specific requirements of the cited standard. **Non-complying conditions** were established from the photographic evidence and the unrebutted testimony of CSHO Magtoto. Mr. Navarrete was the job site foreman and **admitted responsible supervisory employee** of the respondent employer. He conducted no inspection of the roof prior to instructing employees to perform work in the area which in **plain view** depicted floor openings unprotected as specifically required by the cited standard. **Employer knowledge** was established through the testimony of CSHO Magtoto and foreman Navarrete. The foreman knew or should have known with the exercise of reasonable diligence that before sending employees to work in the subject area there should have been a review or determination for their general safety and particularly compliance with the fall protection standards.

Under principles well recognized in occupational safety and health law, supervisory knowledge is imputed to the respondent employer.

The primary defensive position asserted by respondent was that covering of openings was the responsibility of other contractors; and respondent had no knowledge that its employees would be exposed to noncompliant or uncovered floor openings. However the respondent employer is charged with knowledge of the site conditions where its employees were assigned work such that, **with the exercise of reasonable diligence**, a **reasonably prudent employer** would have known of the violative conditions. Further, the violative conditions were in **plain view**.

> In general, the actual or constructive **knowledge of a supervisory employee will be imputed to the employer**, and thus constitute a prima facie showing of employer knowledge. Where supervisory knowledge can be imputed, OSHA need not also show that there were deficiencies in the employer's safety program. *Halmar Corp.*, 18 OSH Cases 1014, 1016-17 (Rev. Comm'n 1997), *aff'd on other grounds*, 18 OSH Cases 1359 (2d Cir. 1998). *But see L.R. Willson & Sons Inc. v. OSHRC*, 134 F.3d 1235, 1240-41, 18 OSH Cases 1129 (4th Cir. 1998), and cases cited therein at footnote 31. Occupational Safety and Health Law, 2nd Ed., Rabinowitz at page 87. (emphasis added)
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> ". . . (A) **supervisor's knowledge** of deviations from standards . . . is properly **imputed to the respondent employer**. . ." *Division of Occupational Safety and Health vs. Pabco Gypsum*, 105 Nev. 371, 775 P.2d 701 (1989). (emphasis added) Nevada Supreme Court decision in case no. 67270 issued January 14, 2016 identified as Terra Contracting, Inc., Appellate, vs. Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and State of Nevada, Respondent
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> Actual knowledge is not required for a finding of a serious violation. **Foreseeability and preventability** render a violation serious provided that a **reasonably prudent employer**, i.e., one who is safety conscious and possesses the technical expertise normally expected in the industry

> concerned, would know of the danger. *Candler-Rusche, Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723 (1976), appeal filed, No. 76-1645 (D.C. Cir. July 16, 1976); *Rockwell International*, 2 OSHC 1710, 1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d 1283 (6th Cir. 1976); *Mountain States Telephone & Telegraph Co.*, 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365 (1973). (emphasis added)

Employee exposure was established directly by preponderant evidence of and also through **access** to the hazardous conditions as depicted in the photographic exhibits and unrebutted testimony of CSHO Magtoto. The witness testimony, interview reports and site conditions confirmed proof for the element of **actual employee exposure.**

> Under Occupational Safety and Health Law, there need be **no showing of actual employee exposure in favor of a rule of access** based upon reasonable predictability - (1) the zone of danger to be determined by the hazard; (2) access to mean that employees either while in the course of assigned duties, personal comfort activities on the job, or while in the normal course of ingress-egress will be, are, or have been in the zone of danger; and (3) the employer knew or could have known of its employees' presence so it could have warned the employees or prevented them from entering the zone of danger. *Gilles & Cotting, Inc.*, 3 OSHC 2002, 1975-1976 OSHD ¶ 20,448 (1976); *Cornell & Company, Inc.*, 5 OSHC 1736, 1977-1978 OSHD ¶ 22,095 (1977); *Brennan v. OSAHRC and Alesea Lumber Co.*, 511 F.2d 1139 (9th Cir. 1975); *General Electric Company v. OSAHRC and Usery*, 540 F.2d 67, 69 (2d Cir. 1976).

The OSHA safety compliance requirements on a **multi-employer worksite** for all employees is the responsibility of four categories of employers. Employers are classified as **controlling**, **creating**, **correcting** or **exposing.** In the subject case, the evidence is unrefuted that the employees of respondent were **exposed** and accordingly the respondent was properly classified and cited as an **exposing employer.**

The Citation 1, Item 1 standard is clear to require a specific duty for compliance by an employer to protect its employees. Absent

ambiguity, a statute's **plain meaning** controls, and no further analysis is permitted.

