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FILED
July 23, 2024
OSH REVIEW BOARD
By: Karen Kennedy

**NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD**

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

**Docket No. RNO 20-2023
Inspection No. 1421670**

Complainant,

vs.

STATE ROOFING SYSTEMS, INC.

Respondent.

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

This case arose out of a referral. *See*, State’s Exhibit 1, p. 7. On August 7, 2019, at 8:53 a.m., an unnamed third person contacted Nevada OSHA to report that four of the Respondent’s employees were working on the top of a high rise condominium building without fall protection. *See*, State’s Exhibit 1, p. 7. The reported violation occurred on a 12 story building located at 1200 Riverside Drive, Reno, Nevada (1200 Riverside). *See, Id.* About an hour after receiving the referral, OSHA Safety Specialist, Stephen Subia conducted an inspection at the reported location. *See, Tr.*, p.

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1 22;4-9.¹ Upon arrival at 1200 Riverside, Mr. Subia witnessed four employees working at heights in
2 excess of six feet without the proper use of fall protection equipment. *See*, State’s Exhibit 1, p. 13.
3 The inspection resulted in the issuance of one citation for a violation of 29 CFR 1926.501(b)(10)
4 and one citation for a violation of NAC 618.540.² *See, Id.*

5 The matter came before the Nevada Occupational Safety and Health Review Board (the
6 Board) on November 10, 2021. The hearing was conducted in furtherance of a duly provided
7 notice. *See*, Notice of Hearing dated December 13, 2019. The Notice of Hearing was amended and
8 the hearing rescheduled multiple times thereafter. In attendance to hear the matter and deliberate
9 thereon were Acting Board Chairman William Spielberg and Board Members Jorge Macias, Frank
10 Mulligan and Scott Fullerton. *See*, Tr., p. 1. Board Chairman Rodd Weber was absent for this case.
11 *See, Id.* As there were four members of the Board present to decide the case, with at least one
12 member representing management and one member representing labor in attendance, a quorum was
13 present to conduct the business of the Board.

14 Nevada has adopted all Federal Occupational Safety and Health Standards which the
15 Secretary of Labor has promulgated, modified or revoked and any amendments thereto. They are
16 deemed the Nevada Occupational Safety and Health Standards. *See*, NRS 618.295(8). Jurisdiction in
17 this matter is conferred by Chapter 618 of the Nevada Revised Statutes, NRS 618.315.

18 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety
19 and Health Administration of the Division of Industrial Relations of the Department of Business and
20 Industry (hereinafter, the State or Nevada OSHA), appeared on behalf of the Complainant (the
21 State). *See*, Tr., p. 5;16-18. The Respondent (hereinafter, State Roofing or the Respondent) was
22 represented at the hearing by Melissa Peters, Esq., and Eric L. Compere, Esq. *See*, Tr., p. 9;23-24.

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26 ¹“Tr.” stands for the transcript of the hearing conducted on November 10, 2021, commencing at
approximately 9:00 a.m., followed by the page and line number where the matter cited can be found.

27 ²The citation for a violation of Nevada Administrative Code was withdrawn at the beginning of the
28 November 10, 2021, hearing. Therefore, no further discussion of this alleged violation is included in this
Decision.

1 Also present was Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., in his capacity as
2 the Board's legal counsel. *See, Tr.*, p. 5.

3 The State issued its Citation and Notification of Penalty (Citation) on September 19, 2019,
4 alleging violations of 29 CFR 1926.501(b)(10). *See, State's Exhibit 1*, pp. 20-25. The Citation
5 alleged that the Respondent failed to require its employees to utilize adequate fall protection devices
6 while working at heights in excess of six vertical feet. *See, State's Exhibit 1*, p. 20. Citation 1, Item
7 1, charged a serious violation of 29 CFR 1926.501(b)(10), as stated below:

8 Except as otherwise provided in paragraph (b) of this section, each employee
9 engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6
10 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail
11 systems, safety net systems, personal fall arrest systems, or a combination of warning
12 line system and guardrail system, warning line system and safety net system, or
13 warning line system and personal fall arrest system, or warning line system and
14 safety monitoring system.

12 At the jobsite, four employees were observed working on a roof at a height of
13 approximately 100 feet to the asphalt below without any means of fall
14 protection. The roof was a flat roof with a parapet approximately 18 inches
15 tall.

