

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3
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5 CHIEF ADMINISTRATIVE OFFICER
6 OF THE OCCUPATIONAL SAFETY AND
7 HEALTH ADMINISTRATION, DIVISION
8 OF INDUSTRIAL RELATIONS OF THE
9 DEPARTMENT OF BUSINESS AND
10 INDUSTRY,

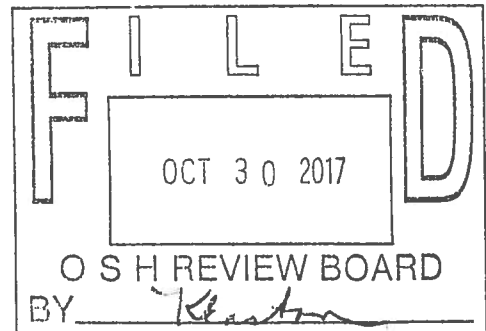
Docket No. LV 17-1905

11 Complainant,

12 vs.

13 THE ORIGINAL ROOFING COMPANY, LLC,

14 Respondent.
15 _____/



16 **DECISION**

17 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
18 **HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of September
19 2017, in furtherance of notice duly provided according to law, MS. SALLI
20 ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**
21 **Administrative Officer of the Occupational Safety and Health**
22 **Administration, Division of Industrial Relations (OSHA);** and MS.
23 BERNADETTE RIGO, ESQ., appearing on behalf of Respondent, **The Original**
24 **Roofing Company, LLC, the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
25 **BOARD** finds as follows:

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

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

1 Citation 1, Item 1, charges a violation of 29 CFR 1926.501(b) (13)
2 which provides:

3 29 CFR 1926.501(b) (13): "Residential construction." Each
4 employee engaged in residential construction activities 6
5 feet (1.8 m) or more above lower levels shall be protected by
6 guardrail systems, safety net system, or personal fall arrest
7 system unless another provision in paragraph (b) of this
8 section provides for an alternative fall protection measure.
Exception: When the employer can demonstrate that it is
infeasible or creates a greater hazard to use these systems,
the employer shall develop and implement a fall protection
plan which meets the requirements of paragraph (k) of
1926.502.

9 Note: There is a presumption that it is feasible and will not
10 create a greater hazard to implement at least one of the
11 above-listed fall protection systems. Accordingly, the
12 employer had the burden of establishing that it is
appropriate to implement a fall protection plan which
complies with 1926.502(k) for a particular workplace
situation, in lieu of implementing any of those systems.

13 NVOSHA alleged that on March 9, 2017 at a residential jobsite
14 located at 5436 Cove Point in Las Vegas, Nevada, four (4) Original
15 Roofing Company employees were observed performing roofing activities
16 at heights greater than 6 feet and were not secured to anchor points.
17 While engaged in the roofing work, employees were exposed to fall hazard
18 height of approximately 8 feet from the eave of the roof to the ground
19 below. Employees were exposed to potential serious injuries, including
20 broken bones and up to death, in the event of a fall.

21 The violation was classified as "Repeat-Serious." The proposed
22 penalty for the alleged violation is in the amount of EIGHT THOUSAND
23 EIGHT HUNDRED DOLLARS (\$8,800.00).

24 Complainant and respondent stipulated to the admission of
25 documentary evidence at complainant Exhibits 1 through 4, pages 1-108;
26 and respondent exhibits identified as Tabs 1, 2 and 4, with Tab 3
27 admitted during the course of the evidentiary hearing.

28 Complainant presented testimony and documentary evidence with

1 regard to the alleged violation through Mr. Jamal Sayegh, a Safety
2 Supervisory from Nevada OSHEs. Mr. Sayegh testified that the actual
3 (CSHO) Mr. Mark Nester who inspected the site was no longer affiliated
4 with NVOSHEs. Mr. Sayegh testified as to the findings and citation
5 issued to the respondent employer as well as the inspection reports,
6 exhibits and documentary evidence admitted in the record by stipulation.

7 Mr. Sayegh referenced Exhibit 1, and identified pages 12 through
8 14 as the written reported narrative from CSHO Nester. He referenced
9 and confirmed the report provided that on or about March 9, 2017 CSHO
10 Nester, while driving to the subject site based upon a referral report,
11 observed four employees working on the east side of the roof structure
12 at approximately 10:15 a.m. He obtained photographs of the employees
13 working from the roof without any means of tie-off to anchor points,
14 observed or any other means of fall protection. After entering the
15 location of where the employees were working, he spoke with Mr. Ramiro
16 Mendez who identified himself as the Foreman. The company Safety
17 Manager arrived at the jobsite at approximately 11:00 a.m. and CSHO
18 Nester conducted the opening conference. They interviewed Foreman
19 Ramiro Mendez who advised he and his crew were working on the east side
20 of the home property and reported

21 ". . . Me and three others were working from the
22 work without tying off. The roof is about 20 feet
23 high where we were working. The work is to replace
24 a leak on the east side of the house. Before you
25 arrived (OSHA) we didn't have any anchor points or
guardrails. From 0800-1100 we were working and not
tied off. After you showed up, Melvin went up and
installed three anchor points."

26 Mr. Sayegh further referenced the written statement provided by Mr.
27 Mendez which provided the substantially same information and noted
28 particularly at Exhibit 1, pages 17 and 18, Mr. Mendez wrote

1 ". . . we worked on the roof for about an hour
2 without tying off . . . it's my fault - was only
3 supposed to take a couple hours . . . we climbed
4 the ladder to get to the roof . . . me and three
5 others were working from the work without tying
6 off. . . ."

