



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD**

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

Docket No. RNO 18-1946

Complainant,

vs.

**DNA FRAMING, INC., dba DNA
CARPENTRY,**

Respondent.

DECISION OF THE BOARD

This matter came on for hearing before the Nevada Occupational Safety and Health Board of Review on December 12, 2018, in furtherance of a notice duly provided according to law. Ms. Salli Ortiz, Esq., appeared on behalf of the complainant, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (the State or OSHA). Charles Woodman, Esq., appeared on behalf of the respondent, DNA Framing, Inc., dba DNA Carpentry (DNA). The Board members in attendance were Chairman Steve Ingersoll, Rodd Weber, James Halsey, Sandra Roche and Frank Milligan. There being five members of the Board present to hear this matter with at least one member representing management and one member representing labor, in attendance, a quorum was present to hear the matter and conduct the business of the Board.

///
///

**RECEIVED
SEP 12 2019
DIR LEGAL
CARSON CITY OFFICE**

1 Jurisdiction in this matter has been conferred in accordance with Chapter 618 of the Nevada
2 Revised Statutes. The complainant, the State, alleges a violation of the Nevada Revised Statutes.
3 Specifically, the State claims in Citation 1, Item 1 a violation of 29 CFR § 1926.502 (d)(16)(iii),
4 which provides: “Personal fall arrest systems, when stopping a fall, shall: ...(iii) be rigged such that
5 an employee can neither free fall more than 6 feet (1.8m) nor contact any lower level...” The State
6 alleges there was a serious violation of this regulation.

7 This matter arose when DNA “...was under contract to perform framing construction for Toll
8 Brothers at the Presidio single family home project at lot 95 on Dyevera Drive, Reno NV.” Exhibit 1,
9 p. 11, admitted into evidence without objection. Tr., p. 12;11-17. This alleged violation came to the
10 attention of OSHA by referral from the State’s District OSHA manager, Tr., p.15;3-5, who
11 witnessed activity on the construction project out his rear window on the Saturday before the citation
12 was issued. Tr., pp. 32, 33. The referral claimed that an employee was seen performing residential
13 construction and was inappropriately using fall arrest assistance. Tr., p. 15;10-14.

14 The citation in this case, however, was not issued until the following Tuesday, February 27,
15 2018. “The assignment to conduct the inspection was made on 2/27/18 in the afternoon and based
16 upon the observation of framing employees working on the top plate of the residence under
17 construction without fall protection.” Ex. 1, p. 12. In fact, the citation was issued only for that which
18 was witnessed at the job site on Tuesday, February 27, 2018. Tr., pp. 40;1-3, 16-20.

19 On the day in question, DNA’s employees were erecting trusses, which is a significant part of
20 what DNA does as a framing contractor for residential construction. Tr., p. 112;6-10. The offending
21 employee was Fannie Lemus, Tr., pp. 18;22-25, 19;1-2, 21;16-17, 160;24-25, 161;1, who was
22 observed by Chris Carling, the State OSHA inspector, when Mr. Carling initially arrived at the job
23 site. Mr. Carling could see Mr. Lemus working with pot plate joint and trusses. Tr., pp. 18;22-25,
24 19;1-2. It was clear to Mr. Carling that Mr. Lemus had too much slack in his lifeline. Tr., pp. 19;1-
25 2, 21;16-17. In Mr. Carling’s opinion, the distance from the anchor to the rope grab would result in a
26 fall of not only more than 6 feet but possibly a fall that would take Mr. Lemus all the way to the

27 ///

28 ///

1 ground. Tr., pp. 22;3-5, 9-12, Measurements were taken and it was evident that Mr. Lemus would
2 free fall more than 6 feet or possibly, as indicated, hit the ground. Tr., p. 22;3-5. He violated 29
3 CFR § 1926.502(d)(16)(iii).

4 DNA was cited only for the incorrect use of fall protection which Mr. Carling had personally
5 observed. Tr., 41;10-13. DNA was not cited for a failure to train employees correctly about fall
6 protection. Tr., 41;7-9. DNA was not cited by Mr. Carling for having an inadequate fall protection
7 plan. Tr., 41;4-6. In Mr. Carling's opinion, DNA's safety plan was adequate for the workplace. Tr.,
8 p. 39;6-7. The citation had nothing to do with what happened on the prior Saturday. Tr., p. 40;1-3.
9 Citation had everything to do with the Tuesday inspection. *Ibid.*

10 Insofar as the violation, itself, was concerned, Mr. Carling testified that he thought that Mr.
11 Lemus was just a guy that kind of lost track of the slack in his rope, Tr., 27;11-17, the guardian rope
12 grab system being used on the job. Tr., p. 21;19-20. In Mr. Carling's opinion, Mr. Leemus'
13 violation was the product of oversight, alone. Mr. Leemus was not trying to cheat the system in
14 order to cut corners and make more work on a piece work basis. Tr., p. 39;4-7.

