

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE ORIGINAL ROOFING
COMPANY, LLC,

Appellant,

vs.

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

Respondent.

No. 74048

Electronically Filed
Oct 12 2017 04:30 p.m.
DOCKETING STATEMENT
Elizabeth A. Brown
CIVIL APPEALS
Clerk of Supreme Court

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department XXIV
County Clark Judge Honorable Jim Crockett
District Ct. Case No. A-16-740022-J

2. **Attorney filing this docketing statement:**

Attorney Micah S. Echols, Esq. and Adele V. Karoum, Esq.
Telephone (702) 382-0711
Firm Marquis Aurbach Coffing
Address 10001 Park Run Drive, Las Vegas, NV 89145
Client The Original Roofing Company ("Original Roofing")

3. **Attorney representing respondent(s):**

Attorney Donald C. Smith, Esq.
Telephone (702) 486-9071
Firm Division of Industrial Relations
Address 1301 N. Green Valley Pkwy., Suite 200, Henderson, Nevada 89074
Client Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, State of Nevada ("OSHA")

4. **Nature of disposition below (check all that apply):**

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of Jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify) |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify) |

5. **Does this appeal raise issues concerning any of the following:** N/A.

- ☐ Child Custody
☐ Venue
☐ Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A.

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Chief Administrative Officer of the Occupational Safety and Health Administration v. The Original Roofing Company, Case No. A-16-740022-J: The order granting the petition for judicial review and overturning the Nevada Occupational Safety and Health Review Board's ("Review Board") decision was filed on August 31, 2017.

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

This case arises from a contested citation issued by OSHA to Original Roofing. OSHA filed a complaint to the Review Board, alleging "repeat serious" violations by Original Roofing of the safety regulations surrounding work on "steep roofs." Original Roofing successfully defended the complaint before the Review Board, and the violation and proposed penalty of \$5,600 for the citation was denied in the Review Board's June 14, 2016 Findings of Fact, Conclusions of Law, and Order. *See* Order attached as Exhibit 1 to Petition for Judicial Review (attached hereto as **Exhibit 1**).

OSHA filed a petition for judicial review with the District Court on July 14, 2016, requesting review of the Review Board's Findings of Fact, Conclusions of Law, and Order. *See* **Exhibit 1**. Following a hearing on January 10, 2017, the District Court entered the August 31, 2017 Order Granting Petition for Judicial Review, which reversed the Review Board's June 14, 2016 Findings of Fact, Conclusions of Law, and Order in its entirety. *See* **Exhibit 2**.

Original Roofing now appeals the District Court's August 31, 2017 order.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether this Court should uphold the Review Board's finding that there was insufficient evidence of Original Roofing's knowledge of an employee safety violation to impute liability to Original Roofing.

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Original Roofing is not aware of any proceedings in this Court raising the same or similar issues.

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. **Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☒ An issue of public policy

☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: The imputation of liability upon an employer under NRS 618.625 et seq. is a public policy issue that should be decided by the Supreme Court.

13. **Assignment to the Supreme Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

According to NRAP 17(a)(10) and (11), this appeal involves an issue of public policy regarding the imputation of liability upon an employer under NRS 618.625 et seq. Therefore, the Supreme Court should retain this appeal.

14. **Trial.** If this action proceeded to trial, how many days did the trial last? There was no trial in this case, but there was a one-day administrative hearing on March 9, 2016, and a one-day District Court hearing on the petition for judicial review on January 10, 2017.

Was it a bench or jury trial? N/A.

15. **Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

N/A.

TIMELINESS OF NOTICE OF APPEAL

16. **Date of entry of written judgment or order appealed from** August 31, 2017. If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. **Date written notice of entry of judgment or order was served** September 1, 2017.

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)**

N/A.

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing

☐ NRCP 52(b) Date of filing

☐ NRCP 59 Date of filing

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion.

(c) Date written notice of entry of order resolving tolling motion was served.

