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OSHA REVIEW BOARD
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NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

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Chief Administrative Officer of the
Occupational Safety and Health
Administration, Division of Industrial
Relations of the Department of Business
and Industry, State of Nevada,

Complainant,

vs.

Platinum Plastering, Inc.,

Respondent.

Docket No. LV 18-1910

Inspection No.: 1225290

DECISION OF THE BOARD

This matter came on for hearing before the Nevada Occupational Safety and Health Board of Review on March 13, 2019, continuing on March 14, 2019 and then, again, on April 10, 2019. The hearings were conducted in furtherance of notices duly provided according to law. 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"). Rusty Graf, Esq., of the law firm of Black & Lobello, appeared on behalf of the Respondent, Platinum Plastering, Inc. Board of Review members in attendance for the hearings, throughout on this matter were Rodd Weber, Acting Chairperson and Secretary of the Board, Frank Milligan, James Halsey and Sandra Roche. Tr. 2. There being four 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.

1 Jurisdiction is not disputed and is conferred in accordance with NRS 618.315. Also, a
2 complaint may be prosecuted which arises before or during an inspection of the employer's
3 workplace. *See*, NRS 618.435(1). And, Nevada has adopted all Federal Occupational Safety and
4 Health Standards which the Secretary of Labor has promulgated, modified or revoked and any
5 amendments thereto and shall be deemed Nevada Occupational Safety and Health Standards.
6 *See*, NRS 618.295(8).

7 The complaint sets forth the allegations which the State claims constitute violations of the
8 Nevada Revised Statutes and Regulations. At the outset of the hearing, the State offered for
9 admission into evidence, Exhibits 1 through 3, consisting of pages 1 through 136. Tr. 10.
10 Counsel for the respondent objected to the admissibility of pages 19 and 20. Tr. 10;4-5.¹
11 Respondent had no exhibits to offer into evidence. However, pages 101-136 of Exhibit 3
12 attached to the Complainant's packet consisted of documents which the Respondent had
13 provided in response to the discovery request of the Complainant. Tr. 12;15-19. Exhibits 1
14 through 3 were admitted into evidence. Tr. 13;11.

15 The Respondent, Platinum Plastering, Inc., (Platinum Plastering), is a Nevada, domestic
16 corporation. Exhibit 1, p. 1. James D. Pope is the General Manager and Owner of Platinum
17 Plastering, Inc. Tr. 103;8-12. Mr. Pope has worked in the field of stucco and plastering for over
18 30 years. Tr. 103;13-15. Levi Pope, James Pope's son, Tr. 105;7-12, was the superintendent on
19 the job, the subject of the State's complaint. Levi Pope was offered as the "competent person" on
20 the job. Tr. 105;18-21. Levi Pope had been with the Company for six or seven years. Tr.
21 105;23-25.

22 The claims against Platinum Plastering were the by-product of a general inspection of the
23 project work site situated at 2095 North Green Valley Parkway, Henderson, Nevada. Exhibit 1,
24 p. 11. Platinum Plastering was engaged in plastering/drywall for the project. Exhibit 1, p. 11.
25 The general contractor on the project was Picerne Construction Corporation. Exhibit 1, p. 12.
26

27 ¹ "Tr." stands for the transcript of the hearing conducted on March 13, 2019, followed by the
28 page and line number where the matter cited can be found. "2Tr." stands for the transcript of the hearing
conducted on March 14, 2019.

1 The project consisted of approximately 688,940 square feet of residential construction having
2 121 units. The project started April of 2016 and was expected to finish at the time of the
3 investigation, by July 4, 2017. Exhibit 1, p. 15. The project's name was Passages Two. Exhibit
4 1, p. 21. DeWaune Montel James was the investigator for the State in connection with this
5 complaint. He commenced a comprehensive inspection of the work site on April 5, 2017.
6 Platinum Plastering was a sub-contractor to Picerne, the general contractor. James conducted a
7 walk-around at the construction site and in the process, noticed potential violations of Nevada
8 statutes and regulations. James conducted the walk-around with Levi Pope, the management
9 representative for Platinum Plastering. As James conducted the walk-around, he took pictures
10 and photographs and measurements of Platinum Plastering's work activities at the site. Tr. 20;8-
11 21.