7 Mr. Mendez further confirmed at Exhibit 1, page 18 of the witness
8 statement that

9 ". . . if I fell from the roof I could maybe die .
10 . . . I checked my equipment before use . . . checked
11 my guys equipment too . . . as Foreman I tell these
12 guys what to do, if I saw guys without gear I would
13 tell them to put it on. . . . It was only supposed
14 to be a quick job which is why we didn't tie off .
15 . . ."

16 Mr. Sayegh identified photographic exhibits at Exhibit 1, pages 49
17 through 58A. He testified the photographs depicted two employees
18 working without any personal protective equipment (PPE); and that two
19 were wearing harnesses but with no tie-off. He testified photographic
20 Exhibit 1, page 50 depicted the Foreman, Mr. Mendez. Mr. Sayegh further
21 testified that Mr. Mendez was also identified by and confirmed by the
22 safety supervisor to be the **competent person** on the jobsite. The
23 picture depicted Mr. Mendez without tie-off protection in the presence
24 of two employees who were not tied off and one other employee who was
25 wearing no harness nor tied off whatsoever.

26 Mr. Sayegh continued his testimony on the photographic exhibits
27 noting particularly 54A and 54B which depicted the tape measure of the
28 distance of the fall to be greater than 6 feet and in fact approximately
29 8 feet from the eave of the roof to the ground below.

30 Mr. Sayegh referenced additional reportings of CSHO Nester and the
31 witness statement of Mr. Mendez at Exhibit 1, page 17 and 18 reflecting
32 where Mr. Mendez explained ". . . it was a small job, of short duration,
33 and no tie-off was effectuated. . . ."

1 Mr. Sayegh testified as to the "Serious" classification based upon
2 the height of a potential fall and the probability and likelihood of
3 serious injuries or even death to occur. Mr. Sayegh testified the
4 citation was classified as a "Repeat" based on a previous fall
5 protection citation within five years for same standard. He identified
6 Exhibit 2, pages 59 through 77 to support the determination for the
7 **Repeat** classification. Mr. Sayegh testified the previous violation was
8 based upon a settlement agreement and final order on June 13, 2013.

9 On continued testimony referencing Exhibit 1, page 19 and the
10 photographs at page 55, Mr. Sayegh explained the factors of **severity**,
11 **probability and gravity** as calculated to support the proposed penalty
12 assessment.

13 Mr. Sayegh testified on Exhibit 2, pages 82, 85 and 86 regarding
14 the previous "write-up" of employee Foreman Mendez for his role in the
15 violative conduct. He referenced the English version at page 88 with
16 regard to the documents based upon Mr. Mendez being a Spanish speaking
17 individual. Mr. Sayegh testified that OSHA was not concerned with the
18 previous violation not being for the exact same provision under the
19 cited standard, because it involved fall protection.

20 Counsel raised questions as to the affirmative defenses that might
21 be available and noted CSHO Nester's reportings at page 24, paragraph
22 7. Mr. Sayegh explained it was not a necessary finding for the
23 enforcement officer, but he considered various factors in his reportings
24 for final consideration by the supervisory personnel to determine
25 whether there were other conditions that might be considered before
26 finalizing the citation.

27 On cross-examination CSHO Sayegh testified that Exhibit 1, page 8
28 referenced CSHO Nester's reporting of comments that Mr. Mendez had been

1 "written up several times. . . ." He explained it applied to Mr. Mendez
2 responses to questions reflecting there was no evidence of "several"
3 write ups. He further testified CSHO Nester obtained no confirmed
4 information of Mr. Mendez previous write-ups for violations of fall
5 protection standards. He testified that the terms of Exhibit 1 at page
6 24, paragraph 7(iv) that CSHO Nester recorded a comment in the report
7 from Safety Manager Kelly who advised "We've wrote this foreman up
8 several times, but can't fire him and we need workers."

9 On continued cross-examination Mr. Sayegh testified with reference
10 to Exhibit 1, page 22, paragraph 23, on the elements of **employer**
11 **knowledge**, was based upon Mr. Mendez' status as a **Foreman** and **competent**
12 **person** to show both actual and constructive employer knowledge. Mr.
13 Mendez identified himself as a Foreman and competent person, and found
14 to be the jobsite supervisory employee. He reported to CSHO Nester that
15 he and his crew worked on the roof for about an hour without tying off.
16 Mr. Sayegh referenced additional provisions in the Exhibit 1 report at
17 paragraph 23 to support the determination of the required **employer**
18 **knowledge** proof element to find violative conditions.

19 Mr. Sayegh testified that Exhibit 1, page 24, number 7, CSHO Nester
20 noted the employer had an established safety policy on fall protection
21 and (Mr. Nester) considered various defensive issues in his report
22 before recommending the issuance of a citation for violation. Mr.
23 Sayegh further testified the Exhibit 1 report showed the employer did
24 not provide written documentation of Mr. Mendez previous disciplinary
25 records, despite request; so he (CSHO Nester) did not have information
26 from those records to confirm previous write-ups of Mr. Mendez. He
27 testified that Mr. Mendez supervisory authority at the time was based
28 upon his statements and the documentary evidence and exhibits which

1 confirmed his role to direct the work and assure safety compliance. He
2 identified Exhibit 1, pages 17 and 18 and paraphrased Mr. Mendez
3 statement to provide ". . . I tell guys what to do work, also if I saw
4 a guy without PPE I tell him what to do . . ." Counsel questioned
5 whether Mr. Mendez authority was limited to that and Mr. Sayegh
6 testified in the affirmative.

7 On rebuttal counsel questioned Mr. Sayegh on whether a Foreman
8 participating in violative conduct while enforcing safety of other
9 employees for PPE is considered more egregious by OSHES. Mr. Sayegh
10 testified affirmatively.