15 At the time of the incident, Mr. Leemus was wearing the right equipment but was using it
16 improperly. Tr., pp. 35;15-18, 21-25, 187;2-6. Mr. Carling also concluded that Mr. Lemus knew
17 how to correctly use the gear he was wearing while working, Tr., pp. 31;15-18, 36;10-14, which
18 meant that he had been properly trained in the equipment and informed of the rules surrounding its
19 use. Tr., p. 36;15-18. Thus, according to Mr. Carling, sometimes employees, like here, with Mr.
20 Lemus, it takes a reminder. Tr., p. 36;10-14. Summarizing, according to Mr. Carling, it is fair to say
21 that "...we have a safety conscious employer with a good plan, and a case where one of his
22 employees just wasn't following that plan." Tr., p. 41;20-25.

23 **General Legal Principles**

24 In this case, a violation of 29 CFR § 1926.502 (d)(16)(iii) is readily established. David
25 Ziegler, the Principal and Owner of DNA, the respondent, conceded that Mr. Lemus was at fault
26 because he did not have the slack adjusted properly on his rope guardian life line. Tr., p. 180;25,
27 Tr., p. 181;1-2. Additionally, during closing argument, Mr. Woodman, counsel for DNA, admitted
28 on behalf of DNA, that on Tuesday, February 27, 2018, Mr. Lemus' performance was deficient. Tr.,

1 p. 198;20-22. There is no dispute that Mr. Lemus had slack in the rope that was intended to protect
2 him from falling more than 6 feet or to the ground below. Tr., p. 140;16-23. Mr. Ziegler believes that
3 on that Tuesday, the day in question, Mr. Lemus was out of compliance. Tr., p. 161;9-13. There is
4 no question, Mr. Lemus was the person caught not being in compliance with the safety plan. TR
5 160;24-25, 161;1.

6 The Board finds and concludes, therefore, a violation of 29 CFR § 1926.502 (d)(16)(iii) was
7 established. That is or not, however, the end of the story. DNA argues in defense of itself, that this
8 is a case of unpreventable employee misconduct committed by Mr. Leemus, which can be a complete
9 defense to the charge brought against DNA. Tr., pp. 198-202. While the burden of proof rests with
10 OSHA under Nevada law ((NAC 618.788)) to prove a *prima facie* case, after OSHA has proven the
11 *prima facie* case, the burden shifts to the respondent, here DNA, to prove any recognized defense.
12 *See, Jensen Construction Co., 7 OSHC 1477, 1979 OSHD ¶23,664, p. 28,694 (1979).*

13 Here, a *prima facie* case has been shown. DNA concedes 29 CFR § 1926.502 (d)(16)(iii)
14 was violated by Mr. Lemus. It then becomes incumbent upon DNA to prove the elements of its
15 alleged affirmative defense of unpreventable employee misconduct. *See, Sanderson Farms, Inc. v.*
16 *OSHRC, 348 Fed.Appx. 53, 57 (5TH Cir., 2009).*

17 The elements of this affirmative defense of unpreventable employee misconduct are well
18 known. DNA must be able to prove by a preponderance of the evidence, 1) that the employer (DNA)
19 has established work rules designed to prevent the violation; 2) has adequately communicated those
20 rules to his employees; 3) has taken steps to discover violations; and 4) has effectively enforced rules
21 when violations have been discovered. *Sanderson, supra* at 57.

22 The analysis of DNA's claim of unpreventable employee misconduct begins with the fact that
23 Mr. Carling has had previous experience with DNA over the years. During that time, he dealt directly
24 with David Ziegler. In Mr. Carling's opinion, for what it's worth, Mr. Carling believes that Mr.
25 Ziegler is a safety conscious employer. Tr., p. 30;11-23. Over the years, Mr. Carling has seen Mr.
26 Ziegler strive for a good safety program with his employers. Tr., p. 3;1-2.