12 On the day of the inspection, Platinum Plastering employees were plastering and sheet
13 rocking all the ceilings using an A frame scaffold on which the employees were elevated above
14 the ground by three and a half feet. Tr. 28;20-25. During the walk-around, Levi Pope, according
15 to James, told him that his (Pope's) guys had been working in this building for about 10 days.
16 According to Pope, he checked on his guys every two days, general supervisory things. Pope told
17 James, also, that they did safety meetings, weekly safety tool talks, they installed their own
18 scaffolding and Pope claimed they did scaffolding training. Tr. 21;17-22. On the day of the
19 inspection and the day of the citations, Pope had checked the scaffolding. Tr. 22;6-8.

20 James interviewed on the day of the inspection Adin Nunez, Tr. 22;11-15 who told James
21 that Platinum Plastering's crew had been working in the building for about a week before the
22 inspections started. The scaffolding had been in the same condition for about 30 minutes before
23 James showed up. Nunez told James that he had not received scaffolding training. Nunez was,
24 however, the immediate boss, according to James. Nunez told James that Levi Pope was his
25 (Nunez's) supervisor. James said Levi gives him his assigned tasks each day. Nunez said he
26 installed chicken wire and Nunez and his brother moved the scaffolding. Nunez told James he
27 was working on the planks for about five minutes in building 24. Tr. 24;8-18.

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1 James also interview Juan Betancourt, a latherer. Tr. 25;1-4. According to James,
2 Betancourt said he was working there at the time of the inspection, putting up chicken wire. He
3 moved the scaffolding. It was his responsibility to put up the scaffolding. Betancourt claimed he
4 had received training on how to put up the scaffold. Tr. 25;23-25.

5 The scaffolding was erected all the way through the hallways and through the rooms in
6 building 24. Betancourt was working on scaffolding in the same building on the first floor. Tr.
7 26;1-3.

8 This case involves whether the erection, use and the monitoring of an A frame scaffolding
9 by the respondent sheet rock, latherer, and plastering sub-contractor, Platinum Plastering on a
10 large residential project in Las Vegas, was compliant with the relevant provisions of 29 CFR §
11 1926.451. The State contends that the subcontractor failed to comply with plank spacing, plank
12 extension supporting requirements and the competent person monitoring requirements of 29 CFR
13 § 1926.451. Platinum Plastering claims, *inter-alia*, the complaint should be dismissed because A
14 frame scaffolding is not covered by 29 CFR § 1926.451. Platinum Plastering, therefore, claims
15 that there is nothing to enforce against Platinum Plastering for using an A frame scaffolding
16 instead of a "normal," box-like scaffold as there is no regulation preventing Platinum Plastering
17 from using an A frame scaffold.

18 The State complained as follows: "Citation 1, Item 1: OTHER. 29 CFR 1926.451(b)(1):
19 Each platform on all working levels of the scaffold shall be fully planked or decked between the
20 front uprights and the guardrail supports." No penalty was proposed for Citation 1, Item 1.

21 The State also issued:

22 Citation 1, Item 2: OTHER. 29 CFR 1926.451(b)(1)(i): Each platform unit (*e.g.*,
23 scaffold plank, fabricated plank, fabricated deck or fabricated platform) shall be
24 installed so that the space between adjacent units and the space between the upper
25 platform and the uprights is no more than one inch (2.5 cm) wide, except where
the employer can demonstrate that a wider space is necessary (for example, to fit
around uprights when the side brackets are used to extend the widths of the
platform).

26 No penalty was proposed for Citation 1, Item 2.

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1 The State also brought "Citation 1, Item 3: OTHER. 29 CFR 1926.451(b)(7): On
2 scaffolds where platforms are overlapped to create a long platform, the overlap shall occur only
3 over supports and shall not be less than 12 inches (30 cm) unless the platforms are nailed
4 together or are otherwise restrained to prevent movement." No penalty was proposed for Citation
5 1, Item 3.

6 Finally, the State levied "Citation 1, Item 4: OTHER. 29 CFR 1926.451(f)(3): Scaffolds
7 and scaffolds components shall be inspected for visible defects by a competent person before
8 each work shift and after any occurrence which could effect the scaffold's structural integrity."
9 No penalty was proposed for Citation 1, Item 4.

