



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 23-2203

Inspection No. 1601498

Complainant,

vs.

EDWARD HOMES INC.,

Respondent.

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

This case arose out of a comprehensive planned inspection, *see*, State's Exhibit 1, p. C-10, a residential construction project known as Rancho Village Apartments, where the respondent, Edward Homes, Inc., worked a project located at 2705 North Rancho Drive, Las Vegas Nevada. *See*, State's Exhibit 1, p. C-3. The State's inspection occurred on June 13, 2022. *See* State's Exhibit 1, p. C-7. The inspection of the premises resulted in the issuance of a complaint consisting of one cause of action as follows:

Citation 1, Item 1: REPEAT - SERIOUS

29 CFR 1926.501(b)(1): "Unprotected sides and edges." Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems. *See*, Complaint, p. 2.

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1 It is alleged, at the Rancho Village Apartments jobsite, the Employer did not ensure
2 that each employee on a walking/working surface with an unprotected side or edge
3 which is 6 feet or more above a lower level was protected from falling by the use of
4 guardrail systems, safety net systems, or personal fall arrest systems. An employee
5 was removing a cross brace from an opening near the second-level balcony of
6 building 6. The width of the opening measured approximately 8 feet and was located
7 approximately 6 feet away from the open sided edge of the balcony. The height of the
8 second level balcony measured approximately 12 feet to the next lower level.

9 The employee was exposed to possible serious injuries or death in the event of
10 a fall to the surface below.

11 Edward Homes, Inc. was previously cited for a violation of this occupational
12 safety and health standard or its equivalent standard 1926.501(b)(1), which
13 was contained in OSHA inspection number 1298245, Citation number 1, Item
14 number 1, and was affirmed as a Final Order on 5/22/2018. Complaint p. 2.

15 [I need to work in some place else also. The State sought a fine of \$13,654, for Citation 1,
16 Item 1, as this was alleged to be a repeat violation of the same standard set forth in
17 Citation 1, Item 1 of the instant Complaint].

18 The matter came before Nevada Occupational Safety and Health Review Board (Board)
19 for a hearing on Wednesday, August 9, 2023, *see*, Tr., p. 1. The hearing was conducted in
20 furtherance of a duly provided notice. *See*, Notice of Hearing, dated July 25, 2023. In attendance
21 at the hearing this matter were Chairman, Rodd Weber, Secretary William Spielberg Board
22 members Frank Milligan, Jorge Macias and Scott Fullerton. *See*, Tr., p. 3.

23 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety
24 and Health Administration of the Division of Industrial Relations of the Department of Business
25 and Industry, State of Nevada, the (State), appeared for the Complainant. Edward Homes, Inc.,
26 hereinafter (Edward Homes) respondent, was represented by Plinio Brito. He is the Safety
27 Consultant for Edward Homes. Mr. Brito is not a lawyer but he appeared as the lay advocate on
28 behalf of the respondent. Tr., p. 87.

Edward Homes, Inc. is a Nevada State Business Licensee. *See*, State's Exhibit 1, p. C-1.
It is located at 8475 South Eastern Avenue, Suite 105, Las Vegas, Nevada 89130. *See*, State's
Exhibit 1, p. C-1. The place of work was a construction site. *See* State's Exhibit 1, P. C-2,
Respondent is a controlling entity engaged in this residential construction project. *See*, State's
Exhibit 1, p. C-2. More particularly Edward Homes was a subcontractor on the jobsite engaged
as a framer, *see*, State's Exhibit C-3 to 3-5, when the incident(s) took place. That is to say,

1 Respondent is a Nevada corporation engaged in the residential construction industry. *See*, State's
2 Exhibit 1, p. C-6.

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

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

12 As this was a comprehensive, planned inspection of the premises, the violations cited
13 were discovered during the course of an inspection of the work site. Edward Homes, Inc. was
14 contracted to build a multi-family town home complex with one clubhouse, 40 apartment
15 buildings and 160 total units. *See*, State's Exhibit 1, p. C-10. The inspector on this case was
16 Darrel Galloway. *See*, State's Exhibit 1, C-11.

17 The State issued a Citation and Notification of Penalty, Inspection No. 1601498, DG-22-
18 030, on December 13, 2022. By contest letter dated January 10, 2023, Exhibit "B" to the State's
19 Complaint, the Respondent contested the Citation and Penalty set forth in the referenced Citation
20 and Notification of Penalty. *See*, Complaint, pp. 1 and 2. The Respondent filed its letter-form
21 answer to the complaint in this matter on February 11, 2023. It is stated as follows:

22 My name is Plinio Brito, and I am the 3rd party safety Consultant for Edward
23 Homes Inc. Docket No. LV23-2203; Inspection No. 1610498 (sic).

