

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. RNO 21-2101

Inspection No. 1480574

Complainant,

vs.

DNA FRAMING, INC., dba DNA  
CARPENTRY,

Respondent.

FILED  
JUN 21 2024  
OSH REVIEW BOARD  
BY *H. Kennedy*

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

This case arose out of a self-referral, *i.e.*, Nevada OSHA, itself, discovered the alleged violation and reported it. *See*, State's Exhibit 1, p. 11. The violation was discovered at 3007 Feathertop Drive (Lot 222), Reno, Nevada, of the Toll South Reno project named Sky Meadow at Caramella Ranch. *See, Id.* In this instance, a State OSHA inspector, Robert Nanse, was driving through construction sites to verify conformance with the State's Covid-19 mandates. *See*, State's Exhibit 1, pp. 4, 11. From his vehicle, Mr. Nanse witnessed two employees working at a height of approximately 10 feet without the proper use of fall protection equipment. *See, Id.* The State's subsequent inspection resulted in the issuance of one citation for a violation of 29 CFR 1926.501(b)(13). *See*, State's Exhibit 1, pp. 20-24.

The matter came before the Nevada Occupational Safety and Health Review Board (the Board) for hearing on November 9, 2021. The hearing was conducted in furtherance of a duly

1 provided notice. *See*, Notice of Hearing dated January 27, 2021. In attendance to hear the matter  
2 and subsequently deliberate thereon were Acting Board Chairman William Spielberg and Board  
3 Members Jorge Macias, Frank Mulligan and Scott Fullerton. *See*, Tr., p. 1.<sup>1</sup> Board Chairman Rodd  
4 Weber was absent for this case. *See*, *Id.* As there were four members of the Board present to decide  
5 the case, with at least one member representing management and one member representing labor in  
6 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).  
10 Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised Statutes, NRS  
11 618.315.

12 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety  
13 and Health Administration of the Division of Industrial Relations of the Department of Business and  
14 Industry (hereinafter, the State or Nevada OSHA), appeared at the hearing on behalf of the  
15 Complainant (the State). *See*, Tr., p. 9. The Respondent (hereinafter, DNA or the Respondent) was  
16 represented at the hearing by its legal counsel, Charles B. Woodman, Esq. *See*, Tr., p. 10. Also  
17 present was Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., in his capacity as the  
18 Board's legal counsel. *See*, Tr., p. 1.

19 The State issued its Citation and Notification of Penalty (Citation) on November 9, 2020,  
20 alleging a violation of 29 CFR 1926.501(b)(13). *See*, State's Exhibit 1, pp. 20-24. The Citation  
21 alleged that the Respondent, while engaged as a subcontract contractor, failed to require its  
22 employees to utilize adequate fall protection devices while working at a height in excess of six  
23 vertical feet. *See*, State's Exhibit 1, p. 10. Citation 1, Item 1, charged a serious violation of 29 CFR  
24 1926.501(b)(13), as stated below:

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28 <sup>1</sup>"Tr." stands for the transcript of the hearing conducted on November 9, 2021, commencing at  
approximately 9:00 a.m., followed by the page and line number where the matter cited can be found.

Two employees were observed performing residential construction activities at heights over six feet without any form of fall protection in the following instances:

a. One employee was observed nailing roof trusses from the first floor interior wall top plate exposing the employee to a fall of approximately 11 feet 9 inches to the concrete floor below.

b. One employee was observed walking within the trusses over the garage area of the partially constructed house exposing the employee to a fall of approximately 9 feet 3 inches to the concrete floor below. *See*, State's Exhibit 1, p. 20.

On December 8, 2020, the Respondent sent its notice of intent to contest the Citation. *See*, State's Exhibit 1, pp. 36-37. On December 17, 2020, the State filed and served its Complaint. On January 4, 2021, Mr. Woodman answered the Complaint. *See*, State's Exhibit 1, pp. 44-52. Therein, Mr. Woodman offered the following affirmative defenses:

Respondent states that it was in compliance with the applicable standards at all times material hereto.

Respondent states that literal compliance with the standard cited in Citation 1 Item 1 was infeasible, and that an appropriate and adequate alternative fall protection was in use.

Respondent states that literal compliance with the standard cited in Citation I would have presented a greater hazard to Respondent's employees.

Respondent states that its conduct provided greater protection for the safety of Respondent's employees than literal compliance with the standards cited in Citation 1.

Respondent states that compliance with the standard cited in Citation 1 would have prevented performance of necessary work.

Respondent states that the alleged misconduct was unpreventable employee misconduct. *See*, State's Exhibit 1, pp. 45-46.

At the hearing on the matter, the State offered for admission its Exhibits 1 and 2, consisting of a total of 76 pages. *See*, Tr., p. 10;3-10. The Respondent had no objections to the admission of the State's Exhibits 1 and 2. *See, Id.* The State's Exhibits 1 and 2 were subsequently admitted. *See*, Tr., p. 11;12-17.

The Respondent offered for admission its Exhibits 1 through and including 8, consisting of a total of 107 pages. *See*, Tr., p. 10;11-16. The State objected to the Respondent's Exhibit 8, pages 63 through and including 107. *See, Id.* The exhibit was the California Code of Regulations, Title 8, Fall Protection Residential Construction, the Respondent's offered Exhibit 8, p. 63-107. The State

1 objected to the admission of the document on relevance grounds. *See*, Tr., p. 10;11-16. The Board  
2 deferred ruling on the admissibility of Respondent's Exhibit 8 until it was formally offered. *See*,  
3 Tr., pp. 11;23-24, 12;1-3. The Acting Board Chairman ultimately sustained the State's relevance  
4 objection to the admission of the Respondent's Exhibit 8. *See*, Tr., pp. 152;9-24, 153;1-11.

5 Before any testimony was given, the parties stipulated that the penalty calculations contained  
6 in the Violation Worksheet were correct. *See*, Tr., p. 14;14-22. The total fine assessed against the  
7 Respondent in the total amount \$34,700. *See*, State's Exhibit 1, p. 34. Accordingly, no testimony  
8 was given regarding the calculation of the assessed fine. *See*, Tr., p. 14;14-22. Thereafter, the State  
9 presented the testimony of Robert Nanse and Omar Lemus. *See*, Tr., p. 2. DNA presented the  
10 testimony of Ronald Barrette, DNA's Loss Control Manager, and David Ziegler, DNA's President.  
11 *See, Id.*

## 12 FINDINGS OF FACTS

13 In the mid or late morning of June 23, 2020, OSHA inspector Robert Nanse, was driving  
14 through a construction area conducting COVID-19 construction observations<sup>2</sup>. *See*, Tr., pp. 19;10-  
15 17, 62;18-24, 63;1-3. Mr. Nanse was not looking for any other types of violations. *See*, Tr., p.  
16 20;14-16. From his vehicle, Mr. Nanse saw two of the Respondent's employees working in the  
17 trusses of the residence without the proper use of fall protection equipment. *See*, State's Exhibit 1,  
18 pp. 53, 55, *see also*, Tr., p. 19;1-9,

19 The employees, Martin Ochoa and Jorge Aguilar, were working in the rafters of a residence  
20 under construction at site number of 222 located on 3007 Feathertop Drive. *See*, State's Exhibit 1,  
21 p. 4, *see also*, Tr., p. 26;12-14. The employees were working at a height of approximately ten feet  
22 above the ground. *See, Id.* From his vehicle, Mr. Nanse photographed Messrs. Ochoa and Aguilar  
23 in the residence's trusses. *See*, State's Exhibit 1, pp. 53-56. The photographs showed that in excess  
24 of five trusses were installed on the residence at the time. *See*, State's Exhibit 1, pp. 53, 55, *see*  
25 *also*, Tr., p. 83;11-20.