10 Pursuant to NAC 618.788, the burden throughout is upon the Chief or Complainant to
11 prove the four citations. Accordingly, the Chief must establish for each charge a *prima facie* case
12 which requires a showing of: (1) the applicability of the OSHA Regulation to the matter at hand;
13 (2) noncompliance with the OSHA Regulation; (3) employee exposure to a hazardous condition;
14 and (4) the employer's actual or constructive knowledge of the wrongful conduct. *See, Original*
15 *Roofing Co., LLC v. Chief Administrative Officer of the Occupational Safety and Health*
16 *Administration*, 135 Nev.Adv.Op. 18, 442 P.3d. 146, 149 (2019).

17 As elucidated below, the Board of Review concluded that the State met this burden in the
18 prosecution of Citation 1, Items 2 through 4. The Board of Review concluded that Citation 1,
19 Item 1 contained no individual prosecutorial standard on its own and, therefore, Citation 1, Item
20 1 must be dismissed.

21 STATEMENT OF FACTS

22 The preceding discussion is incorporated herein as a part of the Statement of Facts.

23 The principle evidence relied upon by the State to prove its citations is found in the
24 photographs taken by Inspector James while inspecting the premises. *See*, photographs, Exhibit
25 1, pp. 66-89. They show employees at Platinum Plastering working on an A frame scaffold
26 elevated three feet, six inches from the floor of the building wherein the work was being
27 performed. Exhibit 1, pp. 70A, 77A, Tr. 28:23-25.

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1 The photographs also reveal that the planking was frayed² that there was a seven-inch gap
2 in the placement of the plankings and that the plankings, where they overlapped to extend the
3 length of the scaffolding, were not over a "bearer. (a weight bearing frame)" *See*, Exhibit 1, p.
4 86-89. *See also*, in particular, Exhibit 1, p. 85. *See further*, Exhibit 1, p. 75a, as evidence of at
5 least a seven-inch gapping in the planks. *See also*, Tr. 27-30, where the contents of the photos
6 are laid out in detail.

7 These photographs were admitted into evidence without challenge at the time they were
8 offered. These photographs were also not challenged as depicting anything other than an
9 authentic representation of the working conditions on the job-site during the site inspection. *See*,
10 Tr. 27-30 where the photographs are discussed.

11 According to Levi Pope, a person offered as a competent person, he checked with his
12 employees every two days on the project. Tr. 21;17-22. Levi also stated that he walked around
13 the entire scaffolding prior to the inspection by Mr. James on April 5, 2017. From the
14 photographs, it is evident that the alleged defects, the subject of the citations, are patent. They
15 are evident to the naked eye for anyone who would inspect the condition of the A frame
16 scaffolding.

17 During the course of the hearing, neither Levi Pope nor anyone else from Platinum
18 Plastering challenged the statement that Levi Pope checked with his employees every two days.
19 Similarly, no one challenged the statement that he checked out the scaffold on the day of the
20 inspection. No one challenged on behalf of Platinum Plastering that the condition of the
21 planking was in plain sight. Tr. 70;9. Nick LaFronz, a State OSHA District Manager, Tr. 65;7,
22 testified that in his experience, the defects in this case would have been plain and obvious. As
23 Levi Pope, a superintendent on the job, inspected the condition of the scaffolding on the day of
24 the inspection, management for Platinum Plastering either knew or should have known of the
25 condition of the planking on the A frame scaffolding. Tr. 84;6-9. *See also*, Tr. 86;2-5, where
26

27 ²This fact was noted, apparently, to connote that the planking was in some kind of weakened
28 condition. It was never weight tested, however, and therefore, the fraying as evidence of a weakened
condition is not a violation. 29 CFR 1926.451(a)(1).

1 Levi Pope is listed as the superintendent on this job. That is to say, if Levi Pope were attentive
2 and, in fact, a competent person, the defects were so evident, that with reasonable diligence, Levi
3 Pope could have identified the deficiencies with the scaffolding on the first floor. Tr. 86;17-20.
4 *See also*, Exhibit 1, p. 32.

5 Platinum Plastering insisted that its employees were trained in the erection and
6 deployment of scaffolding. No detail, however, was provided either by testimony or
7 documentary evidence of the content, itself, of the training. *See*, Exhibit 3, pp. 113-120, pages
8 which document the receipt of a fall protection plan booklet. The booklet itself was not provided
9 and there was no testimony during the course of the hearing concerning the contents of the
10 booklet. According to Mr. LaFronz, the fact of the booklet was discounted. He stated, if
11 Platinum Plastering provided a booklet, he wouldn't consider that training if someone just
12 handed a booklet and told you to read it. That would not be considered training. Tr. 89;23-25.