Was service by:

☐ Delivery

☐ Mail

19. **Date notice of appeal filed** September 14, 2017.

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. **Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other**

NRAP 4(a)(1).

SUBSTANTIVE APPEALABILITY

21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☐ Other (specify)

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(1) allows for an appeal after entry of a final order resolving all claims against all parties.

22. **List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

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

Respondents: The Original Roofing Company, LLC; and Nevada Occupational Safety and Health Review Board

- (b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

The Review Board was a party only due to the nature of the case as a judicial review of an administrative board decision. The Review Board did not appear in the District Court or file any notice of intent to participate.

- 23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the date of formal disposition of each claim.**

OSHA sought judicial review of the Review Board's decision in favor of Original Roofing. The District Court's order granting the petition for judicial review was entered on August 31, 2017 and noticed on September 1, 2017.

- 24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

- 25. If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered “No” to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

N/A.

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

Exhibit	Document Description
1	Petition for Judicial Review (filed 07/14/16)
2	Notice of Entry of Order Granting Petition for Judicial Review with Order (filed 09/01/17)

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

The Original Roofing Company
Name of appellant

Micah S. Echols, Esq.
and Adele V. Karoum, Esq.
Name of counsel of record

October 12, 2017
Date

/s/ Micah S. Echols
Signature of counsel of record

Clark County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 12th day of October, 2017, I served a copy of this completed docketing statement upon all counsel of record:

☒ Via electronic service according to this Court's Master Service List:

Donald Smith, Esq.

☐ By mailing it by first class mail with sufficient postage prepaid to the following address:

Dated this 12th day of October, 2017.

/s/ Leah Dell

Signature

Exhibit 1

DISTRICT COURT CIVIL COVER SHEET

A-16-740022-J

Clark

County, Nevada

XXI V

Case No. _____

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): Nevada OSHA 1301 N. Green Valley Pkwy #200 Henderson, NV 89074 (702) 486-9020	Defendant(s) (name/address/phone): The Original Roofing Company, LLC Attn: Don Kelly, Safety Manager 4515 Copper Sage St., Ste. 100, Las Vegas, NV 89115 (702) 739-7663
Attorney (name/address/phone): Salli Ortiz, Division Counsel 400 W. King St., Ste. 201 Carson City, NV 89703 (775) 684-7286	Attorney (name/address/phone): _____ _____ _____

II. Nature of Controversy (please select the one most applicable filing type below)

Civil Case Filing Types

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input checked="" type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

7/13/16
Date

[Signature]
Signature of initiating party or representative

See other side for family-related case filings.


CLERK OF THE COURT

1 PET
2 SALLI ORTIZ Division Counsel
3 Nevada Bar No. 9140
4 Division of Industrial Relations
5 400 W. King Street, Ste. 201
6 Carson City, NV 89703
7 Tel: (775) 684-7286
8 Fax: (775) 687-1621
9 Email: sortiz@business.nv.gov
10 Attorney for Petitioner
11 Division of Industrial Relations

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 CHIEF ADMINISTRATIVE OFFICER OF)
11 THE OCCUPATIONAL SAFETY AND)
12 HEALTH ADMINISTRATION, DIVISION OF)
13 INDUSTRIAL RELATIONS OF THE)
14 DEPARTMENT OF BUSINESS AND)
15 INDUSTRY, STATE OF NEVADA,)

16 Petitioner,)

17 vs.)

18 THE ORIGINAL ROOFING COMPANY, LLC;)
19 NEVADA OCCUPATIONAL SAFETY AND)
20 HEALTH REVIEW BOARD)

21 Respondents.)

Case No.: A- 16- 740022- J
XXI V
Dept. No.:

22 **PETITION FOR JUDICIAL REVIEW**

23 Comes now, Petitioner, Chief Administrative Officer of the Occupational Safety and
24 Health Administration ("NV OSHA"), Division of Industrial Relations ("DIR"), Department
25 of Business and Industry, a public agency of the State of Nevada, by and through its division
26 counsel, Salli Ortiz, hereby petitions this Court for judicial review of the Findings of Fact,
27 Conclusions of Law, and Final Order of the Nevada Occupational Safety and Health Review
28 Board ("Review Board"), dated June 14, 2016, a copy of which is attached as "Exhibit 1."

