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AUG 25 2023

OSHA REVIEW BOARD
BY A. Kennedy

**NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD**

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**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. LV 20-2003

Inspection No. 1391691

Complainant,

vs.

M. J. DEAN CONSTRUCTION, INC.

Respondent.

**DECISION AND ORDER OF THE BOARD
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER**

This case arose out of a referral alleging a safety violation at a construction site in Las Vegas. *See*, State's Exhibit 1, p. 3. The State's inspection resulted in the issuance of one citation consisting of one violation of federal regulations. *See*, State's Exhibit 1, pp. 41-52.

The matter came before the Nevada Occupational Safety and Health Review Board (the Board) for hearing at 10:30 a.m. on August 11, 2021. *See*, Tr. pp. 1, 45;3-9. The hearing was conducted in furtherance of a duly provided notice. *See*, Notice of Hearing dated December 10, 2020. In attendance to hear the matter were Board Chairman Rodd Weber, Board Secretary William Spielberg, Board Member Frank Milligan, Board Member Scott Fullerton and Board Member Jorge Macias. *See*, Tr. p. 48;8-12. The same Board Members deliberated the case after the conclusion of the hearing on the merits. *See*, Tr. pp. 210-219.

1 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational
2 Safety and Health Administration of the Division of Industrial Relations of the
3 Department of Business and Industry (the State), appeared at the hearing on behalf of the
4 Complainant (the State). *See*, Tr. pp. 44;22-24. The Respondent (hereinafter, Respondent
5 or M. J. Dean) was represented by Jim Kent (Mr. Kent) the Respondent's Safety Director.
6 *See*, Tr. p. 44;15-21.

7 Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised
8 Statutes, NRS 618.315. Jurisdiction was not disputed. As there were five members of the
9 Board present to decide the case, with at least one member representing management and
10 one member representing labor in attendance, a quorum was present to conduct the
11 business of the Board.

12 Nevada has adopted all Federal Occupational Safety and Health Standards which
13 the Secretary of Labor has promulgated, modified or revoked and any amendments
14 thereto. They are then deemed the Nevada Occupational Safety and Health Standards.
15 *See*, NRS 618.295(8). A complaint may be prosecuted for circumstances which arise
16 before or during an inspection of the employer's workplace. *See*, NRS 618.435(1).

17 The Notice of Alleged Safety or Health Violations generally alleged that Felipe de
18 Jesus Ulna-Cortez (Mr. Cortez), an M. J. Dean employee, was injured as the result of a 20
19 foot fall while working on the 59th floor of the Resorts World Tower¹. *See*, State's Exhibit
20 1, p. 3. Nevada OSHA alleged that two employees were installing plywood sheeting to
21 prepare for form work, when one of the employees fell through a hole that would be used
22 as a ladder access. A hole is defined in the regulations to mean "a gap or void 2 inches
23 (5.1 cm) or more in its least dimension, in a floor, roof, or other walking/working
24 surface." 29 CFR 1926.500(b). The instant hole was of a size which far exceeded this
25 definition. *See*, Tr. p. 70;11-14, *see also*, State's Exhibit 1, p. 76. The hole had been
26 covered with plywood but the cover had not been marked HOLE or COVER. *See*, State's

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28 ¹It was subsequently determined that the employee fell from the 61st floor and landed on the 59th
floor of the tower. *See*, State's Exhibit 1, p. 50.

1 Exhibit 1, p. 35. Nevada OSHA issued a Citation and Notice of Penalty which
2 recommended a \$6,300 fine. *See*, State's Exhibit 1, pp. 41-52.

3 On May 29, 2019, a Citation and Notice of Penalty was issued to the Respondent.
4 *See*, State's Exhibit 1, p. 52. On April 26, 2019, the Respondent notified the State of its
5 intent to contest the citation. *See*, State's Exhibit 1, pp. 53-55. On May 15, 2019, the State
6 filed its formal Complaint for resolution by the Review Board. *See*, State's Exhibit 1, pp.
7 60-66.

8 Notice of the proceedings was given to M. J. Dean by first class, certified mail,
9 return receipt requested. *See*, Notice of Hearing dated August 1, 2019. The hearing on the
10 matter was subsequently rescheduled on three occasions. The Complaint alleges the
11 violation of one Federal Regulation. *See*, State's Exhibit 1, pages 69-77. Citation 1, Item
12 1, charged a serious violation of 29 CFR 1926.502(i)(4), as stated below:

13 All covers shall be color coded or they shall be marked with the word
14 "HOLE" or "COVER" to provide warning of the hazard.