15 On October 2, 2019, the Respondent provided its notice of intent to contest the Citation. *See,*
16 *State's Exhibit 1*, p. 39. On October 29, 2019, the State's Complaint was filed and served. On
17 January 4, 2021, David Manning, lay person representative, answered the Complaint for the
18 Respondent. *See, State's Exhibit 1*, pp. 50-51. Therein, Mr. Manning claimed that State Roofing had
19 a safety program in place before the OSHA inspection. *See, Id., see also, Respondent's Exhibit C,*
20 *pp. 0028-0098.* On May 11, 2020, the Respondent's legal counsel, Melissa Peters, Esq., filed and
21 served a second Answer. *See, Respondent State Roofing Inc.'s Answer to Summons and*
22 *Affirmative Defenses dated May 11, 2020.* Therein, the Respondent posited certain affirmative
23 defenses including, but not limited to, employee misconduct. *See, Id.*, p. 3;25-27.

24 At the hearing on the matter, the State offered for admission its Exhibits 1 and 2, consisting
25 of a total of 90 pages.³ *See, Tr.*, pp. 9;20-24, 10;1-5, 11;1-9. The Respondent did not object to the

27 ³The State's proposed evidence package, provided before the hearing, included an Exhibit 3. This
28 exhibit was the Respondent State Roofing Inc.'s Answer to Summons and Affirmative Defenses dated May
11, 2020. The document which the State designated as its Exhibit 3 was never offered for admission.

1 admission of the State's Exhibits 1 and 2, except that the Respondent disagreed with the
2 commentary provided above the photographs on pages 53 to 56 and requested that the commentary
3 not be accepted as fact, subject to the State establishing its veracity. *See, Tr.*, p. 10;9-17. The State's
4 Exhibits 1 and 2 were admitted subject to the challenge to the commentary above the photographs.
5 *See, Tr.*, p. 10;18-21. Later in the proceedings, the State offered two additional photographs. *See,*
6 *Tr.*, pp. 224;3-11, 227;21-24. The first was a photograph of the roof of a small structure located on
7 the top of the building's roof. *See, Tr.*, p. 224;3-11. The second photograph was taken the day after
8 the inspection which showed the Respondent's employees working with their lanyards attached. *See,*
9 *Tr.*, p. 227;2-19. Both photographs were admitted without objection as State's Exhibit 3, p. 91 and
10 State's Exhibit 4, p. 92. *See, Tr.*, pp. 224;12-24, 228;5-14.

11 The Respondent offered for admission its Exhibits A through H, consisting of a total of 121
12 pages. *See, Tr.*, pp. 12-15. The State objected to the Respondent's Exhibit H, pages 114 through and
13 including 121. *See, Id.* In response, the Respondent withdrew its offer of Exhibit H. *See, Tr.*, pp.
14 16;24, 17;1-2. Accordingly, Respondent's Exhibits A through G, consisting of pages 0001 through
15 0113, were admitted into evidence. *See, Tr.*, p. 17;3-7.

16 The State presented the testimony of Mr. Subia and Jared Mitchell in its case in chief. *See,*
17 *Tr.*, p. 17;22-24. The State also recalled Mr. Subia as a rebuttal witness. *See, Tr.*, pp. 221-229. State
18 Roofing presented the testimony of David Manning and Armando Silva, Sr. *See, Tr.*, p. 18;2-7.

19 FINDINGS OF FACTS

20 State Roofing is a California based roofing contractor which primarily works on commercial
21 buildings. *See, Tr.*, pp. 83;18-24, 84;1-3 85;5-10. Over the previous 20 years, the Respondent had
22 also performed several jobs in Nevada. *See, Tr.*, p. 85;11-19. The Respondent was contracted to
23 remove and replace the roofs of two condominium buildings located at 1200 Riverside. *See, Tr.*, p.
24 84;4-11. The job required a crane to remove debris from the roof and to move the new material to
25 the roof. *See, Tr.*, p. 125;20-23. Accordingly, State Roofing had two crews working on this job, *see,*
26 *Tr.*, pp. 130;12-24, 174;1-11, one on the roof and the other on the ground. *See, Id.*

27 The roof at issue was located on what was known as Tower B of 1200 Riverside. *See,*
28 Respondent's Exhibit A, p. 6. This roof had three different elevations, the upper roof, the lower roof

1 and the main roof. Tr., pp. 95;18-24, 96;1-4. The main roof was the lowest of the three elevations
2 and consisted of the largest amount of square footage. *See*, Respondent's Exhibit A, p. 6, *see also*,
3 Tr., p. 89;7-16. The main roof covered the east side of Tower B. *See*, Respondent's Exhibit A, p. 6.
4 The upper roof and the lower roof were located across the west side of Tower B. *See*, Respondent's
5 Exhibit A, pp. 2, 6. The height differential between the upper roof and the lower roof was about four
6 feet. *See*, Tr., pp. 97;24, 98;1-3. However, there was a 10 foot differential between the upper roof
7 and the main roof. *See*, Tr., pp. 98;9-12.