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27 <sup>2</sup>OSHA COVID-19 observations involved driving through construction sites to visually verify that  
28 the construction crews were in compliance with the Governor's COVID-19 restrictions. *See*, Tr., pp. 20;2-  
16, 40;1-12.

1 It was subsequently determined that both employees were in the zone of danger. Mr. Ochoa  
2 was standing at a height of 11 foot 9 inches above a concrete floor. *See*, State's Exhibit 1, p. 54.  
3 Mr. Aguilar had been standing at a height of 9 foot 3 inches above a concrete floor. *See*, State's  
4 Exhibit 1, p. 56.

5 After photographing the employees, Mr. Nanse informed the crew leader, Omar Lemus, that  
6 his employees were working without fall protection. *See*, Tr., pp. 74;5-24, 75;1. Mr. Lemus  
7 immediately directed the employees to get their fall protection equipment. *See*, Tr., p. 43;8-14. The  
8 employees then obtained the proper equipment from a DNA vehicle located at the job site. *See*, Tr.,  
9 pp. 52;18-22, 62;2-7. The employees installed that equipment on the standing trusses in the  
10 structure. *See*, *Id.* "I observed them pulling out some additional ropes, some of those spreader  
11 braces that go across the trusses, things like that." *See*, Tr., p. 62;1-12. It should be noted that Mr.  
12 Nanse remained in his vehicle throughout the events of June 23, 2020. *See*, Tr., p. 21;2-13.

13 After leaving the work site, Mr. Nanse generated the referral with OSHA. *See*, State's  
14 Exhibit 1, p. 4, *see also*, Tr., p. 19;19-21. The referral went to the lead inspector. *See*, Tr., 18;20-  
15 22. From there it was assigned to an inspector. *See*, *Id.* The inspection was then referred back to  
16 Mr. Nanse, who returned to the construction site the next day. *See*, Tr., p. 21;8-13.

17 On June 24, 2020, Mr. Nanse conducted the opening conference with Miguel Castro of  
18 DNA. *See*, State's Exhibit 1, p. 5, *see also*, Tr., p. 21;2-20. Mr. Castro informed Mr. Nanse that he  
19 was responsible for three houses in each of seven communities. *See*, Tr., pp. 22;18-22, 44;17-21.  
20 DNA also had a foreman for each community, *i.e.*, one foreman dedicated to three residences. *See*,  
21 State's Exhibit 1, p. 14. Mr. Castro stated that Matthew Guzman was the foreman for the Sky  
22 Meadows project. *See*, State's Exhibit 1, p. 14, *see also*, Tr., p. 25;10-13. Unfortunately, Mr.  
23 Guzman was not available at the opening conference or at the job site. *See*, Tr., p. 25;14-17.

24 As part of his regular job, Mr. Castro conducted the safety walkthroughs and to make sure  
25 the employees are tied off properly. *See*, Tr., p. 22;18-22. Mr. Castro claimed that he had not  
26 recently witnessed any tie-off violations. *See*, Tr., p. 23;2-7. Mr. Castro testified that the  
27 employees received a written warning for any violation he witnesses. *See*, *Id.* Mr. Castro also

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1 engaged in the enforcement of the safety rules. "If we drive by and they are not tied off then we  
2 write them up." *See*, Tr., pp. 23;24, 24;1.

3 Mr. Castro stated that he regularly conducted safety meetings with his crews. *See*, State's  
4 Exhibit 1, pp. 14, 15. One of the subjects of these meetings was the proper tie off procedures to be  
5 used while installing trusses. *See*, State's Exhibit 1, p. 14, *see also*, Tr., p. 23;22-24. Mr. Castro  
6 explained, "we expect employees to start wearing fall protection equipment once five trusses are  
7 stood. Once five are stood, we put a cross-arm strap on the beams and then the employees would  
8 wear fall protection equipment to block the trusses. The general rule is for employees to be tied off  
9 at six feet."<sup>3</sup> *See*, Tr., p. 24;16-21.

10 Mr. Castro's statement regarding the use of fall safety equipment was consistent with the  
11 Respondent's Safety Manual. *See*, Respondent's Exhibit 1, pp. 5-27. Specifically is the section of  
12 DNA's Safety Manual entitled "FALL PROTECTION FOR THE INSTALLATION OF ROOF  
13 TRUSS / RAFTER." *See*, Respondent's Exhibit 1, p. 25.

14 DNA Carpentry shall take the following steps to protect worker(s) who are  
15 exposed to fall hazards while working from the top plate installing truss /  
16 rafters...[w]orker(s) should use the fall protection bucket that includes, harness,  
17 rope, metal anchor cross-arm strap/rafter bars to tie off **after the first five trusses**  
18 are installation (sic) and braced off for the entire process of sheathing of the roof.  
19 *See, Id.* (Emphasis add).

20 This statement concerned Mr. Nanse because he found it to create an unauthorized exception  
21 to subsection (b)(13) of 29 CFR 1926.501.

22 As part of his investigation, Mr. Nanse interview Messrs. Ochoa and Aguilar. *See*, State's  
23 Exhibit 1, pp. 18, 19. Both employees admitted that they were not properly tied off at the time that  
24 Mr. Nanse witnessed them from the street. *See, Id.* Both said that it was their second day working  
25 on this particular residence. *See, Id.* Mr. Aguilar said that his job was to install the backing for the  
26 trusses. *See*, State's Exhibit 1, p. 18. Mr. Aguilar claimed that he was wearing his wearing his

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27 <sup>3</sup>During the hearing, a significant amount of testimony was devoted to the Respondent's "first five  
28 truss" exception. Strictly speaking, this purported exception is inapplicable because the employees were  
working in an area where more than five trusses were installed. However, the purported exception is  
relevant to the employer's knowledge of the violative conduct.

1 harness but it was not attached to a rope. *See, Id.* He claimed that he had taken the rope off about  
2 five minutes before Mr. Nanse photographed him. *See, Id.* Mr. Aguilar stated that DNA required  
3 him to wear full fall protection at a height of 7 feet. Mr. Aguilar said that he took his rope off to  
4 nail the one-by-fours and the backing into the trusses. *See, Tr.*, pp. 22-29. Mr. Ochoa stated that at  
5 the time of the observation, he was blocking<sup>4</sup> the trusses that were stood up with a nail gun. *See,*  
6 *Tr.*, p. 29;5-12. He claimed to have taken his fall protection off for about 5 or 6 minutes to nail in  
7 supporting woodwork. *See, Tr.*, p. 30;4-7.