15 On June 5, 2019, Mr. Kent, answered the Complaint for the Respondent. *See*,
16 State's Exhibit 1, p. 64. Respondent's Answer alleged the citation was incorrect and
17 without merit. The Respondent intended to show that no "hole" as defined by the
18 regulation was present, negating the duty to cover, paint and/or mark the hole. *See, Id.*
19 Additionally, the Respondent alleged that the employee was engaged in employee
20 misconduct when he disconnected from his fall protection equipment. *See, Id.*

21 At the hearing on the matter, the State offered for admission its Exhibits 1-3,
22 consisting of 172 pages. *See*, Tr. p. 49;2-7. The State's exhibits were admitted without
23 objection. *See*, Tr. p. 54;8-11. The Respondent offered for admission 17 Exhibits of an
24 unspecified number of pages. The State objected to the admission of all of the
25 Respondent's exhibits because the discovery order was not followed and because many of
26 them were not relevant to the violation. *See*, Tr. pp.50;7-9, 53;5-7. The Board decided to

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1 take the State's objections under advisement and resolve any specific disputes during the
2 course of the hearing.² *See*, Tr. p. 54;12-15.

3 FINDINGS OF FACTS

4 M. J. Dean is a Nevada corporation authorized to do business in the State of
5 Nevada. *See*, State's Exhibit 1, pp. 1-2. M. J. Dean's principal place of business is 5055
6 W. Patrick Lane Ste. 101, Las Vegas, Nevada. *See*, State's Exhibit 1, pp. 1-2.

7 The construction site is known as Resorts World, located at 3000 Las Vegas Blvd.,
8 Las Vegas, Nevada (Resorts World). *See*, State's Exhibit 1, p. 3. W.A. Richardson
9 Builders, LLC, (Richardson Builders) was the general contractor for the construction site.
10 *See*, Tr. p. 66;13-15. M. J. Dean was one of the subcontractors at the Resorts World
11 project. *See*, State's Exhibit 1, p. 5.

12 The Respondent's construction process at the Resorts World project is known as
13 the flying form system, among other names. *See*, Tr. p. 120;10-15. In this process,
14 concrete is poured and dries on a moveable platform, known as a form. *See, Id.* After the
15 concrete is dry, the forms are retracted so they are no longer in contact with the concrete
16 floor. Then the forms are flown, lifted from one floor to a higher floor of the building.
17 *See*, Tr. p. 138;10-24, 139, 1-4. Once in place, the form is prepared to receive the
18 concrete, *i.e.*, wet concrete is poured onto it. *See*, Tr. p. 120;10-14. This process is
19 repeated until the building reaches its intended height. The Respondent's employees
20 secure the area on top of the forms and prepare them for the pouring of wet concrete. *See*,
21 Tr. pp. 138;10-24, 139; 1-4.

22 The Respondent's workers had two relevant tasks on the form. The first was to
23 provide for worker safety by putting up railings around the outside and covering the
24 holes. *See*, Tr. pp.140;24, 141;1-21. The second was to set up the block outs, areas where
25 the concrete will not be poured. These penetrations are for things like heating and air
26 conditioning ducts. While its workers are on the form, the Respondent requires each

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28 ²During the hearing, the Respondent utilized several of the documents and photographs it had
offered. As these documents were utilized in the proceedings, they are deemed to have been admitted.

1 employee to wear appropriate fall protection. *See, Id.* This protection consisted of a
2 retractable tie that attached to the building and a full body harness for the worker. *See, Tr.*
3 pp.139;10-13.