11 On re-cross examination Mr. Sayegh testified in response to a
12 question as to what is needed to find constructive employee knowledge.
13 He testified that if an employer sends employees to do roof work, it
14 needs to assure safety compliance through PPE to perform the required
15 work; and supports a determination for constructive notice for
16 constructive knowledge.

17 At the conclusion of complainant's case, respondent presented
18 testimonial evidence from three witnesses, including General
19 Superintendent Glenn Stewart, Mr. Ramiro Mendez Cabrera, aka Mr. Ramiro
20 Mendez, and respondent Safety Manager Mr. Matt Engleson.

21 Mr. Stewart identified documentary evidence from respondent's
22 exhibit Tab 1, including specifically pages 1 through 19. He identified
23 the training documentation and described the "hands on" safety training
24 in place at the time of the citation on March 9, 2017. He identified
25 pages 9 and 10, paragraphs 7 and 8, to support the "communication and
26 enforcement of the safety policy to employees . . ." Mr. Stewart
27 testified at Tab 4, page 117, on the safety discipline procedures in
28 place at the time of the inspection. He testified as to "random field

1 audits" in place under the company safety plan to support discovery of
2 employees in violation of the policies. The safety plan was furnished
3 to employees in both Spanish and English. He described the company
4 bonus policy which is tied to safety compliance at page 45 and explained
5 the application of same to encourage employees to cooperate with the
6 company safety plan and OSHA standards. He described the training as
7 to the safety harness and fall protection in general and identified the
8 "new hire" forms for employees to sign.

9 On cross-examination Mr. Stewart testified there were no citations
10 for improper training nor the existent safety plan of the company. He
11 described the number of job sites of the company to be approximately
12 100; and that 13 Safety Managers have direct responsibilities for
13 enforcing the company safety plan on the work projects. He referenced
14 at Tab 1, page 2, paragraph 2.2 as the definition of a "**competent**
15 **person**". He read the description and explained the meaning of that
16 title. Mr. Stewart also explained the definition of **supervisors** based
17 upon the company documentation. He testified the company does classify
18 "supervisors" and "competent persons" differently. He explained that
19 if either have more or less write ups than others it would subject the
20 supervisor or competent person employees to more intense review. ". . .
21 if you get written up we look at you more closely . . ."

22 Mr. Mendez testified, with the assistance of an interpreter; and
23 explained he was a crew leader and roofer, trained by the company both
24 directly, hands on, and through videos. He was familiar with the
25 company harness PPE training. He worked for the company at the time of
26 the incident, but left employment then returned in 2015. He identified
27 Exhibit 1, page 39 as the attendance sheet for September 22, 2015
28 showing his name and signature. He explained the training procedures,

1 his attendance at instructional classes, the videos and the physical
2 "hands on" instructions for equipping himself with the harness to
3 demonstrate his knowledge and capability for use. He identified Exhibit
4 1, page 54, as the respondent training records; and confirmed his
5 understanding of the company safety plan. He testified on the citation
6 for violation at the subject site on March 9, 2017. "I knew I was
7 supposed to be tied off." In response to a question of whether he had
8 authority to hire or fire employees he testified that he had no
9 authority to fire, transfer, suspend, layoff or promote any employee of
10 the company at the time of the subject inspection and issuance of the
11 citation. He further testified he could not assign, recommend or adjust
12 grievances of employees and that "I was just there to be sure things
13 were safe and to do a good job . . ." He testified he was aware of the
14 employer's "jobsite audits;" and explained they were done by management
15 to come by and check on compliance with safety requirements.

16 On cross-examination Mr. Mendez testified he was "written up" for
17 this violation and that it was not the first time. He further responded
18 to a question that if someone looked at the disciplinary report alone,
19 would it appear like it was his first violation. Mr. Mendez testified
20 "yes." Mr. Mendez further confirmed his witness statement at Exhibit
21 1, and admitted he was not tied off when the CSHO arrived at the
22 inspection site subject of the citation. He testified in response to
23 a question as to whether there were no anchor points that ". . . there
24 were some, but not enough . . . the problem there were four guys and
25 only two anchor points. . . ." He denied that he did not tie off because
26 of being pressed for time. He admitted he was involved in multiple
27 write ups but explained ". . . some times others on the crew do
28 something that's not correct so I'm held responsible . . ."

1 Mr. Matthew Engleson identified himself as the Safety Manager of
2 the respondent employer. He described the company safety plan and fall
3 protection program, instructional presentations, classes, the videos and
4 the materials utilized to support the plan. He identified exhibit Tab
5 1, pages 19 to 36 as a company "Power Point" presentation. He testified
6 it provided extensive training and details for setting anchor points,
7 harness work, load capacities, PPE; and continued testimony with regard
8 to Tab 2, pages 39 to 65. He testified the documents showed three other
9 employees went through retraining and included the sign-in sheets for
10 employees subject of violations and who required company retraining.

11 Mr. Engleson described the company "site audits" for spot checking
12 crews; and also the "mock OSHA inspections" so employees would
13 understand and be accustomed to working with CSHOs who appeared at the
14 jobsite. He identified respondent's Tab 3 to show evidence of the job
15 audits performed for other crews. He testified Tab 3 demonstrates the
16 audits show this same crew photographed after a random audit was
17 conducted where they were observed in full compliance through the
18 photographic exhibits. He referenced page 80 showing Foreman Mendez
19 depicted there. Mr. Engleson testified the employees involved in the
20 subject violation went through even more intensive retraining, and were
21 informed it would be their last time as employees of the company if
22 these incidents occurred again.