8 At the hearing held on November 9, 2021, Mr. Nanse was the State's first witness. Mr.  
9 Nanse's testimony commenced with a review of his interview with Omar Lemus. Mr. Lemus  
10 described his function as making sure everyone is doing their job and that they are doing it  
11 correctly. *See, State's Exhibit 1*, p. 16, *see also, Tr.*, p. 26;16-21. Mr. Lemus was compensated on  
12 a piece work basis as were Messrs. Aguilar and Ochoa. *See, Tr.*, p. 149;15-21. The crew jointly  
13 shared all of the money they earn in the construction of the residences they build. *See, Id.*

14 Regarding the incident of the previous day, Mr. Lemus indicated that he did not know the  
15 two employees were not using their fall protection devices because he was unable to see Messrs.  
16 Aguilar and Ochoa at the time the inspector witnessed them. *See, Tr.*, pp. 36;20-24, 37;1. Mr.  
17 Lemus was working in a different area of the house at that time. *See, Id.* Mr. Castro stated that he  
18 had conducted two safety drive bys the day that the alleged violation occurred. *See, State's Exhibit*  
19 *1*, p. 14. When he did the morning drive by, no employees were in the trusses. *See, Tr.*, p. 37;8-12.

20 Mr. Lemus said he normally verified that his crew members are safely tied off when in the  
21 zone of danger. *See, Tr.*, p. 26;16-21. Further, he checks their equipment. *See, Id.* In addition to  
22 Mr. Lemus' safety check, Miguel Castro said he checked the workers daily to verify their use of  
23 their fall equipment. *See, Tr.*, pp. 28;24, 29;1-4. However, Mr. Castro was unable to inspect  
24 Messrs. Aguilar and Ochoa on that day because he was at that site before the employees climbed  
25 into the trusses. *See, State's Exhibit 1*, p. 14.

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28 <sup>4</sup>Blocking is a wooden plank that spans the width of two adjacent truss sections and provides lateral support. <https://housinghow.com/blocking-between-trusses>.

1 On cross examination, Mr. Nanse testified that he found elements of DNA Carpentry's fall  
2 protection program to be inadequate. Specifically, it appeared to Mr. Nanse that the Respondent  
3 does not require employees to use fall prevention equipment until five trusses are stood when the  
4 employees are rolling trusses on a residence. *See*, Respondent's Exhibit 1, p. 25, *see also*, Tr., p.  
5 48;11-22. Further, Mr. Nanse believed that the Respondent regarded this as an acceptable risk. *See*,  
6 Tr., p. 25;6-9.

7 This was a point of contention for Mr. Woodman. He questioned Mr. Nanse as to whether  
8 DNA's rules contained an exception for the requirement that employees use fall protective  
9 equipment at heights of over six feet.

10 Mr. Woodman: Okay. And yet at the same time in [Mr. Lemus'] statement where he  
11 mentioned that there are times when it actually can be more dangerous to use fall  
12 protection, he also stated ... that DNA still expects them to be tied off at all times  
13 above six feet, correct?

14 Mr. Nanse: There is not really -- that's what's interesting about DNA's written safety  
15 program. They had their written safety program, especially that fall protection system  
16 broken up in specific areas. There's nowhere in DNA's fall protection program that  
17 states employees will always be tied off at six foot or above. That is not in there.  
18 That is in a lot of employers' written safety programs, but that's not in DNA's.

19 Mr. Woodman; You're positive that there is nothing in DNA's safety program that  
20 requires their employees to be tied off at all times above six feet?

21 Mr. Nanse: They have specific situations identified when that six foot requirement is  
22 required for specific tasks. There's not a general rule. *See*, Tr., p. 53;8-24, 54;1-3.

23 Mr. Woodman referred to Mr. Lemus' statement that it's a general rule that employees must  
24 be tied off at heights of over six feet. *See*, Tr., p. 54;4-12. Mr. Nanse responded that DNA's  
25 written fall protection program would tend to negate Mr. Lemus' statement. *See, Id.*

26 On redirect, Ms. Ortiz asked Mr. Nanse whether 29 CFR 1926.501(b)(13) contained an  
27 exception for the first four trusses placed on a roof. Mr. Nanse responded that there was not. *See*,  
28 Tr., pp. 61;19-24, 62;1.

Mr. Lemus was the State's second witness. He provided additional testimony regarding the  
Respondent's fall protection as it applied to the first four trusses installed on a residence.

Ms. Ortiz: I understand you don't tie off until the fifth one. I'm asking what do you  
do before you get to the point to tie off?



1 Mr. Lemus: So we always work that way. So we have two or three people helping  
2 out from the bottom, lower floor. We have two-by-four (sic) and moving the truss  
3 where we need to locate it before we lift it up and then once we lift up five, then  
4 that's when we tie.

5 Ms. Ortiz: So it's accurate to say that you do not use any form of fall protection  
6 before you tie off; is that correct?

7 Mr. Lemus: Yes. And I repeat it again, if we try to tie our self from the first truss it's  
8 more risky for us. *See, Tr., p. 79;3-14.*

9 On cross examination, Mr. Lemus attempted to contradict his statement that the  
10 Respondent's employees were working in the zone of danger without their fall arrest systems fully  
11 activated:

12 Mr. Woodman: And when you were talking about using that two-by-four to help  
13 provide protection for the people up on the top plate, where are the people who are  
14 anchoring? Where are they? Are they on the top plate or on the ground?

15 Mr. Lemus: On the floor.

16 Mr. Woodman: You said on the ground?

17 Mr. Lemus: Yes. *See, Tr., p. 80;24, 81;1-6.*

18 The problem with Mr. Lemus' attempted revision of his testimony was that it left unresolved the  
19 method for securing the first four trusses. The method explained how the trusses are put in place but  
20 omits how the trusses are secured.

21 In summary, the State's witnesses provided testimony showing that Messrs. Aguilar and  
22 Ochoa were working at a height of over six feet without fall protection equipment. Further, that  
23 under certain circumstances, DNA's employees are allowed to work, or are not precluded from  
24 working, in the zone of danger without fall protection equipment.

25 Ronald Barrette was the Respondent's first witness. Mr. Barrette testified that he started  
26 working for DNA in March of 2019. *See, Tr., p. 111;9-11.* Thus, he had been on the job slightly  
27 over a year when the alleged violation occurred. *See, Id.* Mr. Barrette testified that DNA has studied  
28 fall protection for years. *See, Tr., pp. 92;18-24, 93;1-5.* DNA had concluded that its employees are  
at a greater fall risk if they tie off before a secure tie off point can created. *See, Id.* The risk, Mr.  
Barrette explained, was that if an unsecured or partially secured truss fell, any employee attached to

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1 it would be pulled down with it. Thus, DNA did not require a tie off until the fifth truss. *See*, Tr.,  
2 pp. 92;18-24, 93;1-5.

3 Mr. Barrette then explained the system that the Respondent used as an alternative to a tie off  
4 for the first four trusses. *See*, Tr., p. 93;6-24.

5 Mr Woodman: And what about -- can you help me understand better what Omar was  
6 testifying to ....How does that system work?