8 The exterior wall of the Tower B was on the other side of the upper roof. There was about a
9 one hundred foot height differential between the top of the roof and the ground. *See*, Respondent's
10 Exhibit A, pp. 2, 6, 11, *see also*, Tr., p. 25;2-11. Accordingly, there were two fall hazards from the
11 upper roof, one of which was from the upper roof to the ground, a distance of about 100 feet. The
12 other was from the upper roof to the main roof, a distance about 10 feet from the upper roof to the
13 main roof.

14 Located along the inside wall of the structure containing the upper roof were four tie down
15 anchors. *See*, State's Exhibit 1, p. 57, *see also*, Respondent's Exhibit A, p. 11. These ties down
16 anchors were believed to have been placed there for the use of window washers. *See*, Tr., pp. 30;16-
17 14, 31;1-5, Respondent's Exhibit A, p. 11. These tie down anchors could be used for the
18 Respondent's workers on the upper roof to protect them from the 100 ft. fall. *See*, Tr., pp. 100;6-20,
19 103;3-8.

20 Mr. Subia arrived at the job site at approximately to 11:15 a.m., on the morning of August 7,
21 2019. *See*, Tr., p. 34;6-8. Upon arrival, Mr. Subia witnessed three of the Respondent's employees
22 working on the roof without guardrails or lanyards attached to their harnesses. *See*, State's Exhibit
23 1, pp. 53-57, *see also*, Tr., p. 22;10-14. Mr. Subia photographed the Respondent's unprotected
24 employees before taking any other action. *See, Id.* Mr. Subia conducted the opening conference with
25 Mr. Silva Jr., before ascending to the roof. *See*, State's Exhibit 1, p. 16, *see also*, Tr., p. 22;15-17.

26 When Mr. Subia arrived on the roof of Tower B, he found all of the Respondent's employees
27 on the main roof. This area was protected by guardrails so individual fall arrest systems were not
28 required. *See*, Tr., p. 62;17-22. While on the roof, Mr. Subia encountered Mr. Silva, Sr. *See*, State's

1 Exhibit 1, pp. 11, 22, *see also*, Tr., pp. 75;21-24, 80;1-9. Mr. Subia informed Mr. Silva Sr., that he
2 had proof that some of the Respondent's employees were working on the roof without fall
3 protection. *See*, Tr., pp. 183;1-8, 185;3-12. Mr. Silva Sr., responded that he had four employees on
4 the roof without anchor points for fall protection. These employees were supposed to tie off to the
5 anchors on the lower level, about five feet below the top of the wall. *See*, State's Exhibit 1, p. 22.
6 After making these comments, Mr. Silva Sr., left the roof and then departed 1200 Riverside. *See*,
7 Tr., pp. 51;20-24, 52;1-8, 225;6-16. While on the main roof, Mr. Subia climbed the ladder to the
8 upper roof. *See*, Respondent's Exhibit A, p. 11, *see also*, Tr., p. 222;8-17. However, he did not
9 venture on to the upper roof because he did not have any personal fall arrest system with him. *See*,
10 Tr., pp. 222;23-23, 223;1-7. While on the ladder, Mr. Subia took at least one photograph of the
11 upper roof. *See*, State's Exhibit 3, p. 91.⁴

12 While Mr. Subia was conducting the walk around, the Respondent's employees descended
13 from the roof. *See*, Tr., p. 59;9-10. After returning to the ground, Mr. Subia obtained statements
14 from Alejandro Lazano and Francisco Martinez. *See*, State's Exhibit 1, pp. 17-19. Mr. Lazano
15 claimed to have been tied off to the lower wall. *See, Id.* Mr. Martinez also claimed to have been tied
16 off without specifying which anchor he had used. *See, Id.* Mr. Subia also interviewed Mr. Silva Jr.
17 *See*, State's Exhibit 1, p. 16. Therein, Mr. Silva Jr., stated, "I saw three guys without a lanyard (sic)
18 when I got on top of the roof. I told them to hook up." *See, Id.*

19 Mr. Subia returned to 1200 Riverside Drive the next day to verify that the Respondent had
20 abated the hazard. *See*, Tr., pp. 61;3-12, 226;7-21. Mr. Subia verified the abatement from the ground
21 by requesting that the Respondent's employees show him that they were in harnesses with ropes
22 attached. *See, Id.*

23 On the day after the inspection, the entire crew at 1200 Riverside received formal
24 disciplinary warnings. *See*, Respondent's Exhibit B, pp. 12-21. This included Messrs. Loranzo and
25 Martinez who told the State inspector that they were tied off. *See*, State's Exhibit 1, pp. 17-19.