24 I/We are in receipt of the summons and shall wait for further instructions until the
25 conclusion of this case (sic).

26 As this constituted the answer to the Complaint in this matter, no affirmative defenses
27 were alleged by the Respondent. This includes the lack of jurisdiction and the affirmative defense
28 of un-preventable employee misconduct. None were pled by Respondent.

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1 At the outset of the hearing, the State offered for admission into evidence Exhibits 1
2 through 3, consisting of pages C-1 through C-129. They were admitted into evidence without
3 objection by Mr. Brito. *See*, Tr. pp. 88, 94. Mr. Brito, for Respondent, offered one Exhibit
4 consisting of seven pages, which was also admitted into evidence without objection. *See*, Tr. p.
5 93. Ms. Ortiz advised on behalf of the State that she would call two witnesses, Darrell Galloway,
6 the inspector on this project, and William Membreno, a foreman for the Respondent. *See*, Tr. p.
7 87. Mr. Brito intended to call no witnesses except himself on behalf of Respondent. *See*, Tr. p.
8 84.

9 At the duly noticed hearing, conducted on August 9, 2023, the State presented the
10 testimony of Mr. Galloway and Mr. Membreno. Mr. Brito called no witnesses other than
11 himself. His "presentation" was brief and conclusory in nature. He did not call into question, the
12 facts and testimony elicited by the State during the course of its case-in-chief. *See*, Tr. pp. 146
13 through 173. Mr. Britto's discussion after he called himself as a witness focused more on the
14 claim that after he became employed as the safety manager for Respondent, Respondent took
15 safety matters more seriously. *See*, Tr. p. 148. He called no witnesses other than himself, did not
16 dive into any details of the seven pages he brought as his exhibits to this case, and complained
17 that he should have never had let the inspection of the premises take place unless he was present.
18 He would never give such permission absent his presence for the inspection, ever again.

19 As a consequence, the factual underpinnings of the State's Complaint are not in dispute.

20 **FINDINGS OF FACT**

21 Mr. Galloway was called to testify first on behalf of the Respondent. He testified without
22 contradiction that the Respondent provided the employees with fall protection equipment or
23 allowed them to use and secure their own fall protection equipment when working at heights on
24 the job. He also testified, without contradiction during the hearing as also elaborated in his
25 violation work sheets of the State's Exhibit 1, pp. C-27 and 28, that Respondent failed to ensure
26 that each employee walking or working within unprotected sides of edges more than six feet
27 above a lower level was protected from falling by the use of fall protection, guardrails and the

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1 like. An employee was seen removing a cross brace from an opening near the second level,
2 balcony of building 6. Mr. Galloway went on to state:

3 the width of the opening measured approximately 8 feet, it was located
4 approximately 6 feet away from the opened side of the edge of the balcony. The
5 height of the second balcony measured approximately 12 feet to the next lower
level. The employee was exposed to possible serious injuries or death in the event
of a fall to the surface below.

6 *See*, State's Exhibit 1, p. C-27, admitted into evidence without objection. *See*, generally, Tr., pp.
7 97 through 143. During the hearing, according to Mr. Galloway, Ronald Schmitz, the supervisor
8 on-site for Respondent, *See* Exhibit 1, p. C-3, conducted checks on the job site daily for safety
9 issues. Schmitz was in charge of the Framers. The foreman for the job site, was William
10 Membreno, who, if he saw an unsafe condition, had authority to stop work and discipline the
11 employee. *See*, Tr. p. 142. Mr. Schmitz, also, according to Mr. Galloway, went on to state that
12 all of the Framers are required to be trained in fall protection and to follow the policies put in
13 place by the Company. Training is required for all employees. *See*, Tr. p. 103.

14 According to Mr. Galloway's interview of Mr. Membreno, the foreman on this job, fall
15 protection is required by Respondent when employees are working at heights over 6 feet, near
16 openings on the second level. The company's fall protection was typically a harness, a yo-yo and
17 the complete fall protection set. Fall protection policies are communicated verbally. *See*, Tr. p.
18 105.

19 According to Mr. Membreno, through Mr. Galloway, the company communicates fall
20 protection policies daily with the framers. According to Mr. Galloway, Mr. Membreno conveys
21 the information to the framers on a daily basis through toolbox talks. *See*, Tr. p. 105. Mr.
22 Galloway, commenting further on his interview with Mr. Membreno, stated that Mr. Membreno
23 oversees thirty to thirty five framers, directs their work daily, some of whom work from a boom.
24 Even employees working from a boom are required to wear fall protection. *See*, Tr. p. 106.