7 Mr. Barrette: Okay. First of all what happens when you have a gable end truss, you have to  
8 erect the gable end. And what they do is they do what's called gable end bracing. So it ties  
9 the truss erect. It holds it up in place. Then there's a couple of guys on the ground that are  
10 sliding the trusses on the plate line. And then there's another guy on the ground with what  
11 we call a push-up stick. He pushes up the ridge of the truss and pops it up so its erect. At  
12 that time the block, we call it a layout block is already nailed to the ridge of the truss. So  
13 when they flip the truss up it's just a matter of two nails and it's erected. *See, Id.*

14 However, Mr. Barrette's description of DNA procedure for erecting the first four trusses had  
15 a similar problem to Mr. Lemus' explanation of it. It did not explain whether the employee(s) who  
16 insert the two nails were unprotected in the zone of danger while the gable end bracing was being  
17 used. In fact, when pressed by Mr. Zeh, Mr. Barrette admitted that the gable system does not  
18 prevent falls. *See*, Tr., p. 127;7-10.

19 Mr. Barrette then testified about DNA's safety equipment and procedures for its issuance  
20 and care. *See*, Tr., pp. 94-95. Mr. Barrette testified that DNA has made a significant investment in  
21 safety equipment. *See*, Tr., pp. 95;3-24, 96;1-4. Further, the Respondent has procedures wherein an  
22 employee with concerns about his or her company provided safety equipment can obtain  
23 replacement equipment. *See, Id.* The Respondent keeps about \$20,000 worth of safety equipment  
24 on hand so that employees can access serviceable equipment upon request. *See Id.*

25 Mr. Barrette testified that Messrs. Aguilar and Ochoa were provided with safety equipment  
26 and were trained on its use. *See*, Respondent's Exhibit 2, pp. 29-32, *see also*, Tr., p. 96;3-19. Mr.  
27 Barrette provided the safety violation notices for Messrs. Aguilar and Ochoa based on the events of  
28 June 23, 2020<sup>5</sup>. *See* Respondent's Exhibit 3, p. 34, 35, *see also*, Tr., pp. 96;20-24, 96;1-11. The

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<sup>5</sup>It should be noted that Mr. Lemus was not cited for his failure to verify that the members of his team were not using their safety equipment and there is no record that he suffered any other repercussions arising out of the issuance of the Citation.

1 violation notices given to Messrs. Aguilar and Ochoa were issued pursuant to the Respondent's  
2 system of progressive discipline. *See*, Respondent's Exhibit 3, pp. 34, 35. This system starts with  
3 written warning, has two levels of monetary penalties and ends with the employee's termination.  
4 *See*, Tr., pp. 97 -99.

5 Mr. Barrette testified about the use of the progressive discipline system at Caramella Ranch.  
6 *See*, Respondent's Exhibit 7, pp. 56-62, *see also*, Tr., pp. 106-108. One of DNA's employees,  
7 Danny Aiello, had two violations for not tying off in the month of May 20, 2020. *See*, Tr., p. 107;7-  
8 18. The second violation resulted Mr. Aiello being fined \$100. *See, Id.* It was Mr. Barrette's  
9 responsibility to see that the fine was actually taken from Mr. Aiello's check. *See*, Tr., pp. 107;19-  
10 24, 108;1.

11 Mr. Barrette then testified about the training which occurred subsequent to the issuance of the  
12 instant citation. *See*, Respondent's Exhibit 4, p. 37. The document entitled "Supervisor's /  
13 Foreman's Report of Safety Meeting / Training" showed that the entire crew attended the retraining,  
14 not just the two cited employees. *See*, Tr., p. 102;1-15. Mr. Barrette testified that this was a  
15 standard practice at DNA. *See*, Tr., p. 101;11-15.

16 On cross examination, Ms. Ortiz questioned Mr. Barrette about the Respondent's Safety  
17 Manual. The Manual became effective in 2009 and was updated February 26, 2015. *See*,  
18 Respondent's Exhibit 1, p. 12. While the Safety Manual was in effect, DNA was cited by OSHA  
19 for fall protection violations in 2012, 2015 and 2016. *See*, Tr., p. 111;18-24. Then, Mr. Barrette  
20 was asked if he had worked on updates to the manual since joining the company in 2019. *See*, Tr.,  
21 p. 114;19-23. Mr. Barrette responded that he had worked on revisions. However, he could not  
22 recall which areas were revised because the manual was 370 pages. *See, Id.*

23 Ms. Ortiz then questioned Mr. Barrette regarding all of the tie-off violation warnings issued  
24 in the spring of 2020. *See*, Respondent's Exhibit 7, *see also*, pp. 56-62, Tr., 116;14-24, 117;1-8.  
25 These violations occurred on April 17, May 1 and May 28. *See*, Respondent's Exhibit 7, *see also*,  
26 Tr., pp. 56-62. The record indicated that entire crew was involved in the violation which occurred  
27 on May 28, 2020. *See*, Respondent's Exhibit 7, *See, also*, pp. 58-62. Mr. Barrette responded that  
28 one or more morning meetings would have occurred as the result of these violations. *See*, Tr., pp.

1 117;3-24, 118;1-24, 119;1-5. However, Mr. Barrette could not document that a tailgate meeting  
2 occurred for any of the groups of workers other than those cited for the violation. *See*, Tr., pp.  
3 117;3-24, 118;1-6.

4 Board Member Milligan questioned Mr. Barrette regarding whether the Respondent's  
5 procedure for erecting the first four trusses had been approved. And, if so, how that approval was  
6 obtained. *See*, Tr., pp. 119;23-24, 120;1-14.

7 Member Milligan: Mr. Barrette, you mentioned earlier that there was no place to tie  
8 off initially when you're working around trusses. And you said that this was in your  
9 procedure.... that there was a workaround that you had. I was wondering if you could  
point that out as to where it's written. And I'm curious to know how you got it  
approved and certified, if you don't mind, please.

10 Mr. Barrette: The hazard that I was talking about was when you start erecting trusses  
11 is there's (sic) no place to tie off which goes back to the erect five trusses and then  
12 tie off to those five. That's where that came from. Because the hazard is greater  
13 trying to tie off to nothing. There's really nothing out there. So we did a lot of  
investigating and determined that the first five was a good base and we were getting  
zero injuries erecting those five the way we do it from the ground. *See Id.*

14 After this explanation, Member Milligan repeated his question as to whether the Respondent  
15 had obtained either engineering reports or OSHA authorization to not tie off until the 5<sup>th</sup> truss is  
16 placed. *See*, Tr., p. 120;15-21. Mr. Barrette responded that the Respondent believed that it's  
17 previous interactions with OSHA provided that. *See, Id.*

18 Q: Was this approved by engineering analysis or -- or any method or by OSHA  
19 approved or any certification for this that you can point out to myself and the Board?

20 A: Yeah. I don't have it here, but I believe in the prior OSHA inspectors reviewing  
21 our documents they didn't have any issues with it, and we did review that procedure  
that we do. *See, Id.*

22 Unfortunately for the Respondent, Mr. Barrette admitted that he did not have any documentation  
23 wherein OSHA approved DNA Carpentry's work around for the first four trusses. *See*, Tr., p.  
24 126;17-22.