23 On cross-examination Mr. Engleson testified this crew has always
24 followed the rules. He further testified Mr. Mendez did not tell others
25 to not tie off, but rather those individuals were not tied off because
26 they were about to leave the job site as demonstrated by the fact that
27 two of them had their harnesses on. He testified they had another job,
28 so needed to leave, and that's why the subject incident of violation

1 occurred. Mr. Engleson testified Mr. Mendez was within the scope of his
2 authority to make sure employees were tied off. He described the
3 progressive disciplinary policy of the company commencing at page 26.
4 In response to further questions, he testified that page 37 shows that
5 all the employees subject to this violation left the company after the
6 citation, but came back later.

7 On closing argument, complainant counsel asserted that the burden
8 of proof had been established by the evidence in the record and clearly
9 the admissions of Mr. Mendez. There was no dispute nor evidence that
10 the employees photographed and observed on the roof by CSHO Nester were
11 **not tied off** in furtherance of the requirement of the standard.
12 **Exposure** to the described hazards and the **violative conduct** were
13 established by that evidence alone. Mr. Mendez admitted he was a
14 **Foreman and a crew leader** while his testimony reflected he had the
15 **responsibility** for assuring safety at the worksite and assurance
16 employees would complete the work tasks. Counsel asserted the standard
17 was **applicable** by the undisputed work that was underway. As to the
18 element of **employer knowledge**, counsel argued that Mr. Mendez had
19 **sufficient authority**, regardless of specific definition at the worksite
20 to **oversee the work and conduct of the employees**. Mr. Mendez testified
21 he had been written up before. CSHO Nester confirmed Mr. Mendez
22 statement that this was not the first violation.

23 Counsel argued the **employee misconduct defense** must fail because
24 **all four elements were not proven**, focusing particularly on the lack of
25 a **meaningful enforcement** of the rules. Mr. Mendez was known to be a
26 violating Foreman previously, yet again placed in charge of employees
27 at this company's worksite where he again repeated his previous
28 violative conduct of failing to assure the crew tie off protection as

1 well as his own.

2 Counsel identified the elements to establish a prima facie case of
3 violation and argued all were met under the burden of proof by
4 preponderant evidence. Counsel **further asserted the defense of employee**
5 **misconduct must fail** based upon the facts in evidence.

6 Respondent presented closing argument. Counsel asserted the
7 company ". . . did everything it could under its safety plan and
8 particularly retraining procedures for any employees who were subject
9 of violations. . . ." The extensive safety plan, including unannounced
10 job audits and mock worksite training requirements, particularly for the
11 crew employees involved in the subject incident, support compliance with
12 the requirements for the defense of employee misconduct. Counsel also
13 asserted there was no evidence in the record Mr. Mendez violated
14 specific company policy.

15 Counsel argued the burden of proof was not met to establish the
16 violation as there was **no evidence to support any basis for employer**
17 **knowledge, actual or constructive**. She argued there was no evidence
18 offered or admitted of "actual" employer knowledge. The only knowledge
19 that could be applied here must be by imputation but requires Mr. Mendez
20 be a ". . . **supervisor under the recognized meaning of that definition**.
21" However the evidence shows Mr. Mendez **did not have the authority**
22 **of a supervisor** to ". . . hire, fire, review or discipline any
23 employees. . . ." Accordingly ". . . his knowledge cannot be imputed
24 to the employer under the Nevada Supreme Court decision in the *Terra*
25 *Construction* case." There a foreman was working in a trench and in
26 violation of the OSHA standards, but it could not be imputed to the
27 employer. The same conditions apply here as there was no prima facie
28 case of violation because Mr. Mendez was ". . . just a Foreman crew

1 leader therefore that status and knowledge cannot be legally imputed to
2 the employer to establish employer knowledge."

3 Counsel further argued that even **if** a prima facie case of violation
4 was established then the **defense of employee misconduct** should be relied
5 upon because all the proof elements for that defense were established.
6 Counsel referenced the four required elements and noted each in evidence
7 as subject of sworn testimony and extensive documentation. Counsel
8 argued the company had spent a great deal of money to "beef up . . . all
9 training and retraining elements" which fully supports the defense
10 element for employee misconduct. She also argued all the elements of
11 the defense were established and the discipline records show actual
12 enforcement through the retraining procedures. She concluded this was
13 a pure case of an **isolated incident of willful disregard by an employee**.
14 There is no evidence of Mr. Mendez previous violations, other than brief
15 comments there were violations; but he (Mr. Mendez) explained in his
16 testimony that what others did on the worksite as being attributed to
17 him. Counsel concluded arguing there was no prima facie case of
18 violation because no **employer knowledge**, and asserted that if it could
19 be found by the Board then the affirmative defense of employee
20 misconduct should be accepted based upon the proof by evidence of the
21 four elements required under the applicable case law.

22 The Board is required to review the evidence and recognized legal
23 elements to prove violations under established occupational safety and
24 health law.

25 In all proceedings commenced by the filing of a
26 notice of contest, the **burden of proof** rests with
the Administrator. (See NAC 618.788(1)).

27 NAC 618.788 (NRS 618.295) In all proceedings
28 commenced by the filing of a notice of contest, the
burden of proof rests with the Chief.

1 All facts forming the basis of a complaint must be
2 proved by a **preponderance of the evidence**. See
3 *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD
4 ¶16,958 (1973).

5 NRS 233B(2) "**Preponderance of evidence**" means
6 evidence that enables a trier of fact to determine
7 that the existence of the contested fact is more
8 probable than the nonexistence of the contested
9 fact.