27 ///

28 ///

1 DNA has approximately 80-90 employees at any given time. Tr., p. 145;13-16. David
2 Ziegler is a framing contractor and DNA Framing, Inc., is his company doing business as DNA
3 Carpentry. Tr., p. 148;14-22. Mr. Ziegler has been the only owner of the Company for 10 years. He
4 is the principle shareholder and Chief Executive Officer of the Company. Mr. Ziegler testified that
5 he spent \$323,000.00 on safety training and equipment for his employees. This cost is on the light
6 side, in that it does not include salaries paid to employees while being trained. The sum of
7 \$323,000.00 is a significant amount of money compared to the revenues of the Company and other
8 expenses. Mr. Ziegler stated it“huge” Tr., pp. 151,152;15-18.

9 Mr. Ziegler testified that the fall protection process employed by the Company when framing
10 single story projects was a “rope grab system, and that there is(sic) multiple components to it,” Tr., p.
11 180;4-6. Mr. Ziegler testified that as a part of his safety program, his Safety Department goes out and
12 decides whether there is a violation. This happens whether somebody needed to be written up
13 internally and then to retrain them if the employee needs to be retrained. Tr., p. 169;1-5.

14 Mr. Carling testified that nothing Mr. Ziegler said or did indicated to Mr. Carling that Mr.
15 Ziegler was comfortable with an employee like Mr. Lemus working in disregard for company policy
16 and rules. Tr., p. 39;1-3. Mr. Carling admits that in his opinion, Mr. Ziegler’s Safety Plan for the
17 job was adequate Tr., p. 39;6-7. Over the years, Mr. Carling has seen Mr. Ziegler strive for a good
18 safety program for his employees. Tr., p. 31;1-2. As stated, above, Mr. Carling characterized the
19 situation as one where we have a safety conscious employer with a good plan where one employee
20 deviated from the requirements and rules contained in the plan. Tr., p. 41;20-24.

21 Mr. Ziegler employed Miguel Salazar as the safety person at DNA. Tr., p. 102;12-13, 16.
22 Safety was the only duty Mr. Salazar had at DNA. Tr., pp. 102;16, 107;23-25. As the person
23 responsible for training and safety, Mr. Salazar speaks Spanish. Tr., p. 114;6-7. Mr. Salazar
24 received his Bachelor’s Degree from the University of Nevada, Reno in 2015. He has also received
25 his Master’s Degree in Physics and is attending the University of Nevada, Reno, studying for his
26 Ph.D. in Physics, Tr., p. 108;20-25, Tr., p. 110;17. Mr. Salazar has been the Safety Director at DNA
27 since 2015 as a full-time job. Tr., p. 107;10-13.

28 ///

1 Mr. Salazar testified that he visits the job sites as the person in charge of training and safety
2 at least once a week, almost every day, but not the same job every day because they have 20 job sites
3 which are far apart, Tr., p. 144;1-8. Employees at DNA do not share equipment. Tr., p. 145;22. They
4 do not share safety equipment. Tr., p. 145;24. The employees receive fall protection equipment, but
5 they do not share fall protection equipment, Tr., p. 146;10-16.

6 Mr. Salazar states that he has fall protection chats with the employees on a weekly basis.
7 According to Mr. Salazar, that means that employees are retrained every week. Tr., p. 118;20-24,
8 119;1-2, 16-22. These training sessions are rotated so that they become a refresher course for people
9 who have been at DNA a long time and also impart new information for new hires, Tr., p. 120;1-4.
10 The training at DNA includes training for the supervisors, who direct and monitor the line staff
11 employees. Training is provided up and down the organizational ladder at DNA, beginning at the top
12 with Mr. Ziegler. Tr., p. 160;17-20.

13 DNA administers progressive discipline for employees who violate Company Policy which
14 includes the rules in the Company's Safety Plan. DNA actually fines its employees for violations
15 running from a \$0 fine for a first violation up to \$250 for repeat offenders. Tr., p. 123;1-6, 21-23.
16 DNA keeps a safety log where DNA records its employee's history of violations. Tr., p. 122;6-9. In
17 Mr. Salazar's experience, employees, when caught the first time, generally "tune up." Tr., p. 124;22-
18 25. In the last three years of Salazar's employment at DNA, he's never had a situation where
19 someone got caught doing something wrong for a fourth time. DNA has an effective progressive
20 disciplinary system. Tr., p. 124;3-7. If an employee is caught for a fourth time, he/she is subject to
21 termination at DNA's discretion, according to Mr. Salazar. Tr., p. 124;10-14.