25 Member Macias followed up on Member Milligan's questions about the Respondent's  
26 alternative procedure. Specifically, he asked whether DNA's research was documented in its safety  
27 program. Mr. Barrette responded that it was not in their formal safety programs but he was sure that  
28 the Respondent was in possession of it. *See*, Tr., p. 122;2-11.

1 The Respondent's second witness was David Ziegler. *See*, Tr., pp. 131 -182. Mr. Ziegler  
2 testified that DNA Carpentry went from being a one man operation to employing 160 people. *See*,  
3 Tr., 132;7-10. In other words, Mr. Ziegler was able to provide his experience from working in the  
4 field, so to speak, to being the president of a large company. Mr. Ziegler described difficulties of  
5 providing fall protection in residential construction. He explained that the workers are the ones who  
6 erect the building. *See*, Tr., p. 133;9-15.

7 So fall protection is very complicated in framing because we are the erectors of the  
8 building. If you... compare us to steel workers on a lot of commercial jobs it could  
9 be applicable. What they use seems to be a little more solid and engineered to what  
we use. A lot of our structure isn't really sound to tie off to until it's properly braced.  
*See, Id.*

10 Mr. Ziegler testified that DNA conducted significant research regarding the effective fall  
11 prevention in residential construction. *See*, Tr., p. 133;16-24. Mr. Ziegler said that the company has  
12 compiled 3,000 pages of research for use its safety program. *See*, Tr., p. 134;1-6. Mr. Ziegler also  
13 testified that the Company's annual expenditure for safety equipment and training exceeded  
14 \$200,000. *See*, Tr., p. 140;17-24.

15 One of the alternatives to tying off on trusses would have been the use of a pole system. *See*,  
16 Tr., pp. 106;8-18, 141;15-17. Mr. Ziegler explained that the determination to use a pole system in  
17 residential construction required the evaluation of several factors. *See*, Tr., p. 141;15-24. Those  
18 factors include the height needed for the poles, where they can be located and whether they would be  
19 effective with the plate line, the roof pitch and the workers' access. *See, Id.* In this instance, the pole  
20 system was determined not to be appropriate at Carmella Ranch. *See*, Tr., pp. 141;15-23, 142;1-14.

21 Mr. Ziegler explained that DNA has a zero tolerance for safety violations. *See*, Tr., p.  
22 150;20-23. An employee receives a write up for the first violation. *See, Id.* However, no fines or  
23 other discipline is assessed until a repeat violation occurs. *See, Id.* Mr. Ziegler testified that he  
24 believes that safety is his first priority. *See*, Tr., pp. 153;20-24, 154;1-2.

25 On cross examination, Ms. Ortiz asked about Mr. Lemus' testimony wherein he admitted that  
26 no fall safety equipment is utilized for the placement of the first four trusses of each residence. *See*,  
27 Tr., pp. 157;20-24, 158;1-20. Mr. Ziegler responded that this was in CFR and Nevada law. *See, Id.*  
28 However, no citation could be proved. Accordingly, Mr. Ziegler believed that DNA was authorized

1 to suspend the requirements of subsection (b)(13) of 29 CFR 1926.501 during the installation of the  
2 first four trusses.

3 Ms. Ortiz asked Mr. Ziegler if he knew DNA could have applied for an OSHA variance. *See*,  
4 Tr., pp. 158;21-24, 159;1-14. Ms. Ortiz explained that the application process requires an employer  
5 to submit all of its research and everything that the employer has done to support its claim that the  
6 alternative that the employer is proposing is safer or at least as effective as the current law. *See*, Tr.,  
7 p. 159;8-14. Mr. Ziegler testified that he was not aware of this possibility. *See, Id.* Ms. Ortiz then  
8 asked if he had asked Mr. Parker about obtaining a variance. *See*, Tr., pp. 159;15-24, 160;1. Mr.  
9 Ziegler responded that he had not. *See, Id.*

10 Mr. Ziegler was asked who should have been responsible to see that the two employees had  
11 their fall protection on before they came on to the job site. *See*, Tr., p. 166;5-21. His response was  
12 that it should have been the foreman, Mr. Guzman. *See, Id.*

13 On redirect, Mr. Ziegler explained the three point system safety system. *See*, Tr., pp. 173;24,  
14 174;1. The points being, the employees' harness, the lanyard attached to the harness and the tie off  
15 point. *See, Id.*

16 Board Member Milligan asked Mr. Ziegler about positive incentives used to promote safety,  
17 to which Mr. Ziegler responded,

18 One of the really large benefits that we do for *per se* the crew leaders is a gas card  
19 program. That gets stripped away if anybody there gets ticketed. We do not -- we  
20 supply a lot of our employees trucks. We have over 40 something trucks. To get a  
truck you have to be capable of following our safety rules. If -- obviously if you're  
not good at that we would strip your truck away too.

21 We're constantly trying to innovate ways of creating this culture. It's not the easiest  
22 culture to create. But I think we are the leaders in Northern Nevada on it. And if I  
could put some of my competition up here I think they would agree with us. *See*, Tr.,  
23 pp. 181;16-24, 182;1-6.

24 Based on the above, Mr. Lemus should have lost his gas card for the violations of Messrs.  
25 Aguilar and Ochoa. However, the Respondent's records did not indicate that Mr. Lemus suffered  
26 any adverse consequence.

27 The Respondent's witnesses testified that the employer undertook substantial efforts to see  
28 that a safe working environment was provided, through such actions as possessing and providing a

1 substantial inventory of safety gear. *See*, Tr., 96;2-4. However, the State's evidence showed that  
2 DNA failed to foresee the possibility that individuals, such as Messrs. Aguilar and Ochoa, would be  
3 in the zone of danger without fall protection. Further, the State's evidence showed that DNA failed  
4 to prove sufficient management and oversight to prevent its employees from working in the zone of  
5 danger without fall protection.

6 To the extent that any of the Conclusions of Law constitute Findings of Fact, they are  
7 incorporated herein.

### 8 CONCLUSIONS OF LAW

9 The State is obligated to demonstrate the alleged violation by a preponderance of the reliable  
10 evidence in the record. Findings must be based upon the kind of the evidence which responsible  
11 persons are accustomed to rely in serious affairs. *William B. Hopke Co., Inc.*, 1982 OSHARC  
12 LEXIS 302 \* 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ)). Mere estimates, assumptions  
13 and inferences fail this test. Conjecture is also insufficient. Findings must be based upon the kind of  
14 the evidence upon which responsible persons are accustomed to rely in serious affairs. *William B.*  
15 *Hopke Co., Inc., supra*. The Board's decision must be based on consideration of the whole record  
16 and shall state all facts officially noticed and relied upon. 29 CFR 1905.27(b). *Armor Elevator Co.*,  
17 1 OSHA 1409, 1973-1974 OHSD ¶ 16, 958 (1973). *Olin Construction Inc. v. OSHARC and Peter J*  
18 *Brenan, Secretary of Labor*, 525 F.2d 464 (1975).