10 To prove a violation of a standard, the Secretary
11 must establish (1) the applicability of the
12 standard, (2) the existence of noncomplying
13 conditions, (3) employee exposure or access, and
14 (4) that the **employer knew or with the exercise of
15 reasonable diligence could have known of the
16 violative condition**. See *Belger Cartage Service,
17 Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
18 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
19 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC
20 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
21 (No. 76-1408, 1979); *American Wrecking Corp. v.
22 Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
23 2003). (emphasis added)

24 A respondent may rebut allegations by showing:

- 25 1. The standard was inapplicable to the situation
26 at issue;
- 27 2. The situation was in compliance; or lack of
28 access to a hazard. See, *Anning-Johnson Co.*,
4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).
(emphasis added)

29 NRS 618.625 provides in pertinent part:

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

39 NRS 618.635 provides in pertinent part:

40 Any employer who willfully or repeatedly violates
41 any requirements of this chapter, any standard,
42 rule, regulation or order promulgated or prescribed
43 pursuant to this chapter, may be assessed an

1 administrative fine of not more than \$70,000 for
2 each violation, but not less than \$5,000 for each
willful violation. (emphasis added)

3 A "**repeat**" violation is established if based upon a prior violation
4 of the same standard, a different standard, or general duty clause, if
5 the present and prior violation is **substantially** similar.

6 A violation is considered a repeat violation:

7 If, at the time of the alleged repeat violation,
8 there was a Commission final order against the
9 employer for a substantially similar violation.
10 *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (no. 16183,
11 1979). A prima facie case of substantial
12 similarity is established by a showing that the
13 prior and present violations were for failure to
14 comply with the same standard. *Superior Electric*
15 *Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597,
1996). *Robert B. Reich, Secretary of Labor, United*
16 *States Department of Labor v. D.M. Sabia Company*
17 *and Occupational Safety and Health Review*
18 *Committee*, 90 F.3d 854 (1996); *Caterpillar, Inc. v.*
19 *Alexis M. Herman, Secretary of Labor, and*
20 *Occupational Safety and Health Administration,*
21 *Respondents and United Auto Workers, Local 974,*
22 *Intervenors*, 154 F.3d 400 (1998).

23 A repeated violation may be found based on a **prior**
24 **violation of the same standard, a different**
25 **standard, or the general duty clause, but the**
26 **present and prior violations must be substantially**
27 **similar.** *Caterpillar, Inc.*, 18 OSH Cases 1005,
28 1006 (Rev. Comm'n 1997), *aff's*, 154 F.3d 400, 18
OSH Cases 1481 (7th Cir. 1998); *GEM Indus., Inc.*, 17
OSH Cases 1861, 1866 (Rev. Comm'n 1996). OSHA may
generally establish its prima facie case of
substantial similarity by showing that the prior
and present violations are of the same standard.
The employer may rebut that showing by establishing
that the violations were substantially different.
Where the citations involve different standards,
OSHA must present "sufficient evidence" to
establish the substantial similarity of the
violations. A similar showing must be made if the
citations involve the same standard but the
standard is broadly worded. Repeated violations
are not limited to factually identical occurrences.
Provided that the hazards are similar, minor
differences in the way machines work or in the size
and shape of excavations will usually not lead to
a finding of dissimilarity. In general, the key
factor is whether the two violations resulted in

1 substantially similar hazards. It is not necessary,
2 however, that the seriousness of the hazard
3 involved in the two violations be the same.
Rabinowitz, Occupational Safety and Health Law, 2nd
Ed. 2008 at pp. 230-231. (emphasis added)

4 The Board finds the proof elements required for a finding of
5 violation were met by the preponderant evidence as to **applicability**,
6 **noncompliant conditions**, **exposure** as demonstrated by the **photographs** in
7 evidence and corroborated by the uncontroverted written employee
8 admissions through Mr. Mendez. The proof element of "**employer**
9 **knowledge**", while debated under an interpretation of the Nevada Supreme
10 Court case law and the definition of a "supervisory employee," was
11 established by the preponderant evidence. The principle of employer
12 knowledge by imputation for **constructive** application to the employer was
13 supported by the evidence. The case turned on the issue of employer
14 knowledge based on reasonable **foreseeability** of supervisory employee
15 Mendez **personal violation** of the PPE cited standard **and failure to**
16 **enforce the safety standard for the employees** under his supervision.
17 Once proven, the issue then is whether the evidence supports the
18 recognized defense of **unpreventable employee misconduct**.

19 **Employer knowledge** is a critical proof element under occupational
20 safety and health law. It must be proved through preponderant evidence
21 to have occurred either directly or constructively.

22 Actual knowledge is not required for a finding of
23 a serious violation. Foreseeability and
24 preventability render a violation serious provided
25 that a reasonably prudent employer, i.e., one who
26 is safety conscious and possesses the technical
27 expertise normally expected in the industry
28 concerned, would know the danger. *Chandler-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).

1 No actual employer knowledge was subject of evidence, therefore the
2 Board must look to the recognized principles to support the required
3 element constructively by imputation to the employer. Generally,
4 violative employee conduct can be imputed to the employer, including
5 that of a supervisory employee charged with the responsibility of
6 enforcing company and OSHA safety standards. The theory is that a
7 responsible employer who does not **actually know** of violative employee
8 conduct should, through **the exercise of due diligence, be aware, and**
9 **therefore knowledgeable** that employees are not complying with company
10 safety policies and/or OSHA standards. Similarly, if a **supervisory**
11 **employee is involved in self-misconduct or failures to enforce safety**
12 **compliance**, that too can be subject of imputation under established
13 Review Commission, Federal District Court, and Nevada law. *Division of*
14 *Occupational Safety and Health vs. Pabco Gypsum*, 105 Nev. 371, 775 P.2d
15 701 (1989). *Terra Contracting, Inc. vs. Chief Administrative Officer of*
16 *the Occupational Safety and Health Administration, et al.*, citing
17 *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316 (11 Cir.
18 2013). The Nevada Supreme Court in *Terra, supra* established the legal
19 guidance for analysis of evidence on supervisory employee misconduct,
20 for lawful imputation to the employer.