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27 ⁴This photograph was not available to the Board's legal counsel while this Decision was drafted.
28 However, it was admitted into evidence at the hearing. *See*, Tr., p. 224;3-23. Further, Mr. Subia's testimony
clearly described the subject of the admitted photograph.

1 At the hearing held on February 10, 2021, Jared Mitchell testified regarding the State's
2 calculation of the penalty. *See*, Tr., pp. 66-75. Mr. Mitchell explained that the preliminary penalty
3 amount was \$5,000. *See*, State's Exhibit 1, p. 21, *see also*, Tr., p. 74;1-3. The penalty was subject to
4 a 60% reduction as the result of the size of the employer. *See, Id., see also*, Tr., p. 74;4-14.
5 Accordingly, the final penalty recommended was \$1,800. *See, Id.* The Respondent did not object to
6 any of Mr. Mitchell's testimony regarding the penalty calculation. Further, State Roofing did not
7 pose any substantive questions regarding the penalty calculation during its cross-examination of Mr.
8 Mitchell. *See*, Tr., pp. 75-79.

9 Mr. Manning was State Roofing's first witness. Mr. Manning testified that the Respondent
10 utilizes individualized formal safety plans for each of its jobs. *See*, Tr., pp. 84;15-24, 85-1. These
11 plans are developed before work commences. *See, Id.* These plans are developed with the input of
12 the job foreman, the superintendent and a project manager after or in conjunction with an onsite
13 inspection of the work area. *See, Id.* One of the purposes of the formal safety plan is to determine
14 what types of fall systems are to be used. *See, Id.* For this job, Mr. Manning worked directly with
15 Mr. Silva Sr., to develop the safety plan after visiting the site. *See*, Tr., pp. 91;7-15

16 Mr. Manning described the general safety plan for 1200 Riverside.

17 The main roof which had in place rails, but we have to modify the rails to fit the
18 guardrail requirements. On the upper roof the low walls made it really difficult to
19 install guardrails so we installed anchor points at the outside perimeter edge to
prevent the workers from falling towards the main roof, and we utilized the existing
wall anchors to protect the workers from the outside edge. *See*, Tr., p. 89;7-16.

20 Mr. Manning went on to describe the safety plan as it applies to the upper roof.

21 Ms. Peters: Could you explain to us what State Roofing's plan was for fall protection
22 for the employees when they were working on those upper levels of the roof?

23 Mr. Manning: Okay. Because of the short width of the roof and exterior perimeter
24 edge being a hazard, the interior edge over the main roof being a hazard, we utilized
25 anchor points on both sides of the width of that roof. So the plan was to have the
employees tie off on the middle or existing wall anchors while they are working on
the exterior perimeter and then vice-versa when they're working using the anchors on
the outside perimeter edge protect themselves working over the main roof. *See*, Tr.,
26 p. 100;8-20.

27 Mr. Manning testified that the Respondent's safety plan required that there be two sets of tie
28 off anchors for the upper roof. One set was the four existing tie off anchors located on the interior

1 wall of the structure. *See*, Respondent's Exhibit A, p. 11. The other set was to be installed by State
2 Roofing before the work roofing project commenced. *See*, Tr., pp. 100;8-20, 103;7-23, 132;24,
3 133;1-4. Mr. Manning repeatedly testified that the second set of tie off anchors were installed before
4 the roofing job commenced. *See*, Tr., pp. 94;22-24, 95;15, 103;21-23, 132;9-19. However, Mr.
5 Manning had only the word of Mr. Silva, Sr., regarding the installation of the second set of tie off
6 anchors. *See*, Tr., p. 132;9-19.

7 Mr. Manning also testified about the Respondent's progressive discipline system. *See*, Tr.,
8 pp. 110;14-24, 111;1-4, 140;21-24, 141;1-22. The Respondent's system was rather standard, for the
9 first violation there was to be an oral warning, then one or more written warnings and, finally, unpaid
10 leave or termination. *See, Id.* However, Mr. Manning's understanding of the system was less than
11 comprehensive. For example, Mr. Manning was unsure as to whether the warning had to be for the
12 exact same safety violation or whether any safety violation would result in a written warning. *See*,
13 Tr., pp. 110;14-24, 111;1-4.