13 The fall protection handbook was handed out and reviewed with the employees in English
14 and Spanish, where necessary. Levi Pope and Jorge Jacinto, a Spanish translator, were involved
15 in the training. Tr. 105;4-12. There was no proof, however, of the training Levi Pope had
16 received, which he could then impart to the employees beyond the general platitude that Levi
17 Pope had been with the Company for 6-7 years. Tr. 105;23-25.

18 Platinum Plastering claimed that Levi Pope had received training on scaffolding on
19 numerous occasions. Tr. 106;4. There was, however, no explication of what that training
20 consisted of or the depth of the training. The training that Levi Pope purportedly administered by
21 going through the booklet with employees took place on July 15, 2016. The incident took place
22 April 5, 2017. Tr. 106;10.

23 When testifying, James D. Pope, the owner, was asked whether he had anything that he
24 could point to saying that scaffolding standards only applied to more permanent scaffolding as
25 opposed to a temporarily erected A frame scaffolding. His answer was, "No, I do not." Tr.
26 114;12-15. In Mr. Pope's opinion, however, the definition of scaffolding in 29 CFR 1926.451
27 does not include temporary scaffolding, like the A frame being used on this project. Tr. 113;23-
28 25, 114;1-2.

DISCUSSION

The first question to be addressed is whether 29 CFR 1926.451 and subsections apply, whatsoever, to the working conditions in this case, namely the use of an A frame scaffold. According to Platinum Plastering, 29 CFR 1926.451 and subparts are inapplicable as they do not apply to the erection of temporary A frame scaffolding as opposed to "normal" scaffolding. Tr. 15;11-4, 93;1-25, 94;1-5, 107;25, 117;10-16. Platinum Plastering pressed the issue.

At the conclusion of the State's case-in-chief, Platinum Plastering brought what was in effect a Rule 41(b) NRCP Motion to Dismiss on the grounds that as a matter of law, 29 CFR 1926.451(b) and subparts do not apply to an A frame temporary structure as erected by Platinum Plastering and used on this job site. *See*, Graf's opening statement. Tr. 15;11-14. Platinum Plastering seemed to suggest that the scaffolding must elevate employees more than four feet above the ground before 29 CFR 1926.451 intervenes to apply and inasmuch as the scaffolding in this case was only planking at 3 feet 6 inches above the ground, 29 CFR 1926.451 did not apply, here. Tr. 93;1-25. The State disagreed. Tr. 81;19-24, 82;1-2, 82;4-6, 90;25, 91;1-3, 95;21-25, 96;1-2, (height only becomes an issue for scaffolding if the scaffold is 10 feet high or more.)

The Board of Review considered Platinum Plastering's Rule 41(b), NRCP motion to dismiss and found it wanting. The motion brought by Mr. Graf raised a question of statutory or regulatory interpretation. Therefore, analysis of the motion begins with the language employed in the statute or regulation, itself. *See, Las Vegas v. Walsh*, 121 Nev. 899, 903, (2005). It is also well-settled that the words employed in a statute are to be given their plain and ordinary meaning. *See, Barrick Goldstrike Mine v. Peterson*, 116 Nev. 541, 545 (2000). When interpreting a statute, this Board is obliged to look to the plain language of its text and construe the statute according to its term meaning and so it's not to produce unreasonable results. *See, Dolores v. Employment Securities Division*, 416 P.3d. 259, 261 (Nev. 2019). This Board will also give effect, if possible, to every clause and word of the statute or regulation. *See, United States v. Manash*, 340 U.S. 528, 538-539 (1995). (Quoting *Inhabitants of the Township of Montclair, County of Essex v. Ramsdell*, 107 U.S. 147, 152 (1893); *Am. Fed. ' of Gov't. Employees, Local 2782 v. Federal Labor Relations Authority*, 803 F.2d. 737, 740 (D.C. Cir., 1986).

1 Applying these principles of statutory construction, no understanding of 29 CFR
2 1926.451(b) and its subparts other than the interpretation offered by the State will do. 29 CFR
3 1926.451 clearly applies to the construction and use of temporary A frame scaffolding. 29 CFR
4 1926.451(b) states it applies to "scaffold platform construction." 29 CFR 1926.451(b) in turn,
5 defines scaffold as "...any temporary elevated platform (supported or suspended), and its
6 supporting structure (including points of anchorage) used for supporting employees or materials
7 or both."