21 Here the supervisory employee Foreman, crew leader and competent
22 person Mr. Mendez, was observed, photographed and admitted neither he
23 nor any of the employees in his crew whom he was supervising were "tied
24 off." To impute **knowledge** of the supervisory employee violative conduct
25 to the employer as proof of the element of **"employer knowledge"** requires
26 preponderant evidence. Accordingly, the evidence must establish the
27 employer should have **foreseen** and therefore constructively **known** Foreman
28 Mendez was a questionable individual with whom to invest confidence to

1 support safety policy and perform the job tasks assigned, which included
2 assuring **he and all the employees he supervised** complied with the
3 company safety rules, training and OSHA standards.

4 Mr. Mendez was rehired as a foreman by the company after admitted
5 similar previous violative self conduct. After employer sponsored
6 retraining, he was again assigned to supervise employees conducting work
7 requiring PPE - fall protection. The employer had sufficient knowledge
8 to foresee that Mr. Mendez was an individual who should have been
9 watched more closely, and likely not reasonably considered to be placed
10 in charge of a crew performing work requiring tie-off fall protection
11 without additional supervision or a systemology for checks and balances
12 to be sure he was compliant. The employer also had sufficient knowledge
13 to support "foreseeability" that Mr. Mendez might have been considered
14 for general non-supervisory Foreman or competent person work tasks but
15 under the supervision of a more reliable supervisory Foreman, competent
16 person or crew leader.

17 In applying the facts in evidence to the rationale set forth by the
18 Nevada Supreme Court in *Terra, supra*, there was sufficient preponderant
19 evidence of foreseeability on the part of the respondent employer that
20 Mr. Mendez previous conduct upon which to base imputed employer
21 knowledge of the potential for violation of the cited standard by Mr.
22 Mendez. Complainant submitted competent preponderant evidence that the
23 respondent employer here had previously engaged Mr. Mendez as a Foreman
24 and crew leader to supervise it's jobs in the past where he failed to
25 personally comply and enforce fall protection requirements.

26 The Nevada Supreme Court in *Terra* requires specific supportive
27 preponderant evidence to establish constructive employer knowledge.

28 The Third, Fourth, Fifth, Tenth, and Eleventh

1 Circuit Courts of Appeal have concluded that, with
2 respect to supervisor violations of federal
3 occupational safety and health law, "**employer**
4 **knowledge must be established, not vicariously**
5 **through the violator's knowledge**, but by either the
6 employer's actual knowledge, or by its constructive
7 knowledge based on the fact that the employer
8 could, under the circumstances of the case, foresee
9 the unsafe conduct of the supervisor [that is, with
10 evidence of lax safety standards].'" *ComTran Grp.,*
11 *Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316
12 (11th Cir. 2013) (alterations in *ComTran Grp.*)
13 (quoting *W.G. Yates & Sons Constr. Co. Inc. v.*
14 *Occupational Safety & Health Review Comm'n*, 459
15 F.2d 604, 609 n.8 (5th Cir. 2006)); see *Penn. Power*
16 *& Light Co. v. Occupational Safety & Health Review*
17 *Comm'n*, 737 F.2d 350 (3d Cir. 1984); *Mountain*
18 *States Tel. & Tel. Co. v. Occupational Safety &*
19 *Health Review Comm'n*, 623 F.2d 155 (10th Cir. 1980);
20 *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396
21 (4th Cir. 1979); see also *Century Steel*, 122 Nev. At
22 589, 137 P.3d at 1158-59 (looking to federal
23 decisional law in interpreting similar provisions
24 in the NOSHA). (*Terra*, *supra* page 3) (emphasis
25 added)

14 The guidance provided by the Nevada Supreme Court in *Terra* required
15 NVOSHA to provide **evidence of foreseeability** as to violation in addition
16 to confirmation that a supervisor misconduct should be subject of
17 imputation. Here the past conduct of Foreman crew leader Mendez and the
18 difficulties of the industry to enforce fall protection were known by
19 the employer yet it sent Mr. Mendez to a jobsite without any additional
20 supervision of his own conduct and relied on him to enforce the safety
21 of not only himself but the employees under his direction.

22 The Board finds competent preponderant evidence of foreseeability
23 such that the employer could or should have known its supervising
24 Foreman, employee Mendez, may not comply or enforce OSHA standards and
25 company safety policy.

26 There was competent evidence, based upon the employer's knowledge
27 of the previous conduct of Foreman Mendez, that he failed to enforce
28 fall arrest safety requirements.

1 The previous confirmed violation of fall arrest violations by the
2 respondent in evidence supported finding of the "Repeat" classification.

3 Further the previous "write ups" of Foreman Mendez demonstrate in
4 total preponderant evidentiary bases to support constructive imputation
5 of employer knowledge relying upon foreseeability that this employer
6 should have known that Foreman Mendez may not enforce tie off. *Terra*
7 *Contracting, Inc. vs. Chief Administrative Officer of the Occupational*
8 *Safety and Health Administration, et al., ComTran Grp., Inc. v. U.S.*
9 *Dep't of Labor, 722 F.3d 1304, 1316 (11 Cir. 2013)*

10 Respondent raised and argued the recognized defense of
11 **unpreventable employee misconduct.**

12 The burden of proof rests with OSHA under Nevada law (NAC
13 618.798(1)); but after establishing same, the burden shifts to the
14 respondent to prove any recognized defenses. See *Jensen Construction*
15 *Co., 7 OSHC 1477, 1979 OSHD ¶23,664 (1979)*. Accord, *Marson Corp., 10*
16 *OHSCH 2128, 1980 OSHC 1045 ¶24,174 (1980)*.