25 Mr. Galloway stated that Mr. Membreno said, he had seen Julio Ramirez , another framer,
26 wear fall protection equipment. Mr. Ramirez was authorized to work on the second level. Mr.
27 Ramirez was tasked with removing braces in the building, on the day of the inspection and he
28 was removing the braces so that the drywall could be installed by another company. *See*, Tr. p.

1 103. Mr. Ramirez was supposed to remove braces on the side door from inside the building.
2 The distance from the opening to where Mr. Ramirez was working was about 5 feet from the
3 open side of the edge of the building. *See*, Tr. p. 106. According to Mr. Galloway, Mr.
4 Membreno claims that he, Mr. Membreno, tasked Mr. Ramirez with removing the braces in the
5 doorways but not to come out on the balcony floor. Mr. Ramirez did not need fall protection on
6 that day because he was not supposed to go on to the balcony area of building six. *See*, Tr. p.
7 106.

8 Mr. Galloway stated that employees accessed the second level by using stairs. The stairs
9 in building 6, did not have handrails. Again, according to Mr. Membreno, the condition of those
10 stairs has been in that state for the past 6 months. *See*, Tr. p. 107.

11 Mr. Ramirez was provided by the company with fall protection equipment. The
12 company's policy is that when you start to work for the company, you have to have training in fall
13 protection. *See*, Tr. p. 107.

14 The interview that Mr. Galloway conducted with Mr. Membreno and as related above,
15 was through an interrupter. *See*, Tr. p. 108.

16 According to Mr. Membreno, through Mr. Galloway, the general work practice was that
17 when the walls are up, they install truss clips to remove the cross braces on the openings of the
18 units. The cross braces are to be removed from the inside of the units, not on the balcony side of
19 the second level units. Cross braces are removed because they get in the way of other sub-
20 contractors doing their job. "Cross braces are removed after we are done with our work and
21 cleaning up." *See*, Tr. p. 108 and 109.

22 Mr. Ramirez was also interviewed by Mr. Galloway. *See* Tr. P. 109. According to Mr.
23 Galloway, Mr. Ramirez was a framer. Mr. Galloway informed that Ramirez said, he did framing
24 work on the job site. On the day in question, however, Mr. Ramirez was taking nails from the
25 second level but nobody was working up there. He was working at the second level yesterday
26 but not on the day in question. He said he was taking nails to the second level to use later. He

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1 didn't have a safety harness with him that day. He didn't have a safety harness at the time of the
2 interview, but he had one at home, he said. He left his harness at home that day." *See*, Tr. p.
3 109.

4 According to Mr. Galloway, Mr. Ramirez also said:

5 He [Ramirez] was on the second level for about 2 minutes when he took the nails
6 up there. He said his co-worker Milton tells him what to do daily for the job site.
7 He was helping him that day, the company was training him in fall protection.
8 The company trained him in fall protection when he started with the company
9 about four months ago. *See*, Tr. p. 110.

10 Mr. Galloway also interviewed Mr. Andreas Bojorquez. According to Mr. Galloway, Mr.
11 Bojorquez said, he does carpenter work, truss framing on the job site. According to Mr.
12 Galloway, Mr. Bojorquez testified:

13 [Bojorquez] on the day OSHA was on the site, he was also observed working on
14 the building, on the platform side of the building. On the second level of the
15 platform, he was working on for an air condition unit, came out of the balcony to
16 see if someone could check the power for his nail gun and something along the
17 lines of the GFCI trips, when he's looking to see if someone on the lower level
18 could help him power his nail gun.

19 He said that is him on the photo that we provided. He was on the balcony for about ten
20 seconds, He did see someone taking the photo. He was not wearing fall protection or a
21 harness when OSHA observed him working. *See*, Tr. p. 111.

22 Lastly, according to Mr. Bojorquez: "The day OSHA observed him on the balcony, that
23 was the day the supervisor was not around or where I was working, so he said his supervisor
24 wasn't around." *See*, Tr. p. 113.

25 Mr. Galloway testified they took photographs during the inspection. The first was the
26 photograph in evidence at C-51. It is a photograph of an employee on the second level out on
27 that balcony area. *See*, Tr. p. 113. Another photograph was discussed of an associate of Mr.
28 Galloway, securing a measurement using a trenching rod of the second level where Mr.
Galloway observed the employee working. The measurement revealed that this is 12 feet above
below level. *See*, Tr. p. 114; Exhibit 1, P. C-53.