22 Turning to Mr. Lemus, he was, in fact, trained in the intricacies of his job. According to Mr.
23 Salazar, he personally participated in the training of Mr. Lemus, Tr., p. 131;14-16. For example,
24 DNA's Exhibit B, in evidence without objection, Tr., p. 12;11-17, is a Site Inspection Safety Report,
25 pages one and two, for fall protection. These illustrate the toolbox talks which Mr. Salazar performed
26 weekly throughout the various DNA job sites. Tr., p. 118;2-4. Mr. Leemus signature is on the
27 Report, showing his attendance at a tool box session that included training on personal fall
28 protection. Exhibit B, p. 1. The same is true for Exhibit B, page two. This meeting was dedicated to

1 check if all fall protection is in safe working condition, including lifelines. Exhibit B., p. 2. When
2 Mr. Lemus was cited, he had all the personal fall equipment he was supposed to have, in that the
3 personal fall arrest system was complete on the day in question, Tr. p. 135;22-24.

4 Mr. Lemus was trained consistent with the overall safety plan, and as a part of the safety plan,
5 specifically he was trained in fall protection. Tr., p. 131;17-22. Based upon Mr. Salazar's personal
6 first hand experience, Mr. Lemus had been properly trained in fall protection, Tr., p. 131;9-11.

7 Evidence that Mr. Lemus was adequately trained in safety precautions and how to use the personal
8 fall arrest system he was provided also comes from Mr. Carling who stated, after he had interviewed
9 Mr. Lemus when citing him for his violation, Mr. Leemus knew what he needed to do to go from
10 being out of compliance to being in compliance. Tr., p. 31;15-18.

11 DNA also provided trained and adequate supervision over Mr. Lemus and other members of
12 the work force. Tr., p. 160;17-22. There is no evidence in the investigation that DNA did not have
13 proper supervision on the site at all times. It is documented that Jorge Perez, the Site Foreman or
14 Crew Foreman, was on-site at the time of the incident involving Mr. Lemus, Tr., p. 61;12-16. Every
15 morning, Mr. Perez checks to make sure his crew members are tied up using the right safety
16 protection, using the right ladder and everything. Tr., p. 93;16-18. As indicated, management or
17 supervisory personnel are trained in safety requirements, starting with Mr. Ziegler. Tr., pp. 154-159.

18 Promptly following the incident and the issuance of the citation, Mr. Lemus was disciplined
19 by DNA for his infraction on the use of fall protection. An actual citation was issued by DNA to its
20 own employee. Tr., p. 78;8-13. Mr. Lemus signed the citation. Tr., p. 78;1-3. This incident,
21 however, was Mr. Lemus first offense. So, even though he was issued an actual citation in the form
22 of a written warning from DNA, itself, he was not fined. Tr., p. 175;19-22.

23 Promptly following the incident, Mr. Lemus was also retrained. Based upon Mr. Ziegler's
24 knowledge of the company and the practice of Mr. Salazar, Mr. Lemus was given retraining
25 appropriately following the incident. According to Mr. Ziegler: "I believe he absolutely got training.
26 He was obviously fully aware of the entire thing because he's involved in this. So there is no
27 question in my mind that he does have training to do his job correctly." Tr., p. 172;7-11. Mr. Ziegler
28 also followed up, making inquiries which helped him determine whether Mr. Lemus had been

1 retrained following the incident, TR p. 171;4-8. Mr. Ziegler believes that Miguel Salazar would
2 have been the person to retrain Mr. Lemus after the incident, TR p. 176;1. The retraining of Mr.
3 Lemus would have been basically how to adjust the rope correctly and keep it tight and not to pull it
4 out further than what it needed, according to Mr. Ziegler, Tr., p. 176;6-8.

5 Based upon Lemus' prior history with Mr. Ziegler, Mr. Lemus was not on anybody's radar
6 for someone that they had to keep an eye on at work. Tr., p. 162;1-3. Mr. Ziegler testified that he
7 had no reason to wonder whether Mr. Lemus was properly trained because Mr. Lemus had been one
8 of our better employees. He did roof trusses and sheeting only. The feedback that Mr. Ziegler got
9 from staff was that Mr. Lemus was always willing and always willing to do what DNA asked him to
10 do, so he was not on the radar as a bad employee, Tr., p. 161;1-8. Based upon Mr. Lemus' prior
11 history with Mr. Ziegler, Mr. Lemus was not on anybody's radar or a person DNA had to keep an
12 eye on at work, Tr., p. 162;1-3.