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

26 In its defense, DNA alleges that Messrs. Aguilar and Ochoa were engaged in unpreventable  
27 employee misconduct. If proven, employee misconduct would be a complete defense to the charge  
28 brought against the Respondent. *See*, Tr., pp.199-205. While the burden of proof rests with OSHA

1 under Nevada law (NAC 618.788) to prove a *prima facie* case, after OSHA has proven the *prima*  
2 *facie* case, the burden shifts to the Respondent, here DNA, to prove any recognized defense such as  
3 unpreventable employee misconduct. *See, Jensen Construction Co.*, 7 OSHC 1477, 1979 OSHD  
4 ¶23,664, p. 28,694 (1979); *Sanderson Farms, Inc. v. OSHRC*, 348 Fed.Appx. 53, 57 (5<sup>TH</sup> Cir.,  
5 2009).

6 As an initial matter, the Respondent conceded that Messrs. Aguilar and Ochoa violated 29  
7 CFR 1926.501(b)(13) by working at a height in excess of six feet without a personal fall arrest  
8 system. *See, Tr.*, p. 211;18-22. However, the Board evaluated the elements of the State's *prima*  
9 *facie* case and that analysis is provided here. In its *prima facie* case, the State has shown that the  
10 standard of 29 CFR 1926.501(b)(13) applied because the employees worked at a residential  
11 construction site where some of them were working at a height of above six feet. *See, State's*  
12 *Exhibit 1*, pp. 18, 19, 54, 56.

13 The State's evidence showed that the standard was violated because it provided interviews,  
14 testimony and photographs which showed two of DNA's workers located in the zone of danger but  
15 were not properly tied off. *See, State's Exhibit 1*, pp. 53-56.

16 In order to establish employee exposure to a hazard, the Secretary must show that "it is  
17 reasonably predictable either by operational necessity or otherwise (including inadvertence), that  
18 employees have been, are, or will be in the zone of danger." *See, Stevers Roof Side Remodel, Ltd,*  
19 *Respondent.*, 24 O.S.H. Cas. (BNA) ¶ 1962 at \*5 (O.S.H.R.C.A.L.J. Sept. 20, 2013), *citing*  
20 *Fabricated Metal Products, Inc.*, 18 O.S.H. Cas. (BNA) ¶ 1072 (O.S.H.R.C. Nov. 7, 1997).  
21 Employees are regarded to be in the zone of danger when they are at an elevation of approximately  
22 10 feet above ground and without fall protective equipment. *See, Stevers* at \*6.

23 The *Stevens* case is highly analogous, it involves application of 29 CFR 1926.501(b)(13) in  
24 residential construction. In *Stevens*, three employees were witnessed taking their breaks on a roof  
25 without being attached to their personal fall arrest systems. *See, Id.* at \* 2. The necessary ropes were  
26 on the roof and in close proximity to the unprotected workers. *See, Id.* at \* 2. The employer in  
27 *Stevens* believed that fall protection systems only needed to be used when the workers were actively  
28 engaged in roofing but not on breaks. *See, Id.* at \* 5. In its decision, the Administrative Law Judge



1 found that the workers were exposed to the hazard because they were within the zone of danger  
2 without fall protection, regardless of the activity in which they were engaged. *See, Id.* at \* 6.

3 In this instance, Messrs. Aguilar and Ochoa were witnessed at heights of 9 ft. 3 inches and  
4 11 ft. 9 inches, respectively, without the proper use of fall protection. *See, State's Exhibit 1*, pp. 53-  
5 56. Both employees admitted that was the case. *See, State's Exhibit 1*, pp. 18,19. DNA concurred  
6 that the employees lacked protection while in the zone of danger. *See, Respondent's Exhibit 3*, pp.  
7 34, 35. That the employees claimed to have only been in the zone of danger for a limited time is of  
8 no moment. *See, Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2873,  
9 1992)("Even a brief exposure to a hazardous condition such as break of 10 minutes does not negate  
10 the violation or its seriousness.")

11 The Respondent's knowledge can be established by demonstrating "that the employer either  
12 knew, or, with the exercise of reasonable diligence, could have known of the presence of the  
13 violative condition." *Original Roofing Co., supra* at 149, *quoting Pride Oil Well Serv.*, 15 BNA  
14 OSHC 1809, 1814 (No. 86-692, 1992). Here, the State does not allege that the Respondent had  
15 actual knowledge of the violation. Therefore, the State must show that the Respondent had  
16 constructive knowledge, *i.e.*, that it could have known of the violative condition if it had acted with  
17 reasonable diligence.

18 The determination of whether an employer acted with reasonable diligence in identifying a  
19 violative condition involves the consideration of several factors, including the employer's obligation  
20 to have adequate work rules and training programs, to adequately supervise employees, to anticipate  
21 hazards to which employees may be exposed, and to take measures to prevent the occurrence of  
22 violations. *Precision Concrete Constr.*, 19 O.S.H. Cas. (BNA) ¶ 1404 (O.S.H.R.C. Apr. 25, 2001)  
23 *Pride Oil Well Serv.*, 15 O.S.H. Cas. (BNA) 1809, 1814, (O.S.H.R.C. August 17, 1992). That is, this  
24 is a question of foreseeability. In the absence of such measures, it is foreseeable to the employer that  
25 violations might be occurring in the workplace. Hence, the employer should have known.

26 In this instance, the State presented evidence which tended to show that the DNA did not  
27 utilize reasonable diligence to identify the potential for the violation of the regulation through  
28 analysis of the factors from *Precision Concrete*. First, the State provided evidence that the employer

1 failed to anticipate hazards to which employees may be exposed. Second, the State provided  
2 evidence that the Respondent did not provide adequate supervision. Third, evidence was provided  
3 showing that the Respondent failed to have adequate work rules. The State's analysis of each of  
4 these factors is provided below.

5 Evidence shows that the Respondent failed to anticipate that Messrs. Aguilar and Ochoa  
6 would venture into the zone of danger without fall protection. DNA clearly understood the need for  
7 the use of fall protection devices on the roofs and in the trusses during residential construction. Mr.  
8 Ziegler was able to describe the difficulties of providing fall protection in residential construction.  
9 *See*, Tr., p. 133;9-15. In addition to Mr. Ziegler's personal knowledge, he and others had compiled  
10 3,000 pages of research material for the Respondent's safety program. *See*, Tr., p. 134;1-6.

11 Despite its knowledge regarding the need to prevent injuries from falls, DNA had a history of  
12 violations of the regulations. *See*, Tr., p. 111;22-24. DNA was previously cited for a violation of  
13 this occupational safety and health standard as shown by OSHA inspection Number 1177308,  
14 Citation 1, Item 2. The final order of the inspection was dated January 9, 2017. *See*, State's Exhibit  
15 2, pp. 57-76. However, despite this violation and fine, DNA could not document any changes to its  
16 Fall Prevention and Protection Program since November 27, 2013. *See*, Respondent's Exhibit 1, pp.  
17 22, 23, *see also*, Tr., pp. 110;20-24, 111;1-24.