Mr. Galloway explained when he testified that he determined that the Respondent should
be cited for a violation of 25 CFR 1926.501(b)(1). He believed that section of the CFR was
pertinent because its purpose is to protect employees from falls, the most serious consequences of

1 which could be death. *See*, Tr. p. 118. He cited the employer for this violation because we
2 observed employees exposed to falls. Mr. Galloway observed one and then there was an
3 observation by another inspector where other guys were also working at a height over 6 feet and
4 were not protected. According to Mr. Galloway, persons of authority at Edward Homes were
5 aware that a hazard existed. *See*, Tr. p. 118. On the question of employer knowledge, Mr.
6 Galloway, in effect, reasserted the conclusion and the finding he set forth in his violation
7 worksheet. There, he stated that:

8 With the exercise of reasonable diligence, the employer could have been ensured
9 that employees are protected from fall when working at heights above 6 feet to the
10 surface below by using a conventional means for fall protection. Management
11 interviews with Williams Membreno, Foreman revealed that he has seen Julio
12 Ramirez wearing fall protection clothing in the past, and stated that he is
13 authorized to work from a second level of buildings. Management stated that
14 Julio Ramirez was tasked with removing the cross braces in building 6 on the day
15 of the inspection. Management stated that he was removing the braces so that the
16 drywall could be installed by another company. Management told me he was
suppose to remove the bracing on the sliding door area from inside the building.
Management stated that this was from the opening were Julio Ramirez was
working from about 5 feet from the open sided edge. Management told me to task
him with removing the bracing on the doorways but not to come out on the
balcony area of the building. Management also told me Julio Ramirez didn't need
fall protection on that day because he was not suppose to come out on to the
balcony area on the second level. *See*, State's Exhibit 1, p. C-29.

17 Management also had a written fall protection program/plan. *See*, State's Exhibit 2, p. C-
18 74. Pertinently, it states:

19 Our Company's Duty to Provide Fall Protection

20 To prevent falls, Edward Homes has a duty to anticipate the need to work at
21 heights and to plan our work activities accordingly. Careful planning and
22 preparation lay the necessary groundwork for an accident-free jobsite. *See*, State's
Exhibit 2, p. C-76.

23 The Fall Protection Plan goes on to state:

24 Unprotected Sides and Edges

25 We know that OSHA has determined that there is no "safe" distance from an
26 unprotected side or edge that would render fall protection necessary. Therefore,
27 guardrails and/or fall arrest systems will be utilized until all work has been
completed or until the permanent elements of the structure that will eliminate the
exposure to falling hazards are in place.

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1 The Fall Protection Plan clearly establishes that the company was aware of the danger
2 involved in working at heights. The plan also reveals the company had knowledge that
3 provisions for safety protections are mandated and that there is no safe distance from an
4 unprotected side or edge. In other words, the company was clearly aware that when the cross
5 braces were removed from the opening on side walls, edges were exposed and, therefore, either
6 guardrails provided or fall protection equipment must be worn by employees.

7 The incident described by Mr. Ramirez is a clear violation of the company's own policy.
8 Conduct in derogation of the company's own safety plan was further revealed when Mr.
9 Membreno was called to testify. As indicated, Mr. Membreno was a foreman, *see* Tr. p. 119,
10 who was supervising 30 to 35 framers on this job at the time of the incident. As a foreman, he
11 assigns tasks, could chastise employees for failure to follow company safety rules and
12 regulations, and could send employees home from their jobs for violating safety rules. He meets
13 the definition of a supervisor or a part of management. *See, Secretary of Labor, complainant, v.*
14 *Kerns Brothers Tree Service, respondent, OSHRC Docket No. 96-1719; Tampa Shipyards, Inc.,*
15 *15 BNA OSHC 1533, 1537 (No. 86-630, 1992)*

16 When Mr. Membreno was called to testify at the hearing, he testified through an
17 interpreter. *See* Tr. p. 130. He testified, he was the foreman of carpenters, he was in charge of
18 anything to do with framing and that about 35 framers were on the job at the time of the incident.
19 *See* Tr. p. 132.