13 Summarizing DNA's attempted proof of the affirmative defense of unpreventable employee
14 misconduct, the employer was a safety conscious employer who devoted a significant amount of
15 time, resources and money on safety training and equipment. The employer provided training in
16 safety up and down the organizational ladder of the company. DNA had an adequate safety program.
17 DNA was actually bonused by the State with a deduction in the proposed fine for the alleged
18 violation because of the quality of its safety plan.

19 Fannie Lemus, the cited employee, was a good employee who followed the rules of DNA,
20 such that he was not on anyone's radar as someone to watch for violations. He was cited for the
21 misuse of personal fall arrest equipment. He simply lost track of the slack in his safety rope. The
22 employer was not cited for a lack of training. DNA was not cited for the want of an inadequate safety
23 plan. The inspector admits that in his opinion, Mr. Ziegler's DNA safety plan for DNA was
24 adequate.

25 Adequately trained supervision was present on-site on the day and time in question when Mr.
26 Lemus was cited. Mr. Lemus was retrained following the incident. Mr. Lemus was disciplined for his
27 violation. The company has a progressive system of discipline to be imposed upon employees who
28 commit offenses such as the incident dispute. DNA continuously trains and retrains employees with

1 adequate supervision on the site. DNA had taken steps to discover the violation but because the
2 violating employee was not on anyone's radar screen, his misuse went undetected because it was the
3 product of Mr. Lemus' inattentiveness . DNA had no previous violations for the past five years and
4 therefore, obviously effectively enforced the rules when violations were discovered. The progressive
5 discipline system effectively deterred violations due, in part, to weekly lunch box sessions. The
6 company had a Safety Director, whose sole responsibility was workplace safety. He spoke Spanish
7 as well as English, held a Master's Degree in Physics and was working on a Ph.D. in Physics at the
8 time of the incident.

9 DNA established work rules to prevent the violation for which Mr. Lemus was cited. DNA
10 had adequately communicated the proper use of personal arrest equipment, the object of the citation
11 applied to Mr. Lemus. DNA provided adequate personal arrest equipment, had taken steps to
12 discover violations such as that committed by Mr. Lemus and DNA effectively enforced the rules
13 and safety plan when violations were discovered as evidence by the absence of violations, reflecting
14 on the deterrent effect of the company's progressive discipline and the effectiveness of this training.

15 Under these circumstances, this was truly an unpreventable employee situation. Adequately
16 trained supervision was on-site. The employer was committed to train staff and provide a safe
17 worksite. The offending employee simply lost track of what he was doing, according to Chris
18 Carling, the investigator from the State. Tr., p. 37;4-7. Mr. Lemus was wearing the right gear for the
19 job and knew how to use the equipment by virtue of his training provided by DNA. Tr., pp. 36;10-
20 14, 35;21-25. It would be hard to conceive of what more DNA could have done to prevent Mr.
21 Lemus from misusing his equipment and violating 29 CFR § 1926.502 (d)(16)(iii).

22 An employer cannot in all circumstances be held to the strict standard of being an
23 absolute guarantor or insurer that his employees will observe all the Secretary's
24 standards at all times. An isolated brief violation of a standard by an employee which
25 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. *Secretary of
Labor v. Standard Glass Co., Inc.*, 1 OSHC 1045, 1046.

26 *National Realty and Construction Co., Inc. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973), is the
27 fountainhead case repeatedly cited to relieve employers of responsibility for the allegedly disobedient
28 and negligent act of employees which violate specific standards promulgated under the Act. It sets

1 forth the principal which has been confirmed in an extensive line of OSHC cases and reconfirmed in
2 *Secretary of Labor v. A. Hansen Masonry*, 19 O.S.H.C. 1041, 1042 (2000).

3 "Employers are not liable under the Act for an individual single act of an employee which an
4 employer cannot prevent." *Secretary of Labor v. Leone Const. Co.*, 3 O.S.H.C. 1979, 1982 (1976).

5 The OSHRC has repeatedly held that "employers, however, have an affirmative duty to protect
6 against preventable hazards and preventable hazardous conduct by employees." *Id.* See also, *Brock*
7 *v. L.E. Meyers Co.*, 818 F.2d 1270 (6th Cir.), cert. denied 484 U.S. 989 (1987).

8 Nonetheless, the mere occurrence of a safety violation does not establish ineffective
9 enforcement. *Secretary of Labor v. Raytheon Constructors Inc.*, 19 O.S.H.C. 1311, 1314 (2000).