4 On March 18, 2019, Mr. Cortez needed a piece of plywood that was beyond his
5 reach while wearing his fall protection equipment. *See, Employer's Exhibit 7, pp. 26, 27.*
6 Mr. Cortez took his safety harness off to access the piece of plywood. *See, Id.* He grabbed
7 the piece of plywood then fell through a hole. *See, Id., see also, Tr. pp. 62;2-3, 131;2-6.*
8 This opening was predetermined to be the Respondent's ladder access from the lower
9 floor. *See, Tr. pp. 164;21-24; 165;1-2.* The hole had been covered with plywood but the
10 cover was not color coated or marked HOLE or COVER.³ Mr. Cortez fell from the 61st
11 floor and landed on the 59th floor, suffering a laceration to the head and bruising of the
12 upper torso and arms. *See, State's Exhibit 1, p. 50.*

13 On March 19, 2019, Nevada OSHA inspector Berly Carrillo (Mr. Carrillo) went to
14 the Resorts World construction site in response to the referral. *See, State's Exhibit 1, p. 3,*
15 *see also, Tr. pp. 57;20-24; 58;1-3.* The opening conference was conducted with Shelby
16 Burton (Ms. Burton) of Richardson Builders and Raymond Milner of M. J. Dean. *See,*
17 *State's Exhibit 1, pp. 4, 5.* Both Ms. Burton and Mr. Milner signed the employers'
18 Opening Conference Worksheet acknowledging that they understood their rights and
19 consented to an inspection of the construction site. *See, Id.*

20 In her interview, Ms. Burton stated that Mr. Cortez was part of the flyer crew. *See,*
21 *Tr. p. 66;19-24.* Mr. Cortez fell through the hole located on the 61st floor. Directly below
22 this opening was another opening going from the 60th floor to the 59th floor. Mr. Cortez
23 passed through this second opening and landed on the 59th floor. *See, State's Exhibit 1, p.*
24 *18, see also, Tr. p. 66;19-24.*

25 After the opening conference, Mr. Carrillo inspected the construction site. At the
26 location where Mr. Cortez fell, Mr. Carrillo discovered that the hole through which Mr.

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28 ³The citation does not address whether the cover to the hole was secured. The testimony indicated that it was not. However, the State did not cite the Respondent for this issue.

1 Cortez fell had been made into a ladder access from the 60th floor to the 61st floor. *See*,
2 State's Exhibit 1, p. 72, *see also*, Tr. p. 69;2-11. This ladder access had a guardrail system
3 in place. *See*, State's Exhibit 1, p. 73, *see also*, Tr. p. 69;12-15. However, all of the
4 persons interviewed agreed that the guardrail system was not in place at the time of Mr.
5 Cortez' accident. *See*, Tr. p. 69;16-19.

6 The addition of the guardrail system did not prevent Mr. Carrillo from analyzing
7 the alleged violation because he supplied photographs taken as part of the employer's
8 accident investigation. *See*, State's Exhibit 1, pp. 77-79. Several of these photographs
9 were included in the State's Exhibit 1. *See*, Tr. pp. 70;15-22, 71;110. Three of the
10 photographs provided relevant information. The first showed the location of the hole at
11 the time of the accident. The picture did not show any color coding or labeling on the
12 hole. *See* State's Exhibit 1, p. 77. The second showed the plywood that was covering the
13 hole on the 61st floor, as it was found after the accident. *See* State's Exhibit 1, p. 78.
14 Again, the photograph showed that the cover was neither color coded nor labeled. *See, Id.*
15 The third photograph was another picture of the location of the unmarked hole on the 61st
16 floor. *See*, State's Exhibit 1, p. 79.

17 After the inspection, the Respondent supplied its form 300 (Injury and Illness logs)
18 and 300A (certified summaries) for the years 2016, 2017 and 2018. Those forms
19 disclosed that a similar incident had occurred in November of 2018, about four months
20 before the instant accident. *See*, State's Exhibit 3, p. 140. In this earlier incident, the
21 employee pulled the nails out of an unmarked plywood cover and fell through the hole.
22 *See*, State's Exhibit 3, p. 144. One of the recommendations made by the general
23 contractor subsequent to this injury was to "mark and secure all hole covers to insure that
24 nobody accidentally mistakes hole covers as fill material." *See*, State's Exhibit 3, p. 145,
25 *see also*, Tr. p. 74;7-13.⁴

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27 _____
28 ⁴The transcript incorrectly identifies this exhibit as being State's Exhibit number 35. *See*, Tr. p.
74;7-10.

1 At the hearing on the matter held on August 11, 2021, Mr. Carrillo testified to the
2 above. He was then cross examined by Mr. Kent. *See*, Tr. pp. 76- 98. In this cross
3 examination, Mr. Carrillo was asked about the Respondent's fall protection rules and
4 related safety documents. *See*, Employer's Exhibits 1 through 5. Mr. Carrillo was not
5 completely familiar with the documents but, based upon Mr. Kent's description of the
6 Employer's documents, Mr. Carrillo conceded that M. J. Dean had met its obligation for
7 fall protection training. *See*, Tr. pp. 82;15-24, 83;1-2.