18 One additional factor which tended to show that DNA was not diligent in anticipating the  
19 hazard, was its history of sporadic tailgate meetings regarding fall protections, *i.e.*, they did not occur  
20 immediately after incidences of failures to follow the rules. There were only a couple of meetings on  
21 this topic in 2015, some number in 2016, one in 2017, and one in 2020. *See*, Tr., p. 116;1-4. This  
22 limited attention was displayed even though DNA was aware that violations were occurring. *See*,  
23 State's Exhibit 2, pp. 57-76.

24 Further, the Respondent was experiencing increasing compliance problems shortly before the  
25 issuance of this citation. There were three separate offenses within six weeks of the subsection  
26 inspection. *See*, Respondent's Exhibit 7, pp. 56-62. One employee had been cited twice for this  
27 violation in the month of May of 2020. *See*, Respondent's Exhibit 7, pp. 57, 58. On May 28, 2020,  
28 the entire crew was cited for not following fall protection procedures. *See*, Respondent's Exhibit 7,

1 pp. 58-62. However, no Fall Protection Safety meeting was conducted until August 6, 2020. *See*,  
2 Respondent's Exhibit 6, pp. 52-53. Present here was a situation where multiple disciplinary notices  
3 were given to employees regarding the failure to use fall protection equipment. *See* Respondent's  
4 Exhibit 7, pp. 56-62. Under these circumstances, the Respondent should have held one or more  
5 meetings to address this issue. *See*, Tr., p. 101;11-15.

6 Then, the Respondent did not supervise its employees in a manner which anticipated the  
7 violative conduct. Here, the Respondent's management continued to operate as normal, instead of  
8 providing increased supervision in response to the increasing violations. The Respondent's  
9 management was spread very thin. The general foreman, Mr. Castro, was responsible for twenty-one  
10 residential construction projects on the day of the violation. *See*, State's Exhibit 1, pp. 14-15, *see*  
11 *also*, Tr., p. 44;14-21. His inspections of the use of safety procedures were conducted by driving by  
12 each of the work sites under his management. *See*, State's Exhibit 1, pp. 14-15.

13 A further problem with the Respondent's chain of command was the lack of clarity at the  
14 crew leader level. Conflicting testimony was given regarding Mr. Lemus' supervisory authority.  
15 Mr. Lemus said that he was in charge of the other workers on the job. *See*, Tr., pp. 74;5-9, 76;1-3.  
16 Mr. Barrette testified that Mr. Lemus was not a supervisor, *i.e.*, had no oversight authority for the  
17 other employees in the crew. *See*, Tr., pp. 125;20-24, 126;1-4, 173;5-13. Mr. Ziegler testified that  
18 Mr. Lemus was no more responsible for safety than any of the workers for which he was responsible.  
19 *See*, Tr., p. 173;5-13. Mr. Ziegler also admitted that supervisors, like Mr. Lemus, had some level of  
20 authority over the rest of the crew. *See*, Tr., pp. 176;20-24, 177;1-9.

21 Contradicting Mr. Ziegler's statement that Mr. Lemus was not responsible for safety was Mr.  
22 Ziegler's testimony that crew leaders like Mr. Lemus received gas cards in order to promote safety.  
23 *See*, Tr., pp 181;16-24, 182;1-6. Mr. Ziegler also said that crew leaders who fail to meet the  
24 company's safety expectations, lose that benefit. *See, Id.* However here, DNA submitted no  
25 evidence showing that Mr. Lemus suffered any repercussions for the citations issued to Mr. Aguilar  
26 and Ochoa. *See generally*, Respondent's Exhibit 3. This conduct on the part of the Respondent, in  
27 this instance, would be a disincentive to the enforcement of safety rules. The employee continued to  
28 receive the benefit without having to provide the safety oversight.

1 If the Respondent intends to offer the affirmative defense of unavoidable employee  
2 misconduct, the employer/Respondent must show an effective regime of employee discipline. The  
3 Respondent fails here because there was no consequence for employee malfeasance. One other  
4 disincentive for crew leaders to provide adequate safety oversight was the method of their  
5 compensation. *See*, Tr., p. 149;15-21. Crew leaders are compensated equally with the other  
6 members of the crew on a piece work basis. *See, Id.* Therefore, Mr. Lemus' financial incentive was  
7 to see that as much production occurs as possible, with safety as an afterthought. Further, this  
8 method of compensation encourages cutting corners.

9 The third factor was the effectiveness or ineffectiveness of the employer's work rules. An  
10 effective work rule must be designed to prevent the violation or be clear enough to eliminate  
11 employee exposure to the hazard covered by the standard. *See, Beta Construction Co.*, 16 BNA  
12 OSHC 1435 (No. 91-102, 1993). A work rule is an employer directive that requires or proscribes  
13 certain conduct, and that is communicated to the employees in such a manner that its mandatory  
14 nature is made explicit and its scope clearly understood. *See, J. K. Butler Builders, Inc.*, 5 BNA  
15 OSHC 1075 at \* 2 (No. 12354, 1977).

16 Here, DNA excepted from its regulations the first four trusses erected on each residence. *See*,  
17 Respondent's Exhibit 1, p.25, *see also*, Tr., pp. 119;23-24, 120;1-14, 127;7-10. The Respondent's  
18 formal Safety Plan was ambiguous regarding the protection required until the fifth truss is installed  
19 and braced. Mr. Barrette explained procedures during the installation of the first four trusses. *See*,  
20 Tr., pp. 126;17-24, 127;1-10. However, these procedures provided no substitute safety features for  
21 DNA's employees. *See, Id.* In fact, Mr. Barrette ultimately admitted that DNA's procedure for use  
22 at Caramella Ranch did not mandate the use of fall protection equipment in all instances. *See, Id.*  
23 This was consistent with Mr. Lemus' testimony that the employees do not use any fall protective  
24 equipment until the fifth truss is placed. *See*, Tr., p. 79;3-14.

25 This meant that for every residence DNA constructed at Caramella Ranch, there was some  
26 amount of time in which one or more of its employees may have worked at a height in excess of 6  
27 feet without the use of fall protection. Applying this to Mr. Castro's crews, there were twenty-one  
28 residences under construction, all of which may have allowed some number of employees to work on

1 the residences' trusses without fall protection, albeit, for a limited amount of time.

2       Additionally, the Respondent's Safety Plan manual lacked a *per se* rule that employees  
3 working above a height of six feet must be tied off. *See*, Respondent's Exhibit 1, p. 25, *see also*, Tr.,  
4 p. 53;8-24. This manual says, "[w]orker(s) **should use fall protection...** after the first five trusses  
5 are installed and braced." *See*, Respondent's Exhibit 1, p. 25 (Emphasis added). The use of the word  
6 "should" is problematic in the context of an employer directive. The language falls short of being a  
7 mandate that is communicated to the employees in such a manner that its mandatory nature is made  
8 explicit and its scope clearly understood. *See*, *J. K. Butler Builders*, at \* 2.

9       In spite of the evidence of the Respondent's knowledge of the violative conduct, it argues  
10 that the violation was not foreseeable. The Respondent represented itself as a leader in safety in the  
11 community. *See*, Tr., pp. 147;23-24, 148;1-19. Mr. Ziegler had many years of experience in framing  
12 carpentry and knew first hand of the risks of entailed. DNA purports to have developed over three  
13 hundred additional pages of safety related materials. *See*, Tr., pp. 133;24, 134;1-6. However, none  
14 of this additional material was provided to the State or the Board.