8 The photographs show an elevated platform (3 ½ feet) both supported and suspended.
9 Platinum Plastering concedes that the A frame was "temporary" in nature. The photographs
10 clearly show the structure was used for supporting employees, materials, or both. There is no
11 height limitation for a scaffold other than the requirement that the platform be "elevated."
12 Platinum Plastering's A frame was elevated, it was temporary in nature and the planking or
13 platform was supported. The evidence is such that Platinum Plastering's A frame scaffolding
14 falls squarely within the definition of a scaffold under 29 CFR 1926.451. The regulation clearly
15 applies to Platinum Plastering's usage of it's A frame scaffold on this job.

16 Faced with this set of undisputed facts and the law defining a scaffold pursuant to 29 CFR
17 1926.451, the Board was left with no alternative but to deny Platinum Plastering's Rule 41(b),
18 NRCP motion to dismiss. It was accordingly moved by Frank Milligan to deny the motion and
19 continue to hear the case. Member Halsey seconded the motion. The motion was unanimously
20 adopted. Tr. 102;17-24.

21 With the denial of the motion, the first element of a *prima facie* case is also established.
22 It requires, as indicated, a showing that the OSHA Regulation at issue applies to the matter at
23 hand. That is precisely the gravamen of the denial of Platinum Plastering's motion. The Board
24 denied the motion on the grounds that 29 CFR 1926.451 applies to the scaffold deployed by
25 Platinum Plastering. Each of the citation items derive from the same "scaffold." Scaffolding, as
26 deployed by Platinum Plastering, is applicable to the workplace and the employees working on
27 the temporary elevated platform consisting of the A frame scaffolding in this case. The first
28 element of a *prima facie* case is established for all four citation items.

1 Turning to the second element of a *prima facie* case, non-compliance with the OSHA
2 regulation, Citation 1, Item 2 is based upon the requirement that planking be spaced at no greater
3 intervals than one inch (2.5 cm). *See*, 29 CFR 1926.451(b)(1)(i). Citation 1, Item 3 is based
4 upon the requirement that the planking for extensions to be placed over structures or bearers (the
5 frame of the scaffolding). *See*, 29 CFR 1926.451(b)(7).

6 For both Citation 1, Item 2 and Citation 1, Item 3, the photographs provide ample
7 physical evidence that these two regulations were violated. The spacing was as much as seven
8 inches between planks and the overlapping of planking did not occur over bearers or structures.
9 The employees in both instances were exposed to the hazardous condition, namely working in an
10 elevated status involving non-compliant planking as the photographs clearly show. Exhibit 1, pp.
11 72, 72A. Fortunately, for the employer and employees, no fine was levied. Doubtless, the
12 violation was labeled as "other" rather than "severe" because of the minimal height by which the
13 platform was elevated (3 feet, 6 inches). *See*, Exhibit 1, pp. 70, 70A, 71, 71A.

14 For both Citation 1, Item 2 and Citation 1, Item 3, the employer knowledge requirement
15 was also satisfied or proved up by the State through Levi Pope's presence on April 5, 2017. On
16 the day of the inspection, he walked the job site. Tr. 21;19-22, 22;6-8. The photographs show
17 that the violations were obvious. Tr. 69;18-20, 70;1-9. Exhibit 1, pp. 68-89.

18 Levi Pope was the superintendent on the job. Tr. 21;17-22, 86;2-5. He was also the son
19 of the owner of the Company. Tr. 105;12. Knowledge may be established by constructive or
20 actual knowledge of the wrongful conduct. Knowledge may also be imputed through a
21 supervisor to the employer. *See, Original Roofing Co., LLC, supra* at 149, ("Generally an
22 employer is imputed with a supervisor's knowledge of deviation from OSHA's safety rules to
23 encourage employers to exercise reasonable diligence to ensure OSHA compliance by their
24 employees.").