8 Mr. Kent further questioned Mr. Carrillo regarding the final passage of this
9 narrative. *See*, State's Exhibit 1, p. 19, *see also*, Tr. p. 87;14-22. Therein, Mr. Carrillo
10 stated, "it was determined that the employee fell through a hole because the employee
11 disconnected his fall protection equipment...However, it was also determined that the
12 employee fell through a hole on the floor for the hole cover had not been marked 'hole' or
13 'cover.'" Mr. Kent took this comment to indicate that the regulation provided for
14 alternative methods of compliance. The employer could either provide fall protection
15 equipment or mark all of the hole covers. *See*, Tr. pp. 87-88. To bolster his allegation, Mr.
16 Kent provided what appeared to be a page from a Federal OSHA document which defined
17 both a hole and an unprotected edge.⁵ *See*, Employer's Exhibit 8. "Unprotected sides and
18 edges mean any side or edge ... of a walking or working surface, *e.g.*, floor, roof, ramp or
19 runway where there is no wall or guardrail system at least 39 inches (1.0 m) high." *See*,
20 *Id.* Through these questions, Mr. Kent implied that the fall protecting requirements for a
21 leading edge should have been applicable to the entire 61st floor at the time of Mr. Cortez'
22 accident. *See*, Tr. p. 97;12-19. Based upon this interpretation, the unmarked hole cover
23 did not violate any Federal regulation.

24 Mr. Kent then followed up these questions by inquiring as to whether Nevada
25 OSHA should have considered employee misconduct. *See*, Employer's Exhibit 11, *see*

27 ⁵The Respondent did not supply any information regarding the source of this document. It
28 appears to be a from a Department of Labor, OSHA website. However, the date of publication and its
publisher were not provided.

1 also, Tr. pp. 93-95. In support of this contention, Mr. Kent referred to a violation notice
2 from Richardson Builders dated March 18, 2019. *See*, Employer's Exhibit 12. This notice
3 resulted in Mr. Cortez being removed from the Resorts World construction site. *See, Id.*
4 Under cross examination, Mr. Carrillo could not recall why 29 CFR 1926.502(i)(4)
5 applied to this incident as opposed to the leading edge requirements⁶. *See*, Tr. p. 97;16-19.

6 On redirect, Mr. Carrillo clarified the standard upon which the alleged violation
7 was based;

8 Ms. Ortiz: So in this case what was the citation that was issued, what
9 was the standard used?

10 Mr. Carrillo: I don't have that form in front of me. I can't recall right
11 now.

11 Ms. Ortiz: Was it a fall protection citation?

12 Mr. Carrillo: No, ma'am. It was an unmarked hole. *See*, Tr. p. 99;3-8

13 Accordingly, Mr. Cortez' failure to follow the work rules was irrelevant. M. J. Dean was
14 cited for failing to provide markings for the hole cover. This conclusion was reenforced
15 by Jamal Sayegh (Mr. Sayegh), the OSHA compliance supervisor. *See*, Tr. p. 112;14-22.

16 Mr. Sayegh, the State's second witness, testified to the purpose and classification
17 of the violation.

18 Ms. Ortiz: Can you tell us what standard is being violated here?

19 Mr. Sayegh: The standard is [29 CFR 1926.502(i)(4)].

20 Ms. Ortiz: And why would that standard apply in this situation?

21 Mr. Sayegh: Because....there was either a lack of a cover or a cover that
22 was not identified as hole cover.

23 Ms. Ortiz: So what is the purpose of this standard?

24 Mr. Sayegh: The purpose of this standard is to prevent anyone from either
25 tripping or falling because of a hole in the ground or on a
26 floor. *See*, Tr. pp. 112:14-24, 113;1-2.

27 ⁶Leading edge means the edge of a floor, roof, or formwork for a floor or other walking/working
28 surface (such as the deck) which changes location as additional floor, roof, decking, or formwork
sections are placed, formed, or constructed. A leading edge is considered to be an "unprotected side and
edge" during periods when it is not actively and continuously under construction. 29 CFR 1926.500(b).