1 This Petition for Judicial Review is filed pursuant to NRS 233B, which provides for
2 judicial review of contested cases. Petitioner alleges that the Findings of Fact, Conclusions
3 of Law, and Final Order prejudices substantial rights of DIR because it is:

- 4 a. Made upon unlawful procedure;
5 b. Affected by other error of law;
6 c. Clearly erroneous in view of the reliable, probative and substantial evidence on
7 the whole record; and
8 d. Arbitrary or capricious or characterized by abuse of discretion by the Review
9 Board.

10 **WHEREFORE**, Petitioner prays as follows:

- 11 1. The Court grant judicial review of the June 14, 2016, Review Board Findings of
12 Fact, Conclusions of Law, and Final Order;
13 2. The Court **vacate** and set aside the Findings of Fact, Conclusions of Law, and
14 Final Order issued by the Review Board;
15 3. For such other and further relief as the Court deems just.

16 DATED this 12 day of July, 2016.

17 DIVISION OF INDUSTRIAL RELATIONS

18 By: Salli Ortiz
19 SALLI ORTIZ, DIR Division Counsel
20 Nevada State Bar No. 9140
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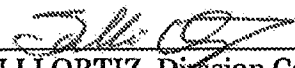
AFFIRMATION

Pursuant to NRS 239B.030/603A.040
(Initial Appearance)

The undersigned does hereby affirm that upon the filing of additional documents in the above matter, an Affirmation will be provided ONLY if the document contains a social security number (NRS 239B.030) or "personal information" (NRS 603A.040), which means a natural person's first name or first initial and last name in combination with any one or more of the following data elements:

- 1) Social Security number.
- 2) Driver's license number or identification card number.
- 3) Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.

The term does not include publicly available information that is lawfully made available to the general public.


SALLI ORTIZ, Division Counsel

7/12/16
Date

The purpose of this initial affirmation is to ensure that each person who initiates a case, or upon first appearing in a case, acknowledges their understanding that no further affirmations are necessary unless a pleading which is filed contains personal information.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of Nevada, Department of Business and Industry, Division of Industrial Relations (DIR), and that on this date, I caused to be served a true and correct copy of the **PETITION FOR JUDICIAL REVIEW**, by the method indicated below, and addressed to the following:

Person(s) Served:

THE ORIGINAL ROOFING CO LLC
ATTN DON KELLY SAFETY MGR
4515 COPPER SAGE ST SUITE 100
LAS VEGAS NV 89115
(Certified mail no. 7010 1870 0000 2210 3684)

Person(s) Served:

ADAM LAXALT ESQ
ATTORNEY GENERAL
100 NORTH CARSON ST
CARSON CITY NV 89701

Person(s) Served:

STEVE GEORGE, ADMINISTRATOR
DEPARTMENT OF BUSINESS & INDUSTRY,
DIVISION OF INDUSTRIAL RELATIONS
400 W KING ST STE 400
CARSON CITY NV 89703

Person(s) Served:

JESS LANKFORD, CAO OSHA
DIVISION OF INDUSTRIAL RELATIONS
1301 N GREEN VALLEY PKWY #200
HENDERSON NV 89074
(Courtesy Copy)

Person(s) Served:

NV OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD
c/o FRED SCARPELLO ESQ
600 E WILLIAM ST STE 300
CARSON CITY NV 89701
(Certified mail no. 7010 1870 0000 2210 3950)

DATED this 13 day of July, 2016.