25 Given the obvious nature of the defects, and the fact that Levi Pope walked the project on
26 the day of the inspection, he must have known that the A frame scaffold was defectively erected
27 in violation of 29 CFR 1926.451(b) and subparts if he did not have actual knowledge. This
28 circumstance creates a further problem for Platinum Plastering through Levi Pope on the

1 question of knowledge. *See, Martin v. Occupational Safety and Health Review Commission*, 947
2 F.2d 1483, 1485 (11th Cir., 1991)(employer must exercise reasonable diligence in it's vigil over
3 the workplace). Then, in *Carlisle Equip. v. Secretary of Labor*, 24 F.3d 793 (6th Cir., 1994), the
4 court determined that the reasonable diligence required of employers "... implies effort, attention
5 and action, not mere reliance upon the action of the other." Levi Pope, superintendent and the
6 employer's competent person on site, displayed little attention and no action, when he failed to
7 recognize or act upon patently obvious defects in the erection of the A frame scaffolding. This
8 shortcoming amounts to a failure to exercise reasonable diligence which, in turn, equates to a
9 showing that Platinum Plastering had constructive, imputed knowledge, if not actual knowledge,
10 of the defective condition of the scaffolding. For both Citation 1, Item 2 and Citation 1, Item 3,
11 the State has shown actual or constructive knowledge of wrongful conduct.

12 The Board accordingly finds that the State successfully met its burden of proof, showing a
13 *prima facie* case for Citation 1, Items 2 and 3.

14 Turning then to Citation 1, Item 4, as indicated the State claims a failure to inspect the
15 scaffolding on a daily or shift basis for defects by a competent person. *See*, 29 CFR
16 1926.451(f)(3). This regulation requires that, "[s]caffolds and scaffold components shall be
17 inspected for visible defects by a competent person before each work shift and after any
18 occurrence which could effect the scaffold's integrity." 29 CFR 1926.451(f)(3). Here, the
19 photographs reveal, the defects were visible, if not blatant or patent. The inspection must also
20 take place each work shift and after any occurrence which could effect the scaffold's structural
21 integrity.

22 Platinum Plastering's "competent person" for inspecting the A frame scaffolding in order
23 to comply with requirements of 29 CFR 1926.451(f)(3) was Levi Pope. This presents two
24 problems, however, for Platinum Plastering. First, Levi Pope told Inspector James that he
25 inspected the scaffolding on the day of the inspection, but that otherwise he would check on his
26 guys every two days. Tr. 21;17-22, 22;6-8. Platinum Plastering, therefore, fails the requirement
27 that the scaffolding be inspected before each work shift, as Platinum Plastering's crew admitted

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1 that they had been working the job site for the past 10 days, as of the date of the investigation.
2 Tr. 21;17-22.

3 Levi Pope's competence, the Board finds, is also suspect. A competent person is:

4 ... one who is capable of identifying existing and predictable hazards in the
5 surroundings or working conditions which are unsanitary, hazardous or dangerous
6 to employees, and who has authorization to take prompt corrective measures to
7 eliminate them. 29 CFR 1926.540(b).

8 As established, the defects in the A frame scaffolding were patent. If Levi Pope saw them
9 and didn't understand that they were existing, hazardous conditions, he could hardly be construed
10 as competent under this definition. Given the open and notorious nature of the defects,
11 alternatively, if he saw and understood the defects, he clearly did nothing about it and, therefore,
12 could not be considered one with authority to take corrective measures to eliminate the defects.
13 The Board, therefore, finds that the State has proven its *prima facie* case, establishing Citation 1,
14 Item 4, a violation of 29 CFR 1926.451(f)(3).

15 This leaves consideration of Citation 1, Item 1. The Board finds and concludes as a
16 matter of law that Citation 1, Item 1, 29 CFR 1926.451(b)(1) is not, standing alone, a regulation
17 which can be violated. It is a violation if one or more subparts (2) through (11) are violated.
18 Subsection (b)(1), standing alone, contains itself no condition, rule or standard that could be
19 violated. As a matter of law, therefore, the Board dismisses Citation 1, Item 1, 29 CFR
20 1926.451(b)(1) as it is not a regulation that could, itself, be violated and enforced.

21 In addition to Platinum Plastering's failed Rule 41(b), NRCP Motion to Dismiss,
22 Platinum Plastering offered other affirmative defenses. An employer need not prove an
23 affirmative defense if the State fails to prove a *prima facie* case in the first instance. Here,
24 however, where the State has proved a *prima facie* case for Citation 1, Items 2 through 4, the
25 burden is Platinum Plastic's to prove the elements of any affirmative defense it might have. *See,*
26 *Danco Const. Co. v. Occupational Safety & Health Review Comm'n*, 586 F.2d 1243, 1246 (8th
27 Cir. 1978).