> *State Farm Mut. Auto. Ins. Co. v. Commissioner of Ins.*, 114 Nev. 535, 540, 958 P.2d 733, 736 (1998). Only where a statute's language is ambiguous, must a court look to legislative history and rules of statutory interpretation to determine its meaning. *Leven v. Frey*, 123 Nev. 399, 404, 168 P.3d 712, 716 (2007). A statute's language is ambiguous when it is capable of more than one reasonable interpretation. *Id.* Internal conflict can also render a statute ambiguous.

Based upon the facts and applicable law the Citation 1, Item 1 violation and classification of **serious** must be confirmed.

NRS 618.625 provides in pertinent part:

> ". . . a serious violation exists in a place of employment if there is a **substantial probability that death or serious physical harm could result from a condition** which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use in that place of employment unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation."

There was a preponderance of evidence in the record for potential serious injury or death to result from a fall through the floor openings to the level below. The evidence supports the classification of the violation as serious.

Respondent raised and asserted the recognized defense of **unpreventable employee misconduct**. However there was insufficient preponderant evidence to satisfy the respondent burden to proof of all the required elements for the defense under occupational safety and health law. To establish the affirmative defense of "unpreventable employee misconduct," the employer must prove four elements: (1) established work rules designated to prevent the violation, (2) adequate communication of those rules to the employees, (3) **steps taken to**

discover any violations of those rules, and (4) **effective enforcement** of those rules after discovering violations. *Marson Corp.*, 10 BNA OSHC 1660 (No. 78-3491, 1982); *see Pabco Gypsum*, 105 Nev. at 373, 775 P.2d at 703, *Terra, supra.*

The burden of proof rests with OSHA under Nevada law (NAC 618.798(1)); but after establishing same, the burden shifts to the respondent to prove any recognized defenses. See *Jensen Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10 OHSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

Respondent Exhibit A, although documentary in nature and not subject to witness testimony did establish an acceptable company safety plan and work rules upon which the respondent is entitled to rely in **asserting** the defense of employee misconduct. However the defense requires satisfaction of all elements of proof. There was insufficient evidence to prove the required elements for **steps taken to discover violations of the rules and effective enforcement of those rules.** Despite working in the subject roof area for approximately **two days** where hole openings were either uncovered or improperly covered with plastic in plain view; the respondent foreman did not inspect the site conditions before sending employees to work, nor assure the employees were utilizing the appropriate safety equipment. Foreman Navarrete testified he observed the noncompliant plastic covers yet took no action to enforce the fall hazard protection standards. Over a two day work period a reasonably prudent employer supervisor would have readily gained knowledge of the existent violative conditions on the roof that required fall protection assurance. Accordingly, the recognized defense of employee misconduct, while raised, was not supported by preponderant evidence to negate the findings and prima facie evidence of violation.

The Board finds the respondent employer had a statutory duty to comply with the OSHA safety standards as an **"exposing employer"** even if it did not create or control the hazard. *Southern Pan Services vs. U.S. Department of Labor*, U.S. Court of Appeals, 11th Cir. No. 16-13417, Decided: April 11, 2017.

In reviewing Citation 1, Item 2, the Board finds insufficient preponderant evidence of a violation under OSHES statutory burden of proof. The necessary proof element of **employer knowledge** was not established. The facts, testimony and documentary reports demonstrate the **wall** openings presented different worksite conditions from the **floor** hole openings at Citation 1, Item 1. The evidence at Exhibit 1, page 112 depicted a side view of the building wall openings with guard railings installed. The photo was taken the evening prior to the inspection and date stamped 12/07/2016. The interview statements of employees Luis and Humberto Escobar and supporting evidence demonstrated they arrived at the work area on 12/08/2016 at 6:00 a.m. and began installing drywall at 8:00 a.m. A photo of the two employees at Exhibit 1, page 111, depicted them installing a guard railing during the inspection. There was no photo of foreman Navarrete at the location taken by CSHO Magtoto. Mr. Navarrete testified he did not inspect the roof area prior to the employee work; nor was he even on the roof despite Mr. Magtoto's reported recollection. The subject employees were trained and the company safety policy in place for fall hazard protection based upon documentary evidence at respondent Exhibit A, pages 1-18. There was no evidence of **actual employer knowledge** of the alleged brief violative conditions, **nor can that proof requirement be imputed** under the facts in evidence. The employer and foreman could reasonably rely on the photograph at page 112 to assume the guard

railing shown would remain in place until the brief drywall work was completed the following morning.

The Board need not reach a determination on the employee misconduct defense under the facts in evidence. There is no finding of **employer knowledge** of violative conditions, and therefore no basis to shift the burden of proof to respondent to establish the employee misconduct defense. The Board finds no evidentiary bases to reasonably support the required proof element of employer **forseeability**, either directly or by imputation through the supervising foreman.