20 Mr. Membreno also testified that he had assigned Julio Ramirez to remove the cross
21 braces on the job, that he had evaluated Mr. Ramirez, he found that Mr. Ramirez was competent
22 to work on the second floor, and that the company had assigned fall protection equipment to Mr.
23 Ramirez. He also stated that he had seen Mr. Ramirez wearing fall protection equipment in the
24 past. *See* Tr. p. 133. Mr. Ramirez had all of the equipment for safety prevention and his job was
25 to take away the braces while he was inside the building. *See* Tr. p. 134. The removal of cross
26 braces on this job would ordinarily take two to three hours. *See* Tr. p. 135. According to Mr.
27 Membreno, Mr. Ramirez was hired to do ground work including second and third floors inside
28 the units, not outside and be exposed to falls. According to Mr. Membreno, the distance from the

1 braces to the leading edge was 6 feet from the last brace to the balcony. *See* Tr. pp. 138 and 139.

2 While claiming Mr. Ramirez was working inside and, therefore, not exposed to a fall, the
3 photograph depicts that he was actually outside with exposure. *See* Tr. p. 140. *See*, photograph,
4 State's Exhibit 1, p. C-51. According to Mr. Membreno, in fact, and as shown in pictures C-51
5 and C-52, "Julio" Ramirez was outside of the building, but Mr. Membreno did not know how
6 many feet from being exposed. *See* Tr. p. 140.

7 Nonetheless, Mr. Membreno also stated when there's exposure when the employees are
8 working on the second and third floor, they always put up handrails but on this job there were no
9 handrails. Then, when Mr. Membreno was asked the following question:

10 Q: So looking at the picture on page C-52, do you agree that he [Mr.
11 Ramirez] was exposed to a fall?

12 A: Yes, Now to look at it this way, yes, he is exposed to danger. *See*, Tr. p.
13 142.

14 Then, Mr. Membreno was asked a hypothetical question:

15 Q: We're going to use as the leading edge meaning where a person can fall.
16 From your distance, how far back should a person be not to go to a leading
17 edge to prevent that fall? What should be that distance?

18 A: About ten feet. *See*, Tr. p. 143.

19 Ms. Ortiz asked the question, where did you get that information? "A: That is a way that
20 I think somebody could be secure." Management personnel such as Mr. Membreno, therefore,
21 were unaware of or disregarded the Edward Home's Fall Protection policy which states:
22 "... [T]here is no "safe" distance from an unprotected side or edge that would render fall
23 protection necessary." The Policy goes on to state that guardrails and/or fall arrest systems will
24 be utilized. *See*, State's Exhibit 2, p. C-76. As according to Mr. Membreno, there were no
25 guardrails in use, when the cross braces were being removed, the company violated its own
26 safety policies.

27 At the conclusion of Mr. Membreno's testimony, the State rested. *See*, Tr. p. 145. The
28 Respondent then presented its defense. Mr. Brito called himself to testify. He was the lay
advocate in defense of the Respondent. *See*, Tr. p. 146. Mr. Brito backed off of any specific

1 challenge to the facts testified to by Mr. Galloway and Mr. Membreno. *See*, Tr. p. 145. However,
2 he admitted that " Edward Homes received the same citation that they just received now for June
3 13th, 2022, which is 1926.501(b)(1), which is the repeat citation" *See*, Tr. p. 146. "Citations have
4 to be given or could be a repeat citation every - - for up to seven years if they are the same issue."
5 *See*, Tr. p. 146.

6 The rest of Mr. Brito's testimony was of little consequence, substantively. He did not
7 directly challenge with his testimony any of the factual recitations, gleaned from the testimony of
8 Mr. Galloway and Mr. Membreno.

9 Mr. Brito claimed, however, he received the citation according to the regulations a day
10 past the period that it was due to be served. *See*, Tr. p. 170. If this was an attempt at establishing
11 an affirmative defense such as a failure to follow procedure, an unfair investigation or some form
12 of lack of administrative/procedural jurisdiction, it fails because no affirmative defenses were
13 pled in the answer of Edward Homes to the Complaint. *See* Respondent's Answer.

14 When cross examined, however, Mr. Brito admitted that he had a closing conference with
15 Mr. Galloway on June 27, 2022. Mr. Brito was asked if it was not true that Mr. Galloway told
16 him during a conversation that he, Mr. Galloway, was proposing to give a citation which was
17 followed up with an email with that information. *See*, Tr. p. 176. Mr. Brito said he didn't
18 remember the email. *See*, Tr. p. 171.