28 Platinum Plastering argued before the Board its own variation of the "greater hazzard
defense." Platinum Plastering chose to deploy an A frame scaffolding which was installed in
hallways that Platinum Plastering claimed served as a means of ingress and egress to the

1 premises. A "normal" scaffolding would have been so wide, it would have blocked ingress and
2 egress to the premises and, therefore, Platinum Plastering claims it would have run afoul of
3 OSHA for having blocked ingress and egress to the premises, *e.g.*, created a greater hazzard. Tr.
4 107, 108, 117;10-16.

5 The A frame was the cure or solution, consequently, because it was narrower, allowing
6 ingress and egress to be had. If, therefore, a normal scaffolding would have been required as the
7 cure, the cure would have been worse than the A frame scaffold because the cure, "normal"
8 scaffolding would have barred ingress and egress, itself a violation, according to Platinum
9 Plastering. Tr. 107, 108, 117;10-16.

10 Platinum Plastering is mistaken. Platinum Plastering need not offer the A frame as the
11 cure to avoiding the problems purportedly created by a "normal" or presumably a box like
12 scaffolding because the A frame scaffolding is, itself, a permitted use. The cure would have been
13 to properly install the A frame, which Platinum Plastering failed to do.

14 Finally, Platinum Plastering raises the "rogue employee" defense. Mr. Graf said: "We
15 did argue employer knowledge, and that is the mechanism and the manner for proper installation,
16 including training was provided to these employees, but not just training, the proper installation."
17 Tr. 97;5-10. Also known as the unpreventable employee misconduct defense, for this affirmative
18 defense, Platinum Plastering must show: (1) the employer has established work rules designed to
19 prevent the violation; (2) it is has adequately communicated those rules to its employees; (3) it
20 has taken steps to discover violations; and (4) it has effectively enforced rules when violations
21 have been discovered. *See, A.G., Sanderson Farms, Inc. v. OSHRC*, 348 F.App'x 53, 57 22 OSH
22 Cases 1889 (5th Cir., 2009).

23 To prove effective enforcement of a safety rule, "an employer must present evidence of
24 having a disciplinary program that was effectively administered when the work rule violations
25 occurred." *See, P. Gioioso & Sons, Inc. v. Occupational Safety & Health Review Comm'n*, 675
26 F.3d 66, 73 (1st Cir. 2012). This means the employer's disciplinary program must usually be
27 progressive. *Gem Indus., Inc.*, 17 O.S.H. Cas. (BNA) ¶ 1861, 1863-64 (O.S.H.R.C. Dec. 6,
28 1996). It is also true that, "[i]n cases involving negligent behavior by a supervisor or foreman

1 which results in dangerous risks to employees under his or her supervision, such fact raises an
2 inference of lax enforcement and/or communication ..." *Brock v. L.E. Myers Co., High Voltage*
3 *Div.*, 818 F.2d 1270, 1277 (6th Cir. 1987)

4 The Board finds that Platinum Plastering fails proof of the unpreventable employee
5 misconduct defense. The work rules that were violated consist of the regulations cited above.³
6 The training, however, in the implementation of 29 CFR 1926.451, the Board finds, was suspect,
7 at best. As indicated, Platinum Plastering repeatedly claimed it trained its employees in
8 connection with the erection and the use of an A frame scaffolding. Platinum Plastering,
9 however, provided no detail into the training, only platitudes about its insistence upon a well-
10 trained crew. Therefore, the training was suspect.

11 Platinum Plastering's enforcement of 29 CFR 1926.451 was also indifferent. Levi Pope
12 inspected the scaffolding on the day in question and did nothing about it. His supervision was
13 lax. When asked if there was any evidence of any kind of disciplinary action taken against staff
14 for violating the pertinent provisions of 29 CFR 1926.451, Platinum Plastering conceded that
15 they "did not present any testimony as to that, no." Tr. 131;8-13. Other than having talked to the
16 employees, no further action was taken for the violation of 29 CFR 1926.451. Platinum
17 Plastering also presented no proof it even had an actual progressive discipline program.

18 The Board finds that and concludes that Platinum Plastering has not shown the
19 affirmative defense of unpreventable employee misconduct.