14 On the day after the State's inspection, Mr. Manning issued written warnings to the entire
15 crew at 1200 Riverside, regardless of that person's involvement in the incident. *See*, Respondent's
16 Exhibit B, pp. 12-21. This included a written warning to Messrs. Lonzano and Martinez, both of
17 whom gave statements that they were tied off. *See*, State's Exhibit 1, pp. 17-19. Further a warning
18 was issued to Mr. Silva Sr., the only one Mr. Manning had ever issued to him. *See*, Respondent's
19 Exhibit B, p. 12, *see also*, Tr., p. 111;22-24, 112;1-10.

20 Mr. Silva Sr., testified that he had worked for State Roofing for nearing 30 years, serving as a
21 foreman for 28 of those years. *See*, Tr., p. 168;10-18. In all of that time, Mr. Silva Sr., had never
22 issued a written warning. *See*, Tr., p. 213;2-23. Mr. Silva Sr., also repeatedly testified that the
23 Respondent had installed tie off anchors on the top of the upper roof before the job started. *See*, Tr.,
24 pp. 170;21-24, 174-17-21, 219;19-24. As an impeachment witness, Mr. Subia testified and provided
25 photographic evidence that no tie off anchors were in place on the top of the upper roof on the day of
26 the inspection. *See*, State's Exhibit 3, p. 91, *see also*, Tr., p. 222;11-24, 223;1-23. In other words, the

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1 testimony of Mr. Silva Sr., was untruthful regarding the installation of tie down anchors on the
2 outside wall of the upper roof.⁵

3 CONCLUSIONS OF LAW

4 The State is obligated to demonstrate the alleged violation by a preponderance of the reliable
5 evidence in the record. Findings must be based upon the kind of the evidence which responsible
6 persons are accustomed to rely in serious affairs. *William B. Hopke Co., Inc.* 1982 OSHARC
7 LEXIS 302 * 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ)). The Board's decision must be
8 based on consideration of the whole record and shall state all facts officially noticed and relied
9 upon. 29 CFR 1905.27(b). *Armor Elevator Co.*, 1 OSHA 1409, 1973-1974 OSHD ¶ 16, 958 (1973).
10 *Olin Construction Inc. v. OSHARC and Peter J Brennan, Secretary of Labor*, 525 F. 2d 464 (1975).
11 In this case, the burden is on the State to prove its *prima facie* case against the Respondent by a
12 preponderance of the evidence. See, NAC 618.788(1), see also, *Original Roofing Company LLC v*
13 *Chief Administrative Officer of the Nevada OSHA*, 442 P. 3d 146, 149 (Nev. 2019).

14 In its defense, State Roofing alleges that the cited employees were engaged in unpreventable
15 employee misconduct. See, Tr., p. 241;1-6. If proven, employee misconduct would be a complete
16 defense to the charge brought against the Respondent. See, *TNT Crane & Rigging, Inc. v.*
17 *Occupational Safety & Health Rev. Comm'n*, 74 F.4th 347, 359 (5th Cir. 2023); *Angel Bros.*
18 *Enterprises, Ltd. v. Walsh*, 18 F.4th 827, 832 (5th Cir. 2021). While the burden of proof rests with
19 OSHA under Nevada law (NAC 618.788) to prove a *prima facie* case, after OSHA has proven the
20 *prima facie* case, the burden shifts to the Respondent, here State Roofing, to prove any recognized
21 defense such as unpreventable employee misconduct. See, *Jensen Construction Co.*, 7 OSHC 1477,
22 1979 OSHD ¶23,664, p. 28,694 (1979); *Sanderson Farms, Inc. v. OSHRC*, 348 Fed.Appx. 53, 57
23 (5TH Cir., 2009).

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27 ⁵While the dishonesty of Mr. Silva Sr., was rather damning, it was not dispositive. Respondent's
28 employees on the upper roof could have been protecting themselves from falling off of the side of the
building by hooking up to the available tie off anchors on the inside of the structure. See, Respondent's
Exhibit A, p. 11.

1 In its *prima facie* case, the State showed that the standard of 29 CFR 1926.501(b)(10)
2 applied because the employees were on a low slope roof at risks for unprotected falls of more
3 than six feet. *See*, State’s Exhibit 1, p. 22, *see also*, Respondent’s Exhibit A, p. 11. The State’s
4 evidence also showed that the standard was violated because it provided interviews, testimony and
5 photographs which showed State Roofing’s workers located in the zone of danger but were not
6 properly protected from falling. *See*, State’s Exhibit 1, pp. 16, 53-56.