19 Mr. Brito is then asked while looking at State's Exhibit 3, p. C-128, whether that page
20 was an email to Mr. Brito, with his email address on it conveying information about the citation
21 and what Edward Homes was to be charged. Mr. Brito then admitted that he did receive this
22 email, State's Exhibit C-128, from Mr. Galloway telling him exactly what the citation was that
23 Mr. Galloway was proposing and that Mr. Brito confirmed receipt of information. Tr. p. 172.
24 After this exchange between Ms. Ortiz, counsel for the State, and Mr. Brito, Mr. Brito had no
25 other comments. *See*, Tr. p. 173. Mr. Brito then clarified that he was resting in defense of
26 Edward Homes. *See*, Tr. p. 173. Mr. Brito admitted that he had no more witnesses, no more
27 documents, no more tapes, and that he had nothing further to add. *See*, Tr. pp. 173 and 174.

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1 The Board, therefore, deliberated the status of the record. William Speilberg, the Board's
2 Secretary, stated "I didn't hear a lot of supporting claim from the company. I heard some good
3 arguments but nothing that was really presented in evidence to be able to sink our teeth into." Tr.
4 p. 181. Then Chairman Weber was prompted to state:

5 I think the State provided, you know, good evidence. I think there's certainly a
6 standard in place. I think as to the repeat nature of this, it certainly seems it's a
7 repeat looking at the previous citation that they had received and then they had
8 another exposure. It's clear from the photo that you have the exposure. It's clear
9 from the work construction that if he's removing the bracing but yet the bracing is
10 what was supposedly providing the protection from the fall and then his task was
11 to remove the bracing, whether he's inside or outside the balcony, once the bracing
12 is gone, there's an opening. There's a horizontal opening with an exposure to fall
13 that according to the pictures is only six feet away.

14 And is there, if you look at document C-76, on page C-76, which is Edward
15 Homes' Safety Program, under their fall protection thing, if you go down to the
16 second to last paragraph, it says that we know that OSHA has determined that
17 there is no safe distance from an unprotected side or edge that would render fall
18 protection unnecessary. Therefore, guardrails and/or fall arrest systems will be
19 utilized until all work has been completed or until the permanent elements of the
20 structure will eliminate the exposure to falling hazards are in place. Clearly they
21 have it in their own policy that they know that there's no safe distance. *See*, Tr.,
22 pp. 182,183

23 During the course of the hearing, the State established the elements of Citation 1, Item 1,
24 that clearly CFR 1926.501(b)(1) was applicable. The sides or edges were unprotected on the job
25 site and the employees were working in an unprotected area. Though issued fall protection
26 equipment, employees worked at heights without it, without the use of safety net systems or any
27 other form of personal fall protection? *See*, State's Exhibit 1, C-26. They worked without fall
28 protection when working in an unprotected area, at least 12 feet above the next lower level.

29 This was a repeat offense and Mr. Brito conceded the point. The severity was "high",
30 State's Exhibit 1, C-26, given the unprotected heights at issue.

31 The determination of the severity was high because of the height 12 feet above a lower
32 level, where the individuals were working. State's Exhibit C-26 and the testimony adduced at the
33 hearing, discussed probability, which is the likelihood that injury would occur. The likelihood
34 was listed as "lesser" because he wasn't working right on the edge, Mr. Ramirez was working
35 five to six feet away from the edge.

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1 Then gravity was discussed. Gravity is generated from the computer and is based upon
2 severity and probability. *See*, Tr. p. 123. Citation 1, Item 1, has a gravity based penalty of
3 \$9,753. *See*, Tr. p. 124. The penalty was increased to \$13,654 because this was a repeat offense.
4 A repeat offense carries with it a two times multiplier based on the fact that it's a repeat. Mr.
5 Brito conceded that this case was a repeat offense. Also, *See*, State's Exhibit 2, pp. C-60, C-81
6 where the prior inspection that resulted in a fine is described as indicated and which Mr. Brito
7 admits the cases were the same thereby justifying a conclusion that this was a repeat offense case.

8 Nonetheless, the State granted a 30 percent discount to the Company based upon the size
9 of the company. Based upon history, they received a zero discount because it was repeat. Good
10 faith was given a zero consideration and zero for quick fix. *See* Tr. p. 124. None of this
11 discussion was challenged by Edward Homes either. The damage assessment and calculations of
12 are uncontroverted. *See*, State's Exhibit 1, p. C-26

13 At bottom, as observed by Board Secretary Spielberg, there was no substantive challenge
14 to the factual recitation's set forth above. The preceding Findings of Fact are undisputed in the
15 record.

16 To the extent any of following Conclusions of Law also amount to statements of fact,
17 they are incorporated herein. To the extent any of the statements of fact above constitute
18 Conclusions of Law, they are incorporated in the Conclusions of Law discussion set forth below.