The Board would be required to extrapolate a violation under the strict burden of proof by imputing employer knowledge to strained factual circumstances. This would require reliance upon speculation **estimates**, **assumptions**, and/or **inferences** as to what might or could occur in a series of events. However, it is incumbent upon the **complainant to meet the burden of proof by preponderant evidence to establish a violation.**

> . . . The **Secretary's obligation** to demonstrate the alleged violation by **a preponderance of the reliable evidence** of record **requires more than estimates, assumptions and inferences** . . . [t]he Secretary's reliance on mere conjecture is insufficient to prove a violation . . . [findings must be based on] 'the kind of evidence on which responsible persons are accustomed to rely in serious affairs.' *William B. Hopke Co., Inc.*, 1982 OSAHRC LEXIS 302 *15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ) (citations omitted). (Emphasis added)

> When the Secretary has introduced evidence showing the existence of a hazard in the workplace, the employer may, of course, defend by showing that it has taken **all necessary precautions to prevent the occurrence of the violation.** *Western Mass. Elec. Co.*, 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981). (Emphasis added)

The Board cannot engage in speculation to extrapolate a violation by imputing employer knowledge to the respondent based on a condition

that not reasonably noticeable to a foreman supervisor when viewing the outside barricaded condition in the photo taken on December 7 at page 112A. It is reasonable to rely on trained experienced employees to perform work safely and in accordance with an established safety training plan. The facts, testimony, photographs and reports taken as a whole confirmed the wall openings presented a different worksite condition distinguished from the floor hole openings which occurred in **plain view**. The wall opening condition and the brief work effort near the wall opening does not provide sufficient preponderant evidence upon which to base or impute employer knowledge to find a violation.

> An employer cannot in all circumstances be held to the **strict standard of being an absolute guarantor or insurer that his employees will observe all the Secretary's standards at all times.** (emphasis added) An isolated brief violation of a standard by an employee which is unknown to the employer and is contrary to both the employer's instructions and a company work rule which the employer has uniformly enforced does not necessarily constitute a violation of [the specific duty clause] by the employer. *Id.*, 1 O.S.H.C. at 1046. (emphasis added)
>
> *National Realty and Construction Co., Inc. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973), is the fountainhead case repeatedly cited to relieve employers of responsibility for the allegedly disobedient and negligent act of employees which violate specific standards promulgated under the Act, and sets forth the principal which has been confirmed in an extensive line of OSHC cases and reconfirmed in *Secretary of Labor v. A. Hansen Masonry*, 19 O.S.H.C. 1041, 1042 (2000).
>
> ". . . employers are not liable under the Act for an individual **single act of an employee which an employer cannot prevent.**" *Id.*, 3 O.S.H.C. at 1982. The OSHRC has repeatedly held that "employers, however, have an affirmative duty to protect against preventable hazards and preventable hazardous conduct by employees. *Id.* See also, *Brock v. L.E. Meyers Co.*, 818 F.2d 1270 (6th Cir.), *cert. denied* 484 U.S. 989 (1987). (emphasis added)
>
> . . . the mere occurrence of a safety violation

does not establish ineffective enforcement, *Secretary of Labor v. Raytheon Constructors Inc.*, 19 O.S.H.C. 1311, 1314 (2000).

At Citation 2, Item 1, the Board finds a lack of preponderant evidence to establish a violation for the cited electrical equipment standard at 29 CFR 1926.403(b)(ii). It was undisputed that employee Baide brought his own RPT to the worksite. He admitted the employer had no knowledge of the RPT. While the employer is expected to have knowledge of **its worksite equipment** through foremen and supervisors, the facts in evidence demonstrated a **lack of reasonable foreseeability** to establish employer knowledge directly or vicariously through imputation. The location where the equipment batteries were being charged was not in the direct work area. Additionally, the potential exposure time by respondent employees in the area was not substantial.

Based upon facts, evidence and testimony, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did occur at Citation 1, Item 1 29 CFR 1926.501(b)(4)(i), the Serious classification and proposed penalty in the amount of $800.00 are confirmed.

It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation did occur as to Nevada Revised Statutes at Citation 1, Item 2, 29 CFR 1926.501(b)(14). The Serious classification (zero proposed penalty) is denied.

It is the additional decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation did occur as to Nevada Revised Statutes at Citation 2, Item 1, 29 CFR 1926.403(b)(2), the Other than Serious classification and proposed penalty are denied.

The Board directs counsel for the **respondent** to submit proposed Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**

SAFETY AND HEALTH REVIEW BOARD and serve copies on opposing counsel within twenty (20) days from date of decision. After five (5) days time for filing any objection, the final Findings of Fact and Conclusions of Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the **BOARD.**

DATED: This 29th day of August 2017.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JAMES BARNES, CHAIRMAN