1 Mr. Sayegh further testified that there is no alternative to compliance, *i.e.*,
2 safety devices and/or training do not and cannot replace the proper securing and
3 marking of a hole. *See*, Tr. pp. 124;6-125;6-15. As Mr. Sayegh explained to Board
4 Member Fullerton:

5 Member
6 Fullerton: [] Mr. Kent points out that if you can have the either
7 or. You can either have the hole protection or the tie
8 off protection. Is that an applicable standard if you
9 have one and not the other and you're good?

8 Mr. Sayegh: No, sir. ... the standard that we cited was specific to
9 that. This had nothing to do with being tied off or not
10 being tied off. This was specific because there was a
11 hole in a floor that did not have margins on it as far as
12 hole or cover on it.

11 Member
12 Fullerton: So my other question is, [h]ad the hole not been
13 covered and the individual was tied off are there any
14 other applications that would have been pertinent to
15 that open space there or would the vertical edge
16 application apply?

14 Mr. Sayegh: I would say the latter, the vertical edge application may
15 apply.

16 Member
17 Fullerton: So they would not have needed to put a guardrail
18 around it as long as he was tied off?

18 Mr. Sayegh: If he was tied of off, no.

19 Member
20 Fullerton: Is the intent of [the regulation] that since it was a hole
21 and it was covered it needed to be marked no matter
22 what else was in place at that point?

21 Mr. Sayegh: Yes, sir, that's exactly it. *See*, Tr. pp.125:6-24,126;1-6.

23 Mr. Sayegh also testified about the calculation of the penalty assessed by the State.
24 *See*, Tr. pp. 116-118. Mr. Sayegh explained that it was a gravity based fine, determined
25 through the use of objective evaluations of certain factual information. *See*, State's
26 Exhibit 1, pp. 35-40. Mr. Sayegh testified that M. J. Dean's violation was considered
27 serious because serious injuries could result from a fall from a height of 20 feet. *See*, Tr.
28 p. 116;8-17. Mr. Sayegh further testified that the severity factor was high because such

1 fall could result in death, permanent disability or permanent impairment of an employee.
2 *See*, Tr. pp. 116;22-24, 117;1-9. The State found probability of injuries from the hazard to
3 be “greater.” *See*, Tr. p. 100;5-16. The probability of injury is a function of the number of
4 employees involved or exposed to the condition, how often the employees are exposed
5 and similar factors. *See*, Tr. p. 117;12-23. In this instance, two workers were exposed to
6 the hazard. The employee proximity was given a rating of ten because they were working
7 at the point of danger. *See*, Tr. p. 117;19-21. The frequency of exposure was given a ten
8 also because it was being done on a daily basis as a regular part of their job. *See*, Tr. p.
9 117;18-23. The gravity of the violations is the starting point for the calculation of the
10 penalty. The gravity of the violation is a function of the probability of an injury and the
11 severity of the injury, should one occur. *See*, Tr. pp. 117;24, 118;1-5. This was a gravity
12 based penalty with a starting amount of \$7,000. *See*, Tr. p. 118;6-11. This gravity based
13 penalty was then reduced to \$6,630, as the result of the Respondent’s size and its history.
14 *See*, Tr. p. 118;12-21.

15 The State’s next witness was Chris Otto (Mr. Otto), the Respondent’s
16 superintendent of the job site on the day of the inspection. *See*, Tr. pp. 127;17-24, 128;1-
17 2. During the inspection, Mr. Otto gave a statement, wherein he provided two relevant
18 comments. *See*, State’s Exhibit 1, pp 30-31. The first was that there was a hole for ladder
19 access which should have been nailed down and marked “hole.” *See, Id.* The second was
20 actually an internal contradiction. At one point, Mr. Otto said that Mr. Cortez was
21 responsible for nailing it down. *See, Id.* However, a few lines below, Mr. Otto stated that
22 there is no designated person for marking the cover. *See, Id.*

23 Mr. Otto was also questioned about the form entitled “Daily Pre-Task Planning
24 Sheet” (Planning Sheet) Dated 3-18, (March 18, 2019). *See*, State’s Exhibit 3, p. 132.
25 Specific to this inquiry is the statement, “Be sure to ask the following when evaluating
26 your work...[a]re all holes covered marked and secured?” *See, Id.* The response to this
27 question was affirmative, the “yes” was circled. *See, Id.* Mr. Otto responded that this form
28 is Xerox copy, most likely created by Mr. Kent and the Safety Officer. *See*, Tr. p. 136;3-

1 13.