19 CONCLUSIONS OF LAW

20 The State is obligated to demonstrate the alleged violation by a preponderance of
21 the reliable evidence in the record. Mere estimates, assumptions and inferences fail this test.
22 Conjuncture is also insufficient. Findings must be based upon the kind of the evidence which
23 responsible persons are accustomed to rely in serious affairs. *William B. Hopke Co., Inc.* 1982
24 OSHARC LEXIS 302 * 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ)). The Board's
25 decision must be based on consideration of the whole record and shall state all facts officially
26 noticed and relied upon. 29 CFR 1905.27(b). *Armor Elevator Co.*, 1 OSHA 1409, 1973-1974
27 OHSD ¶ 16, 958 (1973). *Olin Construction Inc. v. OSHARC and Peter J Brennan, Secretary of*
28 *Labor*, 525 F. 2d 464 (1975). A Respondent may then rebut the allegations by showing, 1) the

1 standard was inapplicable to the situation at issue or 2) the situation was in compliance. *S.*
2 *Colorado Prestress Co. v. Occupational Safety & Health Rev. Comm'n*, 586 F.2d 1342, 1349–50
3 (10th Cir. 1978).

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

12 The State met its burden to show that the Respondent violated 29 CFR 1926.501(b)(1).
13 The Record is complete with unchallenged overwhelming evidence by reason of the testimony
14 adduced at trial and the State's Exhibits 1 through 3, admitted without objection into evidence,
15 that 29 CFR 1926.501(b)(1) was violated. The evidence is overwhelming that 29 CFR
16 1926.501(b)(1) applied in this case. By its plain terms the regulation is intended to protect
17 employees against a fall from 6 feet or more to the next lower level by reason of unprotected
18 sides and edges. That is the circumstance involved in this case.

19 It is beyond question that Julio Ramirez was working at a height above 6 feet within 6
20 feet or less of an unprotected side and edge as he removed the cross boards from an exterior wall
21 of the apartment, unit 6, under construction. The photographs and testimony reveal that he was
22 outside the wall on the balcony without personal fall protection with no use of guardrails
23 systems, safety net systems to prevent his fall.

24 The employer's own Personal Protection Fall Policy recognizes that according to OSHA,
25 there is no safe distance that exists around an unprotected side or edge as existed here in this
26 case. *See*, State's Exhibit 2, p. C-76. Edward Homes states, " know that OSHA has determined
27 there is no "safe" distance from an unprotected side or edge that would render fall protection
28 unnecessary." *See*, State's Exhibit 2, p.C-76 By its own admission, Edward Homes

1 acknowledges that there is danger working adjacent to or in the vicinity of an exposed open edge
2 or side. Edward Homes' foreman, a member of management, also conceded the point. He stated,
3 that it was unsafe to be within 10 feet of an open side or edge at height. He also conceded that
4 Mr. Ramirez was working without protection from 5 to 6 feet from the open side or edge. These
5 facts are not controverted in the record, either.

6 Based upon these facts, the State has shown by an abundance of evidence that a *prima*
7 *facie* case has been established. 29 CFR 1926.501(b)(1) is applicable for the work environment
8 existed in a non-compliant condition. And, employee Ramirez was working at that altitude
9 without personal fall protection or other protections against a fall from that altitude. Therefore,
10 Mr. Ramirez was exposed to a non-complying condition, namely, working at height in the
11 presence of unprotected sides and edges. None of these facts, which underlie the three elements
12 of a *Prima Facie* case are in dispute. Edward Homes eschewed, any attempt to challenge the
13 facts and prove otherwise. Edward Homes offered no affirmative of defenses to the allegations
14 of the complaint. Edward Homes could not raise an affirmative defense in that its "letter form"
15 answer contained no allegation of any affirmative defense.

16 As for the fourth element of the *prima facie* case, proof of knowledge, it exists as the
17 photographs show. *See*, State's Exhibit 1, pp. C-51-C-59. Mr. Ramirez was working outside the
18 wall in the presences of unprotected sides or edges in plain site without fall protection or
19 guardrails. The employer was aware that this circumstance could not and should not be
20 countenanced. As Edward Homes states in its "Fall Protection Program/Plan," we know that it is
21 unsafe to work adjacent to unprotected sides and edges without adequate safety protection being
22 implemented." *See*, State's Exhibit 2, C-76.