7 In order to establish employee exposure to a hazard, the Secretary must show that “it is
8 reasonably predictable either by operational necessity or otherwise (including inadvertence), that
9 employees have been, are, or will be in the zone of danger.” *See*, *Stevens Roof Side Remodel, Ltd,*
10 *Respondent.*, 24 O.S.H. Cas. (BNA) ¶ 1962 at *5 (O.S.H.R.C.A.L.J. Sept. 20, 2013), *citing*
11 *Fabricated Metal Products, Inc.*, 18 O.S.H. Cas. (BNA) ¶ 1072 (O.S.H.R.C. Nov. 7, 1997).
12 Employees are regarded to be in the zone of danger when they are at an elevation of approximately
13 10 feet above any lower surface and without fall protective equipment. *See*, *Stevens* at *6.

14 In this instance, four of the Respondent’s employees were witnessed at a height in excess of
15 100 feet, without the proper use of fall protection. *See*, State’s Exhibit 1, pp. 53-56. State Roofing
16 concurred that the employees lacked protection while in the zone of danger. *See*, State’s Exhibit 1,
17 p. 16, *see also*, Respondent’s Exhibit B, pp. 12-21.

18 The Respondent’s knowledge can be established by demonstrating “that the employer either
19 knew or with the exercise of reasonable diligence, could have known of the presence of the violative
20 condition.” *Original Roofing Co., LLC v. Chief Admin. Officer of Occupational Safety & Health*
21 *Admin.*, 135 Nev. 140, 143, 442 P.3d 146, 149 (2019) *quoting* *Pride Oil Well Serv.*, 15 BNA OSHC
22 1809, 1814 (No. 86-692, 1992).

23 Here, Messrs. Silva Jr. and Silva Sr., both State Roofing’s foremen at 1200 Riverside, knew
24 that four of the Respondent’s employees were on the upper level of the roof without fall protection.
25 *See*, State’s Exhibit 1, p. 22. By way of explanation, Mr. Silva Sr., stated that the tie off anchors
26 were inadequate to protect against the 10 ft. fall from the upper roof to the main roof. *See, Id.* Mr.
27 Silva Sr.’s statement did not address why these employees did not protect themselves from the
28 potential 100 ft. fall to the ground. Mr. Silva Jr., also relayed that he had witnessed three employees

1 without fall protection when he got to the roof. *See*, State’s Exhibit 1, p. 22. However, Mr. Silva Jr.
2 indicated that he “told them to hook up.”⁶ Accordingly, both of the Respondent’s on site managers
3 knew that its employees were in the zone of danger without adequate fall protection.

4 In addition to showing the Respondent’s actual knowledge of the violation, the State showed
5 that the Respondent had constructive knowledge, *i.e.*, that it could have known of the violative
6 condition if it had acted with reasonable diligence. In this instance, the State argued that the
7 Respondent had constructive knowledge of the violation because it failed to exercise reasonable
8 diligence. Whether an employer was reasonably diligent involves a consideration of several factors,
9 including the employer’s obligation to have adequate work rules and training programs, to
10 adequately supervise employees, to anticipate hazards to which employees may be exposed, and to
11 take measures to prevent the occurrence of violations. *Precision Concrete Constr.*, 19 O.S.H. Cas.
12 (BNA) ¶ 1404 (O.S.H.R.C. Apr. 25, 2001). The State’s analysis of the adequacy of the
13 Respondent’s work rules, the effectiveness of its supervision and its preventative measures are
14 provided below.

15 On paper, State Roofing appeared to have adequate work rules. The Respondent’s Health
16 and Safety Program consisted of 76 pages. *See*, Respondent’s Exhibit C, pp. 022- 098. The Safety
17 Program covered things like emergency action plans, fire prevention and fall protection. *See, Id.*
18 The fall protection section of the Safety Program addressed safety provisions like guardrails and fall
19 arrest systems. *See*, Respondent’s Exhibit C, pp. 072- 076. Additionally, the Respondent developed
20 a site specific safety plan which considered the unique characteristics of Building B. *See*,
21 Respondent’s Exhibit A, p. 1-11, *see also*, Tr., pp. 85;2-4. 89;4-16. The site specific plan was
22 developed by Mr. Manning, Mr. Silva Sr., and the project manager. *See*, Tr., pp. 90;18-24, 91;1-15.
23 However, The Respondent’s Safety Program needed to be effective in practice as well as theory.
24 *See, Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277-1278 (6th Cir. 1987). In this,
25 the Respondent’s safety plan failed.