15       To its credit, the Respondent made a sizable investment in safety. It estimates that it has  
16 about \$20,000 worth of safety equipment on hand. *See*, Tr., p. 96;2-4. Further, Mr. Barrette testified  
17 that there were no problems obtaining additional safety equipment when needed. *See*, Tr., p. 95;22-  
18 24, 96;1-3. The Respondent has documented meetings where facets of safety are discussed. These  
19 meetings are both regularly scheduled as well as being held on an as needed basis. On top of all this,  
20 DNA Carpentry provides trucks to some of its employees and gives gas credit cards to the crew  
21 leaders. *See*, Tr., p. 181;16-23. One of the purposes of this is to motivate these managers to see that  
22 work rules are followed, such as safety rules. *See*, Tr., pp. 181;5-24, 182;1-6. However, the  
23 Respondent provided no evidence that Mr. Lemus suffered any repercussion as the result of the  
24 citations issued to Messrs. Aguilar and Ochoa. *See generally*, Respondent's Exhibit 3, pp. 34, 35.

25       The Board then considered the record as a whole, weighing the Respondent's positive actions  
26 against its lack of clear work rules and inadequate supervision of its employees. After evaluation of  
27 the evidence, Board found and concluded by a preponderance of the evidence that DNA did not  
28 require its employees to utilize adequate fall protection as mandated by 29 CFR 1926.501(b)(13).

1 As the State had proved its *prima facie* case, the Respondent would need to refute this  
2 finding by showing that the employee's conduct was a result of unpreventable employee misconduct.  
3 In this instance, the employer has the burden of proof which it must show by a preponderance of the  
4 evidence. *See, Jensen Construction, supra*, at 28,694 (1979); *Sanderson Farms, supra*, at 57.

5 The elements of the affirmative defense of unpreventable employee misconduct are well  
6 known. DNA Carpentry must be able to prove by a preponderance of the evidence: 1) that the  
7 employer has established work rules designed to prevent the violation; 2) has adequately  
8 communicated those rules to his employees; 3) has taken steps to discover violations; and 4) has  
9 effectively enforced rules when violations have been discovered. *Sanderson, supra* at 57; *Angel*  
10 *Bros. Enterprises, Ltd. v. Walsh*, 18 F.4th 827, 832 (5th Cir. 2021). However, if the employer does  
11 not establish work rules designed to prevent the violation, the defense is unavailable. *See, PSP*  
12 *Monotech Indus.*, 22 O.S.H. Cas. (BNA) ¶ 1303 at \*4. (O.S.H.R.C. Aug. 14, 2008)

13 The Respondent's efforts to show established work rules designed prevent the violation was  
14 unconvincing. First of all, the Respondent's Safety Plan manual lacked a *per se* rule that employees  
15 working above a height of six feet must be tied off. *See, Respondent's Exhibit 1, p. 25, see also, Tr.*,  
16 *pp. 53;8-24, 54.* This manual says that, [w]orkers should use fall protection... to tie off after the first  
17 five trusses are installed and braced off." *See, Id.* The use of the word "should" is problematic in the  
18 fall protection context. It is far less than the compelling language which is mandatory in nature and  
19 explicit in its scope. *See, J.K. Butler, supra*, at \* 2. In fact, most employers made the use of fall  
20 protection equipment mandatory. *See, Tr.*, p. 53;14-21.

21 As discussed above, the Safety Plan used in Caramella Ranch allowed the workers at each  
22 residence to work unprotected at heights above six feet in the construction of every residence. *See,*  
23 *Respondent's Exhibit 1, p. 25.* The alternative procedure to which Messrs. Lemus and Barrette  
24 referred was ultimately determined not to provide any fall protection. *See, Tr.*, p. 127;7-10. Further,  
25 DNA made no effort to obtain a variance or submit their own fall protection plan pursuant to 29 CFR

26 ///

27 ///

28 ///

1 1926.502(k).<sup>6</sup> In fact, Mr. Ziegler was unaware that such things could be accomplished. *See, Tr.*, pp.  
2 158;21-24, 159;1-14. Accordingly, DNA Carpentry was unable to show that it had established work  
3 rules designed to prevent the violation. As DNA was unable to show that it had a clearly established  
4 rule requiring all employees to use fall protective equipment when working above six feet, it could  
5 not take advantage of the unpreventable misconduct defense. *See, PSP Monotech* at \* 4.

6 Accordingly, the Board finds and concludes that DNA's defense of unpreventable employee  
7 misconduct fails. Therefore, the defense is not available to the Respondent to eliminate its liability  
8 in this matter.

### 9 ORDER

10 It was moved by Board Member Fullerton to uphold the violation with the recommended  
11 penalty in the amount of \$34,700. *See, Tr.*, pp. 217;18-24, 218;1-6. The motion was seconded by  
12 Board Member Milligan. *See, Id.* The motion was approved unanimously upon a vote of four in  
13 favor and none in opposition, with one member absent. *See, Tr.*, p. 218;7-8. Accordingly, the State  
14 OSHA Board of Review hereby upholds the citation and fine assessed against DNA Carpentry in the  
15 amount of \$34,700. *See, Tr.*, p. 218.3-6.

16 On June 12, 2024 the Board convened to consider adoption of this Decision combined with  
17 the Findings of Fact and Conclusions of law, as written or as modified by the Board, as the decision  
18 of the Board.

19 Those present and eligible to vote on this question consisted of the 4 current members of the  
20 Board, to-wit, William Spielberg, Acting Board Chairman, and Members Jorge Macias, rank  
21 Milligan and Scott Fullerton. Upon a motion by Jorge Macias, seconded by Scott Fullerton, the  
22 Board voted 4-1 (Chairman Rodd Weber abstaining as he was absent for the hearing) to approve this  
23 Decision of the Board as the action of the Board and to authorize Secretary William Spielberg, after  
24 any grammatical or typographical errors are corrected, to execute, without further Board review this  
25 Decision on behalf of the Nevada Occupational Safety and Health Review Board. Those voting in  
26

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27 <sup>6</sup>This option is available "to employees engaged in ....residential construction work who can  
28 demonstrate that it is infeasible or it creates a greater hazard to use conventional fall protection equipment.  
The fall protection plan must conform to the following provisions..." *See, 29 CFR 1926.502(k).*

1 favor of the motion either attended the hearing on the merits or had in their possession the entire  
2 record before the Board upon which the decision was based.

3 On June 12, 2024 this Decision is, therefore, hereby adopted and approved as the Final  
4 Decision of the Board of Review.

5 IT IS SO ORDERED.

6 Dated this 19<sup>th</sup> day of June, 2024.

NEVADA OCCUPATIONAL SAFETY AND  
HEALTH REVIEW BOARD

7  
8 By: William Spielberg  
9 William Spielberg  
10 Acting Board Chairman  
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16 NOTICE: Pursuant to NRS 233B.130, any party aggrieved by this Final Order of the Nevada  
17 Occupational Safety and Health Review Board may file a petition for judicial review to the District  
18 Court within thirty (30) days after service of this order.  
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