2 The State's next witness was Sergio Resendiz (Mr. Resendiz), who was the deck
3 foreman at the time of the accident. *See*, Tr. pp. 174-175. Mr. Resendiz testified that he
4 signed the Planning Sheet for March 18, 2019, the day of the accident. *See*, Tr. p. 176;4-
5 13. Mr. Resendiz indicated that the Planning Sheet was filled out at the start of the day.
6 *See*, Tr. p. 176;14-17. Accordingly, the statement that "all holes covered marked and
7 secured" was applicable to the 60th floor, as opposed to the 61st floor. This was because
8 the 61st floor had not been created at the time that Mr. Resendiz completed the form. *See*,
9 Tr. p. 176;17-24.

10 Mr. Resendiz provided conflicting testimony regarding responsibility for securing
11 and marking the hole. In one instance he testified that Mr. Cortez and his partner, "had
12 plenty of time to nail that plywood down. So if that plywood was not nailed... those are
13 the guys that put it together." *See*, Tr. p. 184;10-16. However, Mr. Resendiz later testified
14 that another group of workers would nail down the plywood over the hole. "Somebody
15 from flyer crew would have to come back after the deck was sheeted to mark the hole."
16 *See*, State's Exhibit 1, p. 25.

17 In deliberations, the Board Members made comments on the evidence supplied by
18 the parties. *See*, Tr. pp. 210-212. Board Member Fullerton provided a couple of
19 comments which exposed flaws in the Respondent's argument that the regulation
20 provided alternative methods of compliance. First, he explained why covering and
21 marking a hole are necessary even when working in close proximity to a leading edge and
22 wearing fall protective devices.

23 The other aspect of it is when they talk about the other areas with the
24 leading edge where the joists are, the reason that those aren't marked is
25 because that is a clear and visible danger. Guys don't walk between those
26 joists because they know they can't walk on air. The intent of marking that
27 covered area as a hole is because it is not a clear and visible danger at that
28 point, and the intent of that is to keep somebody from inadvertently taking
that piece of plywood or even walking on a piece of plywood that would not
be secure enough to support their weight. *See*, Tr. Pp. 211;22-24, 212;1-7.

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1 Further, Board Member Fullerton explained why covering and marking holes are
2 valuable even when full fall protection is utilized.

3 The idea is even with that support that marking is to keep you from walking
4 in there and suffering even minor abrasions. You know, the fall protection
5 is going to protect you from the serious injury, but it's still not going to
6 protect you from some minor injuries that you may have sustained through
7 that accident. *See*, Tr. p. 212;17-22 .

8 After the Board seemed to reach a consensus that the first three elements of the
9 State's *prima facie* case were met, it went on to discussed the employer's knowledge of
10 the violative conduct. Towards that end, the Members brought up an issue which the State
11 had not discussed, the location of the accident. *See*, Tr. pp. 213;20-24, 214;1-15. The
12 unmarked hole was located on the 61st floor. *See*, Tr. pp. 213;20-24, 214;1-15. Each floor
13 of the 60 lower floors is presumed to have had ladder access in a similar location on the
14 floor. *See, Id.* The ladder accesses need to be created, covered, marked and eventually
15 enclosed on each of the lower floors. This activity would have occurred on almost a daily
16 basis which should have informed the employer that securing and covering the holes on
17 each floor is required. *See, Id.*

16 CONCLUSIONS OF LAW

17 The burden is on the State to prove by a preponderance of the evidence, a *prima*
18 *facie* case against the Respondent. *See*, NAC 618.788(1), *see also, Original Roofing*
19 *Company LLC v Chief Administrative Officer of the Nevada OSHA*, 442 P. 3d 146, 149,
20 (Nev. 2019). Thus, in matters before the Board of Review, the State must establish (1) the
21 applicability of a standard being charged; (2) the presence of a non-complying condition;
22 (3) employee exposure or access to the non-complying condition; and, (4) the actual or
23 constructive knowledge of the employer's violative conduct. *Id.* at 149, *see also,*
24 *American Wrecking Corp. v. Secretary of Labor*, 351 F. 3d 1254, 1261 (D. C. Cir., 2003).