23 During the course of the hearing and in the State's Exhibit 1, pp. C-26, C-31, the State
24 presented testimony and evidence as to how it arrived at a fine in the amount of \$13,654. The
25 amount of the fine, in large part, was attributable to the doubling of the gravity based dollar
26 amount by a multiple of 2 because this was a repeat offense. The evidence is clear that this was,
27 in fact, a repeat offense. Edward Homes did not contest the finding of a repetition. Edward
28 Homes conceded that point. The paper trail in support the claim that this was a repeat offense

1 was admitted into evidence, without objection in State's Exhibit 2, pp. C-60 through C-81. The
2 gravity based dollar amount was also admitted into evidence, unchallenged in State's Exhibit 1,
3 pp. C-26 through C-31. Testimony regarding the gravity based number was also introduced at
4 the hearing without challenge.

5 As commented by Board Secretary William Spielberg: "I didn't hear a lot of supporting
6 claim from the company. I heard ... nothing that was really presented in evidence to be able to
7 sink our teeth into." *See*, Tr. p. 181.

8 Board Chairman Weber then concluded:

9 I think the State provided, you know, good evidence. I think there's certainly a
10 standard in place. I think as to the repeat nature of this, it certainly seems it's a
11 repeat looking at the previous citation that they had received and then they had
12 another exposure. It's clear from the photo that you have the exposure. It's clear
13 from the work construction that if he's removing the bracing but yet the bracing is
14 what was supposedly providing the protection from the fall and then his task was
15 to remove the bracing, whether he's inside or outside the balcony, once the bracing
16 is gone, there's an opening. There's a horizontal opening with exposure to a fall
17 that according to the pictures is only six feet away.

18 And is there, if you look at document C-76, on page C-76, which is Edward
19 Homes' Safety Program, under their paragraph, we know that OSHA has
20 determined that there is no safe distance from an unprotected side or edge that
21 would render fall protection unnecessary. Therefore, guardrails and/or fall arrest
22 systems will be utilized until all work has been completed or until the permanent
23 elements of the structure will eliminate the exposure to falling hazards are in
24 place. Clearly they have it in their own policy that they know that there's no safe
25 distance. *See*, Tr. Pp. 182, 183

26 The Chairman added: "So, Mr. Membreno is saying, oh, I think six feet or ten feet is
27 irrelevant. Obviously, the company knows it. He's the foreman leading the work. He
28 should clearly know that. If he's assigning someone to take down the cross bracing that's
meant to provide fall protection temporally to that exposed leading edge, once you take
down, they should know that person should be tied off or there should be some measure
of protection. Whether they're inside the opening or not, they're still exposed to that. So,
yeah, to me it's clear that they - - that they violated this policy. Their own policy they
violated, and they had a guy clearly in the pictures exposed to a fall. So, yeah, - - I don't
see where there's really any argument." Tr. pp. 183, 184.

29 The observations of the Chairman and Board Secretary fairly encapsulate the status of this
30 case after hearing and upon consideration of the documentary evidence.

31 The Board accordingly finds and concludes that the preponderance of the evidence
32 establishes that the State met its *prima facie* burden under 29 CFR 1926.501(b)(1) and the

1 justification for the fine of \$13,654. Respondent shall also be required to provide documentation
2 or other appropriate evidence of abatement of the violation set forth in the Citation and
3 Notification of Penalty.

4 **ORDER**

5 It was moved by Scott Fullerton, to uphold the violation in its entirety. It was seconded by
6 William Spielberg. There was no further discussion, a vote was taken, the motion was adopted,
7 unanimously, with 5 votes in favor and no vote against. *See*, Tr. p. 184. Accordingly, the State
8 OSHA Board of Review hereby upholds the citation and fine assessed against the Respondent.

9 This is the final order of the Board.

10 IT IS SO ORDERED.

11 On December 13, 2023 the Board convened to consider adoption of this decision, as
12 written or as modified by the Board, as the decision of the Board.

13 Those present and eligible to vote on this question consisted of the 4 current members of
14 the Board, to-wit, Chairman, Rodd Weber, Secretary William Spielberg, Frank Milligan and
15 Jorge Macias. Upon a motion by Jorge Macias, seconded by Frank Milligan, the Board voted 4-0
16 to approve this Decision of the Board as the action of the Board and to authorize Chairman Rodd
17 Weber, after any grammatical or typographical errors are corrected, to execute, without further
18 Board review this Decision on behalf of the Nevada Occupational Safety and Health Review
19 Board. Those voting in favor of the motion either attended the hearing on the merits or had in
20 their possession the entire record before the Board upon which the decision was based.

21 On December 13, 2023 this Decision is, therefore, hereby adopted and approved as the
22 Final Decision of the Board of Review.

23 Dated this 9th day of January, 2024.

NEVADA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

24
25 By: 
26 Rodd Weber, Chairman
27
28