17 To establish the affirmative defense of "unpreventable employee
18 misconduct," the employer **must prove four elements:** (1) **established**
19 **work rules** designated to prevent the violation, (2) **adequate**
20 **communication of those rules** to the employees, including supervisors,
21 **3) steps taken to discovery violations** of those rules, and (4) **effective**
22 **enforcement of those rules after discovering violations.** *Marson Corp.,*
23 *10 BNA OSHC 1660 (No. 78-3491, 1982); see Pabco Gypsum, 105 Nev. at 373,*
24 *775 P.2d at 703, Terra Contracting Inc., supra.*

25 In the subject case, the un rebutted evidence and lack of any
26 challenge as to the first element reflected an established **recognized**
27 **safety plan** upon which the respondent could rely to assert the defense
28 of employee misconduct. Further, the exhibits and testimony established

1 there were work rules **designed to prevent violation**. The evidence of
2 training and references at the exhibits and testimony demonstrated
3 **adequate communication of the rules to its employees**. The safety
4 programs identified to discover violations and enforce the rules and
5 particularly the retraining aspects were directly set forth and
6 undisputed by contrary evidence from the documentation. However the
7 respondent evidence of **effective enforcement** was not persuasive nor
8 preponderant to meet the essential element to find **meaningful effective**
9 **enforcement of the safety program**.

10 The respondent specifically raised the recognized defense of
11 "unpreventable employee misconduct;" and asserted employee misbehavior
12 and the principles of the defense through the employer safety policy and
13 disciplinary program.

14 However, employee misbehavior, standing alone, does not relieve an
15 employer. Where the Secretary shows the existence of violative
16 conditions, an employer may defend by showing that the employee's
17 behavior was a deviation from a **uniformly and effectively enforced work**
18 **rule, of which deviation the employer had neither actual nor**
19 **constructive knowledge**. *A. J. McNulty & Co., Inc.*, 4 OSHC 1097, 1975-
20 1976 OSHD ¶ 20,600 (1976). (emphasis added)

21 An employer has the **affirmative duty to anticipate and protect**
22 **against preventable hazardous conduct by employees**. *Leon Construction*
23 *Co.*, 3 OSHC 1979, 1975-1976 OSHD ¶ 20,387 (1976).

24 In order to prove an unpreventable employee
25 misconduct defense, the employer must establish
26 that it had: established work rules designed to
27 prevent the violation; adequately communicated
28 those work rules to its employees (including
supervisors); taken **reasonable steps to discover**
violations of those work rules; and **effectively**
enforced those work rules when they were violated.
New York State Electric & Gas Corporation, 17 BNA

1 OSHC 1129, 1195 CCH OSHD ¶30,745 (91-2897, 1995).
2 (Emphasis added)

3 Although there is a similar doctrine of **supervisory**
4 **misconduct**, some cases characterize it not as an
5 affirmative defense but as a rebuttal of the
6 imputation to the employer of the supervisor's
7 knowledge. The Commission has stated that
8 **involvement by a supervisor in a violation is**
9 **"strong evidence that the employer's safety program**
10 **was lax."** "Where a supervisory employee is
11 involved, the proof of unpreventable employee
12 misconduct is **more rigorous and the defense is more**
13 **difficult to establish since it is the supervisors'**
14 **duty to protect the safety of employees under their**
15 **supervision."** *Daniel Constr. Co.*, 10 OSH Cases
16 1549, 1552 (Rev. Comm'n 1982). *Consolidated*
17 *Freightways Corp.*, 15 OSH Cases 1317, 1321 (Rev.
18 Comm'n 1991). *Seyforth Roofing Co.*, 16 OSH Cases
19 2031 (Rev. Comm'n 1994). Rabinowitz Occupational
20 Safety and Health Law, 2008, 2nd Ed., page 157.
21 (Emphasis added)

22 ". . . (A) **supervisor's knowledge** of deviations
23 from standards . . . is properly **imputed to the**
24 **respondent employer.** . . ." *Division of Occupational*
25 *Safety and Health vs. Pabco Gypsum*, 105 Nev. 371,
26 775 P.2d 701 (1989). (emphasis added)

27 It is well settled that **knowledge, actual or**
28 **constructive, of an employer's supervisory**
personnel will be **imputed to the employer**, unless
the employer establishes **substantial grounds** for
not doing so. *Ormet Corp.*, 14 BNA OSHC 2134, 1991-
93 CCH OSHD ¶29,254 (No. 85-531 1991). The
Commission held that once there is a prima facie
showing of employer knowledge through a supervisory
employee, the employer can rebut that showing by
establishing that the failure of the supervisory
employee to follow proper procedures was
unpreventable. In particular, the employer must
establish that it had relevant work rules that it
adequately communicated **and effectively enforced**.
Consolidated Freightways Corp., 15 BNA OSHC 1317,
1991-93 CCH OSHD ¶29,500 (No. 86-531, 1991).
(emphasis added) *Terra Contracting, Inc.*, (*supra*)

29 Foreman Mendez himself was observed, photographed and admitted
30 working without fall protection in violation of the cited standard.

31 "[w]here a **supervising employee is involved**, the
32 proof of unpreventable employee misconduct is more
33 rigorous and the defense is more difficult to

1 establish since it is the supervisor's duty to
2 protect the safety of employees under his
3 supervision." In *Sec'y of Labor v. Westar Energy*,
20 BNA OSHC 1736 (OSHC Jan. 6, 2004) (emphasis
added)

4 A further element of proof to support the defense of unpreventable
5 employee misconduct requires preponderant evidence the respondent has
6 **taken steps to discover violations** and **effectively enforced the rules**
7 **when violations are discovered.** The weight of evidence from the company
8 safety records and disciplinary practice supports a reasonable inference
9 and finding that no meaningful discipline was imposed or reinforced.