25 The State is obligated to demonstrate the alleged violation by a preponderance of
26 the reliable evidence in the record. Mere estimates, assumptions and inferences fail this
27 test. Conjecture is also insufficient. Findings must be based upon the kind of the evidence
28 upon which responsible persons are accustomed to rely in serious affairs. *William B.*

1 *Hopke Co., Inc.* 1982 OSHARC LEXIS 302 * 15, 10 BNA OSHC 1479 (No. 81-206,
2 19820 (ALJ). The Board's decision must be based on consideration of the whole record
3 and shall state all facts officially noticed and relied upon. 29 CFR 1905.27(b). *Armor*
4 *Elevator Co.*, 1 OSHA 1409, 1973-1974 OHSD ¶ 16, 958 (1973). *Olin Construction Inc.*
5 *v. OSHARC and Peter J Brennan, Secretary of Labor*, 525 F. 2d 464 (1975). A
6 Respondent may then rebut the allegations by showing, 1) the standard was inapplicable
7 to the situation at issue or 2) the situation was in compliance. *S. Colorado Prestress Co. v.*
8 *Occupational Safety & Health Rev. Comm'n*, 586 F.2d 1342, 1349-50 (10th Cir. 1978).

9 The State met its burden to show that M. J. Dean violated 29 CFR 1926.652
10 because it provided testimony and photographs showing that there was an opening with a
11 dimension in excess of 2 inches. *See*, 29 CFR 1926.500(b). In fact, this opening was 40
12 by 42 inches. *See*, Tr. p. 70;11-14, *see also*, State's Exhibit 1, p. 76. The condition was
13 non-compliant because the cover was neither color coded nor marked HOLE or COVER.
14 *See*, State's Exhibit 1, pp. 25, 26, 27, 29, 30. In this instance, employee exposure is
15 proven, because M. J. Dean, had two employees installing plywood sheeting to prepare
16 for form work within a few feet of this hole. Exposure is shown because Mr. Cortez did
17 not see the hole and fell 20 feet 3 inches to the 59th floor, suffered a laceration to the head
18 and suffered a bruise of the upper torso and arms. *See*, State's Exhibit 1, pp. 24, 25, 26,
19 27.

20 The final element of the State's *prima facie* case, employer knowledge, is shown in
21 several ways. First, the Respondent requires its managers to fill out a Daily Pre-Task
22 Planning Sheet which expressly requires that all holes are covered and marked. *See*,
23 State's Exhibit 3, p. 132, *see also*, Tr. p. 136;3-9. The daily use of this form, alone,
24 showed the Respondent understood that covering and marking holes are continuing
25 requirements. Moreover, one of the Respondent's employees suffered a very similar
26 accident on this same job site four months before. *See*, State's Exhibit 3, p. 140. One of
27 Richardson Builders' recommendations made subsequent to this injury was to "mark and
28 secure all hole covers to insure that nobody accidentally mistakes hole covers as fill

1 material.” See, State’s Exhibit 3, p. 145. The relevance of this previous accident and
2 subsequent recommendation was to show that the Respondent knew of the hazardous
3 condition, unmarked holes, before Mr. Cortez’ injury. See, Tr. pp. 74;18-24, 75;1-5.

4 Based upon the above, the Respondent’s knowledge of the standard was established.

5 In its defense, M. J. Dean provided two arguments. The first was a variant of the
6 inapplicable standard defense. The Respondent alleged that the work environment was
7 such that the entire deck should be considered a leading edge. See, Tr. pp. 206;7-22,
8 207;1-7. Therefore, the Respondent provided sufficient protection by training all of its
9 employees in the use of fall protection equipment and required them to use it. See, Tr. p.
10 207;8-22.

11 The Respondent’s argument fails because the opening met with the regulatory
12 definition of a hole. See, 29 CFR 1926.500(b). The opening had dimensions of 40 by 42
13 inches. See, Tr. p. 70;11-14, see also, State’s Exhibit 1, p. 76. Thus, under the plain
14 meaning of the regulation, there was a hole that needed to be labeled. See generally,
15 *Valley Camp of Utah, Inc. v. Babbitt*, 24 F.3d 1263, 1270 (10th Cir. 1994)(Regulations
16 are interpreted by applying general rules of statutory construction, beginning with the
17 plain language of the regulation), see also, *Aspenwood Investment Co. v. Martinez*, 355
18 F.3d 1256, 1261 (10th Cir. 2004). The plain meaning of the regulation overrode, the more
19 general requirement that the employees must use fall protection. As the opening was a
20 hole, as defined by the regulations, the Respondent was required to mark it as “hole” or
21 “cover.”