20 **DECISION OF THE BOARD AND ORDER**

21 This matter carried over to March 14, 2019, for discussion by the Board Members of their
22 disposition of the case. The Board members were concerned that the State was in essence
23 making multiple claims out of one incident where there should, therefore, have been only one
24 citation, or at least a reduced number of charges levied. The Board was particularly concerned
25 about the relationship of Citation 1, Item 1, an allegation that the scaffold was not fully planked,

26
27 ³The regulations become by default the work rules being violated because, while offering a
28 handbook as evidence of training in the correct methods of deploying an A frame scaffolding, Platinum
Plastering never disclosed the contents of the handbook and, therefore, the rules it may have contained.
Platinum Plastering is left with the regulations as the source of the pertinent work rules.

1 and Citation 1, Item 2, which addressed the spacing or gapping of the planks. It looked to the
2 Board like these were one and the same charge, and not two, separate charges. 2Tr. 2;7-18, 8;7-
3 13. The Board was not satisfied with what appears to be the unnecessary number of charges and
4 wanted to know its options for addressing the situation, bearing in mind that it was also apparent
5 to the Board that the scaffolding was deficient and warranted some citation.

6 It was, therefore, moved by Sandra Roche, seconded by Frank Milligan, to table this
7 matter to give Board counsel the opportunity to determine what options the Board might have to
8 address its concerns and to address this matter again at the next meeting of the Board. Motion
9 adopted on a vote of four in favor and no against the motion.

10 This matter was then returned to the Board for further deliberation on April 10, 2019.
11 The Board members present, then, were Acting Chairman Rodd Weber, James Halsey, Sandra
12 Roche and Frank Milligan. A quorum was present to deliberate and make a decision on this
13 matter.

14 Board counsel explained to the Board members that in his opinion, as a matter of law, 29
15 CFR 1926.451(b)(1) was not an independent basis for a charge to be levied against an employer
16 and, therefore, could provide no basis for bringing a charge. Standing alone, it contains no rule
17 or standard to be violated and cannot, therefore, serve as an independent basis for levying a
18 charge in this case against Platinum Plastering. In Board Counsel's opinion, Citation 1, Item 1
19 should be dismissed as a matter of law. Since it is based only on 29 CFR 1926.451(b)(1), it is
20 toothless. Dismissal of Citation 1, Item 1 would address the Board's concerns about piling on
21 claims against the respondent. It reduces by one Item the number of claims brought.

22 After considerable deliberation, it was moved by Sandra Roche, seconded by Frank
23 Millligan, to dismiss Citation 1, Item 1, as it is not an independent source for establishing a
24 violation as a matter of law. It was further moved and seconded to uphold Citations 1, Items 2, 3
25 and 4. Included in the motion was approval of the classification, in each instance, as non-serious
26 with no fine. The motion was adopted upon a vote of 4-0, with one member, Chairman Ingersoll,
27 absent.

28 ///

1 The motion was based upon the Board's related findings of fact and conclusions of law
2 elaborated herein, as to Citation 1, Items 2 through 4. The motion was also based upon the
3 Board's conclusion that as a matter of law, 29 CFR 1926.451(1)(b) is not an independent source
4 for a violation to be levied against and employer.

5 The Board ordered that counsel for the complainant submit proposed Findings of Fact
6 and Conclusion of Law to the Nevada Occupational Safety and Health Review Board consistent
7 with this Decision and serve copies on opposing counsel within 20 days from the date of this
8 decision. After five days time for filing any objections, the final Findings of Fact and
9 Conclusions of Law shall be submitted to the Nevada Occupational Safety and Health Review
10 Board by prevailing counsel. Service of the Findings of Fact and Conclusions of Law signed by
11 the Chairman of the Nevada Occupational Safety and Health Review Board shall constitute the
12 Final Order of the Board.

13 On June 10, 2020, the Board convened to consider adoption of this decision, as written or
14 as modified by the Board, as the decision of the Board.

15 Those present and eligible to vote on this question consisted of three of the five current
16 members of the Board, to-wit, Rodd Weber, James Halsey and Frank Milligan. Upon a motion
17 by Rodd Weber, seconded by James Halsey, the Board voted 3-0-2, (Ingersoll and Semenko
18 abstaining) to approve this Decision of the Board as the action of the Board and to authorize the
19 Board Acting Chairman, Rodd Weber, after any grammatical or typographical errors are
20 corrected, to execute, without further Board review, this Decision on behalf of the Nevada
21 Occupational Safety and Health Review Board.

22 On June 10, 2020, this Decision is, therefore, hereby adopted and approved as the
23 Decision of the Board of Review.

24 Dated this 10th day of June, 2020.

NEVADA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: 

Rodd Weber, Acting Chairman