10 The facts in evidence clearly establish that foreman Mendez had
11 direct knowledge of the violative conduct while working along side his
12 crew. He could readily observe the violative conduct. The entire crew
13 was in violation of the standard at the time of the CSHO inspection,
14 observations and photographs. The violations of the standard, by
15 multiple employees, occurred in **plain view.**

16 The Board is concerned with the negative impacts upon any Nevada
17 employer cited for a **repeat/serious** violation and subjected to notably
18 substantial monetary penalties but also a negative work record. While
19 regrettable, the facts in evidence under the governing occupational
20 safety and health law leave no alternative. Employee safety and assured
21 compliance must be fully enforced at Nevada worksites. The Board
22 recognizes and compliments the efforts of the respondent employer
23 through its substantial **retraining** program and hiring additional
24 qualified safety consultants; however the widespread operations
25 throughout the city and substantial number of working employees require
26 actual **meaningful enforcement** be undertaken to assure compliance,
27 employee safety, and the avoidance of future citations. It is
28 understandable that an employer cannot supervise all of its employees

1 every hour of the day, however, an accelerated enforcement program
2 **uniformly applied and meaningfully enforced** can result in substantial
3 compliance, a safer worksite, and elimination of citations. Evidence
4 of a uniformly applied and meaningfully enforced safety and discipline
5 program is recognized under occupational safety and health law for an
6 employer defense of unpreventable employee misconduct or isolated acts
7 of employee noncompliance. Nevada occupational safety and health law
8 does not require unreasonable enforcement practices, nor impose strict
9 liability on employers. However there must be evidence of a qualified
10 safety program in conjunction with a **meaningfully enforced safety/
11 disciplinary program** to avoid the imposition of citations and more
12 importantly the potential for serious employee injuries.

13 The controlling cases under occupational safety and health law have
14 widely recognized the employer defense for the **unforeseeable**
15 disobedience of an employee who violates a specific standard. Further,
16 the Nevada Supreme Court has made it clear that the element of **employer**
17 **knowledge** is a critical factor in OSHA construction cases. However,
18 with preponderant evidence of foreseeability and lack of a sufficient
19 proof element to support the defense of employee misconduct through
20 insufficient evidence of meaningful actual enforcement, the defense
21 cannot mitigate or eliminate the violations cited.

22 While respondent questions what more could an employer do than hire
23 qualified people to supervise employees under an established company
24 safety and training program, expecting supervisory personnel to enforce
25 those policies and practices. The position of NVOSHES and confirmed by
26 this Board is that there must be preponderant evidence for the very
27 important element of not just the existence of an enforcement program
28 but a **meaningfully enforced plan** by the employer. Here, while it is not

1 the ruling of this Board that every employee found in violation
2 supervisor or otherwise be terminated, that employee could be returned
3 to the workforce, but under the direction of qualified supervisors who
4 **known to have a record for responsible self and employee enforcement of**
5 **those working under his direction or supervision.** With the evidence of
6 past violative PPE tie-off by Mr. Mendez, and the failure to provide any
7 historical records of his previous, but admitted violative conduct in
8 evidence, the Board cannot find support for meaningful enforcement. It
9 is critical that a supervisory employee with a past history of ignoring
10 the basic tie off requirements which expose employees and the supervisor
11 himself to serious injury or death cannot be responsibly addressed. The
12 elements required to support the employee misconduct defense are
13 reasonable and practical. Here, while the safety plan of the respondent
14 employer is admirable, and particularly the retraining program, there
15 should have been additional or better qualified supervisory personnel
16 on the jobsite with this crew rather than Mr. Mendez. The lack of a
17 reasonable alternative requires this Board to include imputation of the
18 knowledge for the past conduct of Mr. Mendez to the employer when a
19 similar violation occurred. In the subject case, the facts and evidence
20 provide the level of proof by a preponderance that the respondent
21 employer could or should have known with the exercise of reasonable
22 diligence that its enforcement policies would not be implemented by its
23 supervising Foreman, crew leader, Mr. Mendez.

24 The Board concludes, based upon the evidence, as a matter of fact
25 and law, the cited violation occurred, properly classified as a
26 "Repeat/Serious" violation and the proposed penalty in the amount of
27 \$8,800.00 reasonable and confirmed.

28 It is the decision of the NEVADA OCCUPATIONAL SAFETY AND HEALTH

1 REVIEW BOARD that a violation of Nevada Revised Statutes did occur as
2 to Citation 1, Item 1, 29 CFR 1926.501(b)(13), the violation is
3 classified as a "Repeat/Serious", and the proposed penalty in the amount
4 of Eight Thousand Eight Hundred Dollars (\$8,800.00) approved.

5 The Board directs counsel for the Complainant to submit proposed
6 Findings of Fact and Conclusions of Law to the NEVADA OCCUPATIONAL
7 SAFETY AND HEALTH REVIEW BOARD and serve copies on opposing counsel
8 within twenty (20) days from date of decision. After five (5) days time
9 for filing any objection, the final Findings of Fact and Conclusions of
10 Law shall be submitted to the NEVADA OCCUPATIONAL SAFETY AND
11 HEALTH REVIEW BOARD by prevailing counsel. Service of the Findings of
12 Fact and Conclusions of Law signed by the Chairman of the NEVADA
13 OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD shall constitute the Final
14 Order of the BOARD.

15 DATED: This 30th day of October 2017.

16 NEVADA OCCUPATIONAL SAFETY AND HEALTH
17 REVIEW BOARD

18 By /s/
19 JAMES BARNES
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