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28 ⁶The inference here is that this event occurred on the upper roof because there were guardrails
around the lower roof.

1 The most obvious failure was the lack of tie off anchors on the upper roof on the inside of
2 the outside edge of the upper roof. *See*, State's Exhibit 3, p. 91, *see also*, Tr., pp. 37;23-24, 38;1-11,
3 222;13-20. This failure vitiated the value of the Respondent's Safety Program because the lack of
4 these tie off anchors rendered its employees unable to protect themselves from a fall hazard of
5 approximately 10 feet. Accordingly, the Respondent's safety plan lacked the ability to protect its
6 workers from falling from the top of the upper roof to the main roof.

7 The next issue was the Respondent's supervision of its employees. On the day of the
8 inspection Mr. Silva Sr., saw a couple of employees without their lanyards which he told them to
9 tie off. *See*, Tr., pp. 214;14-24, 215;1-2. While the time at which this occurred was uncertain, Mr.
10 Silva Sr., indicated that he saw them on the morning of the inspection. *See*, Tr., p. 215;6-22. Even
11 after witnessing this, Mr. Silva Sr. did not take any action to enforce the Respondent's Safety
12 Policy. *See*, Tr., p. 215;6-22. The controlling foreman (*see*, Tr., p. 129;7-13) Mr. Silva Sr., was on
13 the roof with the people not tied off at the time that the inspector arrived. *See*, State's Exhibit 1, pp.
14 53-57, *see also*, Tr., pp. 174;2-11, 182;17-22. Additionally, there was little to no supervision of the
15 supervisors, the foremen themselves. *See*, Tr., p. 216;5-9. Mr. Manning testified that he only visited
16 the Reno job monthly. *See*, Tr., pp. 136;12-15, 157;15-24.

17 The Respondent purported to have a progressive disciplinary program. However, Mr. Silva
18 Sr. testified that he has never utilized this process. *See*, Tr., 213;2-23. Mr. Silva Sr., just talks to the
19 employees to correct whatever deficiency he notices. *See, Id.* Mr. Silva testified that he never
20 forwarded any notices of safety violations for any employee. *See*, Tr., 213;2-23. Mr. Silva Sr.'s
21 testimony is consistent with that of Mr. Manning. *See*, Tr., pp.139-141. Mr. Manning described
22 certain disciplinary steps, however, he explained that their application was very discretionary. *See*,
23 Tr., 139;17-24. Further, Mr. Manning stated that every employee is different. *See*, Tr., 141;1-12.

24 All of this might have lead to confusion regarding what disciplinary measure would be taken
25 if the Respondent's employees were caught violating a safety rule. To add to that confusion, Mr.
26 Manning wrote up all the employees, including the ground crew for the violations which were the
27 subject of the inspection. *See*, Respondent's Exhibit B, pp. 12-21, *see also*, Tr., pp. 111-116. Even
28 more problematic, Mr. Manning wrote up two people who were following the Respondent's safety

1 plan. *See*, Respondent's Exhibit B, pp. 13, 20. Mr. Lozano and Mr. Martinez stated that they were
2 tied off to that wall anchor. *See*, State's Exhibit 1, pp. 17, 19. They received this warning even
3 thought the Respondent's Safety Plan stated that it was appropriate to tie off to a wall anchor. *See*,
4 Respondent's Exhibit C, p. 72-74. Yet, Messrs. Lozano and Martinez received write ups along with
5 all of the employees who were not doing anything that they were supposed to do. *See*, Respondent's
6 Exhibit B, pp. 12-21. One additional problem with the write up of the entire crew was that some of
7 the employees who received the formal disciplinary warnings were working at street level. *See*,
8 Respondent's Exhibit B, pp. 12-21, *see also*, Tr., pp. 111-116. The Respondent's knee jerk reaction
9 to the OSHA inspection cannot be considered proper supervision of its employees.

10 After the conclusion of the closing arguments, the Board then considered the record as a
11 whole, weighing the Respondent's positive actions against its lack of clear work rules and
12 inadequate supervision of its employees. After evaluation of the evidence, the Board found and
13 concluded by a preponderance of the evidence that State Roofing did not require its employees to
14 utilize adequate fall protection as mandated by 29 CFR 1926.501(b)(10).

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

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

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1 The Respondent's efforts to show established work rules designed prevent the violation were
2 unconvincing because a key element of the fall protection plan was not in place. There were no tie
3 off anchors on the outside edge of the upper roof. *See*, State's Exhibit 3, p. 91, *see also*, Tr., p.
4 222;11-17.