22 The Respondent’s other defense was unpreventable employee misconduct. This
23 defense necessarily failed because there was no nexus between the violation and the
24 misconduct. In order to invoke this defense, the employer must prove, *inter alia*, that it
25 had established work rules to prevent the violation and it effectively enforced violations
26 when discovered. *D.A. Collins Const. Co. v. Sec’y of Lab.*, 117 F.3d 691, 695 (2d Cir.
27 1997).

28 In this instance, M. J. Dean did not show that it had any work rules to prevent

1 unsecured and unmarked holes. Moreover, Mr. Cortez was not disciplined for failing to
2 label the hole. Instead he was disciplined for not being tied off on the 61st floor. *See*,
3 Employer's Exhibit 12, *see also*, Tr. p. 95;8-23. Thus, this defense was unavailable to the
4 Respondent.

5 The Board accordingly finds and concludes that the preponderance of the evidence
6 reveals the State met its *prima facie* burden under 29 CFR 1926.502(i)(4). Further, the
7 evidence reveals that neither of the Respondent's affirmative defenses was applicable.
8 The claim and penalty are hereby sustained.

9 ORDER

10 It was moved by Board Member Fullerton that the citation for a violation of 29
11 CFR 1926.502(i)(4) and the fine of \$6,300 be upheld. *See*, Tr. p. 219;7-12. The motion
12 was seconded by Board Member Macias. *See*, Tr. p. 219;13-16. The motion was approved
13 unanimously upon a vote of five in favor and none in opposition. *See*, Tr. p. 219;19-23.
14 Accordingly, the State OSHA Board of Review hereby upholds the citation and fine
15 assessed against M. J. Dean.

16 This is the Final Order of the Board.

17 IT IS SO ORDERED.

18 On December 15, 2022, the Board convened to consider adoption of this decision,
19 as written or as modified by the Board, as the decision of the Board.

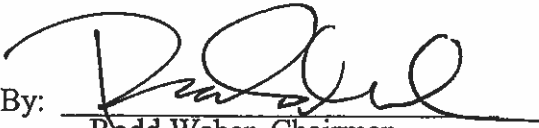
20 Those present and eligible to vote on this question consisted of the full current
21 members of the Board, to-wit, Chairman Rodd Weber, William Speilberg, Frank
22 Milligan, Jorge Macias and Scott Fullerton. Upon a motion by William Speilberg,
23 seconded by Frank Milligan, the Board voted 5-0 to approve this Decision of the Board as
24 the action of the Board and to authorize Chairman Weber, after any grammatical or
25 typographical errors are corrected, to execute, without further Board review of this
26 Decision on behalf of the Nevada Occupational Safety and Health Review Board. Those
27 voting in favor of the motion either attended the hearing on the merits or had in their
28 possession the entire record before the Board upon which the decision was based.

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On December 15, 2022 this Decision is, therefore, hereby adopted and approved as the Final Decision of the Board of Review.

Dated this ~~25~~²⁰ day of ~~June~~^{August}, 2023.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: 
Robd Weber, Chairman

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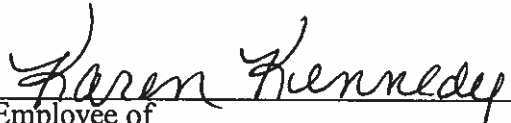
CERTIFICATE OF SERVICE

Pursuant to NRCPC 5(b), I certify that I am an employee of the Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached document, *Decision and Order of the Board, Findings of Fact and Conclusion of Law, and Final Order*, on those parties identified below by placing an original or true copy thereof in a sealed envelope, certified mail/return receipt requested, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada:

Salli Ortiz, Esq.
DIR Legal
400 West King Street, Suite 201
Carson City, NV 89703

Jim Kent
5055 W. Patrick Lane Ste. 101
Las Vegas, NV 89118

Dated this 25th day of August, 2023.



Employee of
The Law Offices of Charles R. Zeh, Esq.

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