10 And, "[the] actual occurrence of hazardous conduct is not, by itself, sufficient evidence of a
11 violation, even when the conduct has led to an injury. The record must additionally indicate that
12 demonstrably feasible measures would have materially reduced the likelihood that such misconduct
13 would have occurred." *National Realty, supra* at 1266.

14 Moreover,

15 [e]vidence that the employer effectively communicated and enforced safety policies to
16 protect against the hazard permits an inference that the employer justifiably relied on
17 its employees to comply with the applicable safety rules and that violations of the
18 safety policies were not foreseeable or preventable. See, *Austin Bldg. Co. v.*
Occupational Safety and Health Review Com'n., 647 F.2d 1063, 1068 (10th Cir.,
1981).

19 And, when an employer proves that it has effectively communicated and enforced its safety
20 policies, serious citations are to be dismissed. See, *Secretary of Labor v. Consolidated Edison Co.*,
21 13 O.S.H. Cas. (BNA) 2107, 1989 WL 406337 (January 11, 1989). Thus, in *Consolidated Edison*,
22 the tribunal concluded that since the respondent had proved that "...it had a safety program that it
23 effectively communicated to employees and enforced, ..." the Respondent was capable of proving the
24 defense of unpreventable misconduct by an employee." *Id.*, at *3. See also, *Secretary of Labor v.*
25 *General Crane Inc.*, 13 O.S.H. Cas. (BNA). 1608, 1987 WL 89222 (Jan. 19, 1988); *Secretary of*
26 *Labor v. Greer Architectural Prods., Inc.*, 14 O.S.H. Cas. (BNA) 1200, 1989 WL 223396 (July 3,
27 1989).

28 ///

1 This is the situation, here. An inattentive employee lost sight of where he was in relation to
2 his rope grab, the result of which was a violation of 29 CFR § 1926.502 (d)(16)(iii). The act was an
3 isolated incident. It was committed by an employee who was on no one's radar screen as he was,
4 otherwise, a solid employee. The violation was contrary to the employer's training of the employee.
5 The violation was contrary to the training given the employee about DNA's safety plan and
6 procedure. Trained Supervisors were on site. The employee was disciplined pursuant to an effective
7 progressive discipline regime. He was re-trained following the incident. In short, nothing more
8 could be expected of DNA under the circumstances, unless DNA was expected to assign a personal
9 supervisor to each roof truss installer to sit there and monitor the slack in that installer's grab line, an
10 infeasible solution for guarding against employees inattentiveness. The facts of the case squarely
11 track the affirmative defenses of unpreventable employee misconduct. DNA has met its burden of
12 proof by a preponderance of the evidence.

13 Thus, while it is true that there was a violation of 29 CFR § 1926.502(d)(16)(iii), the Board
14 cannot sustain the complaint set forth in Citation 1, Item 1, because DNA proved unpreventable
15 employee misconduct. It was accordingly moved by Sandra Roche, seconded by James Halsey, to
16 dismiss the complaint in its entirety with prejudice.

17 On August 20, 2019, the Board met to consider adoption of this Decision, as written or as
18 modified by the Board as the decision of the Board. Upon a motion by James Halsey, seconded by
19 Frank Milligan, to approve this Decision of the Board as the Decision of the Board.

20 The motion was adopted upon a vote of 4 in favor of the motion, 0 against the motion with
21 one abstention as member Lance Semenko did not participate in the hearing of this case. The Board,
22 by this motion, authorizes the Chairman, Steve Ingersoll, after any grammatical or typographical
23 errors are corrected in the Decision, to execute, without further Board review, this Decision on
24 behalf of the Board of Review.

25 The Board accordingly directs counsel for the respondent to submit proposed findings of fact
26 and conclusions of law to the Nevada Safety and Health Review Board and serve copies on opposing
27 counsel within 20 days from the date of this decision. After 5 days time for filing any objections, the
28 final findings of fact and conclusions of law shall be submitted to the Nevada Occupational Safety

1 and Health Review Board by prevailing counsel. Service of the findings of fact and conclusions of
2 law signed by the Chairman of the Nevada Occupational Safety and Health Review Board shall
3 constitute the Final Order of the Board.

4 DATED this 11th day of September, 2019. NEVADA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD

5
6 By: /s/ Steve Ingersoll 
7 STEVE INGERSOLL, CHAIRMAN
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28