5 Further, the Respondent's evidence that it monitored safety was unconvincing. Mr. Silva Sr.,
6 said that he orally corrects employees on the spot for safety violations. However, he had never
7 forwarded any violation notices to his supervisor. *See*, Tr., p. 213;2-23. In fact, Mr. Silva Sr., did
8 not report the instant violation, either. The State reported them and then Mr. Manning got involved
9 and wrote the warning slips. *See*, Respondent's Exhibit B, pp. 12-21, *see also*, Tr., p. 111;18-21.

10 Lastly, the Respondent's progressive discipline system fell short of proving this element of
11 the defense. As mentioned above, there was no investigation done after the State issued its citation.
12 All of the Respondent's employees were written up including Messrs. Lozano and Martinez who
13 were following the safety guidelines. *See*, State's Exhibit 1, pp. 17-19, *see also*, Respondent's
14 Exhibit B, pp. 18, 20. Additionally, Mr. Silva Sr., admitted that he had never, in all of the time he
15 worked for the Respondent, issued a formal write up for a safety violation. *See*, Tr., p. 213;2-23.

16 Accordingly, the Board found and concluded that State Roofing's defense of unpreventable
17 employee misconduct fails. Therefore, the defense is not available to the Respondent to eliminate its
18 liability in this matter.

19 ORDER

20 It was moved by Board Member Milligan to uphold the violation with the recommended
21 penalty in the amount of \$1,800. *See*, Tr., p. 257;1-7. The motion was seconded by Board Member
22 Fullerton. *See*, Tr., p. 257;15-17. The motion was approved unanimously upon a vote of four in
23 favor and none in opposition, with one member absent. *See*, Tr., p. 257;18-24. Accordingly, the
24 State OSHA Board of Review hereby upholds the citation and fine assessed against State Roofing in
25 the amount of \$1,800. *See, Id.*

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1 It was moved by Board Member Milligan to accept the State’s withdrawal of Citation 2, Item
2 1. *See, Tr., p. 257;1-12.* The motion was seconded by Board Member Fullerton. *See, Tr., p. 257;15-*
3 *17.* The motion was approved unanimously upon a vote of four in favor and none in opposition,
4 with one member absent. *See, Tr., p. 257;18-24.*

5 On July, 10, 2024 the Board convened to consider adoption of this Decision combined with
6 the Findings of Fact and Conclusions of Law, as written or as modified by the Board, as the decision
7 of the Board.

8 Those present and eligible to vote on this question consisted of the 4 current members of the
9 Board, to-wit, Chairman Jorge Macias, Board Secretary William Spielberg and Members Frank
10 Mulligan and Scott Fullerton. Upon a motion by Scott Fullerton, seconded by William Spielberg,
11 the Board voted 4-0-1 (Hollis abstaining) to approve this Decision of the Board as the action of the
12 Board and to authorize Chairman Macias, after any grammatical or typographical errors are
13 corrected, to execute, without further Board review this Decision on behalf of the Nevada
14 Occupational Safety and Health Review Board. Those voting in favor of the motion either attended
15 the hearing on the merits or had in their possession the entire record before the Board upon which
16 the decision was based.

17 On July 10, 2024 this Decision is, therefore, hereby adopted and approved as the Final
18 Decision of the Board of Review.

19 IT IS SO ORDERED.

20 Dated this 23rd day of July, 2024.

NEVADA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD

21
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23 By: /s/Jorge Macias
Jorge Macias, Chairman

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27 NOTICE: Pursuant to NRS 233B.130, any party aggrieved by this Final Order of the Nevada
28 Occupational Safety and Health Review Board may file a petition for judicial review to the District
Court within thirty (30) days after service of this order.

1 **CERTIFICATE OF SERVICE**

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

7 Salli Ortiz, Esq.
8 DIR Legal
9 1886 East College Pkwy., Suite 110
10 Carson City, NV 89706.

11 Melissa K. Peters, Esq.
12 LITTLER MENDELSON, P.C.
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17 633 West 5th Street
18 63rd Floor
19 Los Angeles, CA 90071

20 ALKA RAMCHANDANI-RAJ, ESQ.
21 LITTLER MENDELSON, P.C.
22 1225 Treat Boulevard, Suite 600
23 Walnut Creek, CA 94597

24 Dated this 23rd day of July, 2024.

25 /s/Karen Kennedy
26 Employee of
27 The Law Offices of Charles R. Zeh, Esq.

28 S:\Clients\OSHA\RNO 20-2023 State Roofing Systems\Decision\Final Decision.R8.wpd