U.S. Mail

☒ via State Mail room (regular or certified)
☐ deposited directly with U.S. Mail Service
☐ Overnight Mail
☐ Interdepartmental Mail
☐ Hand Delivery
☐ Facsimile fax number: _____

U.S. Mail

☐ via State Mail room (regular or certified)
☐ deposited directly with U.S. Mail Service
☐ Overnight Mail
☐ Interdepartmental Mail
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☐ deposited directly with U.S. Mail Service
☐ Overnight Mail
☐ Interdepartmental Mail
☐ Hand Delivery
☐ Facsimile fax number: _____

Ashley Tolmonda
State of Nevada employee

EXHIBIT 1

EXHIBIT 1

RECEIVED
JUN 16 2016
JIR LEGAL
CARSON CITY OFFICE

NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER
OF THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION, DIVISION
OF INDUSTRIAL RELATIONS OF THE
INDUSTRY,

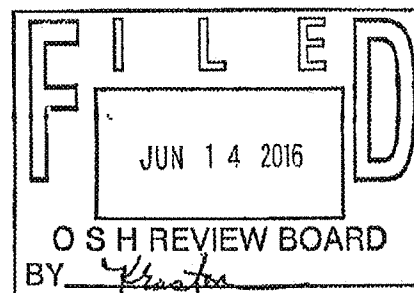
Docket No. LV 16-1830

Complainant,

vs.

THE ORIGINAL ROOFING COMPANY, LLC,

Respondent.



FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Nevada Occupational Safety and Health Review Board at a hearing on March 9, 2016. Ms. Salli Ortiz appeared on behalf of the Complainant, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (OSHA or Complainant); and Mr. Don Kelly, Safety Manager, appearing on behalf of Respondent, The Original Roofing Company, LLC (TORC or Respondent), the Nevada Occupational Safety and Health Review Board finds as follows:

FINDINGS OF FACT

1. Jurisdiction in this matter is proper and has been conferred in accordance with Chapter 18 of the Nevada Revised Statutes.
2. Complainant and Respondent stipulated to the admission of the following documentary evidence: Complainant's Exhibits 1, 2 and 3; and Respondent's Exhibit A.

1 3. Documents that are part of Respondent's Exhibit A established a recognized
2 safety plan.

3 4. Complainant's Exhibit 1, page 68, referenced a previous OSHA citation to TORC
4 for the violation of this occupational safety and health standard, 29 CFR 1926.501(b)(11), which
5 was contained in OSHA inspection number 316841196, Citation 01, Item 001. The Final Order
6 date of this inspection was June 17, 2013 and is Complainant's basis for classifying the alleged
7 violation in this matter as a "Repeat-Serious". The proposed penalty for the alleged violation is
8 in the amount of FIVE THOUSAND SIX HUNDRED DOLLARS (\$5,600).

9 5. On or about July 22, 2015, Compliance Safety and Health Officer (CSHO) Aldo
10 Lizarraga conducted an inspection at the Canyon Ridge Apartments jobsite in Henderson,
11 Nevada. The project involved multi multi-employers and employees engaged in a variety of
12 construction activities including framing, insulation, electrical, plumbing, roofing and drywall
13 work.

14 6. TORC employees were performing roofing activities at the Canyon Ridge
15 Apartments on a steep roof (slope of 5/12) without any means of fall protection in place.

16 7. Without fall protection, employees were exposed to a fall hazard of approximately
17 23 feet and 1 ¾ inches and exposed to serious injuries in the event of a fall to the rocks and dirt
18 below.

19 8. TORC employee, Mr. Silverio Betancourt, admitted he was "not tied off for
20 approximately 20 minutes" and signed a statement confirming his lack of tie-off protection.

21 9. TORC foreman, Jose Cortez, signed a statement confirming his lack of tie-off
22 protection.
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27

10. Foreman Cortez was aware that Mr. Betancourt was exposed to fall hazards due to lack of "tie-off" protection, and acknowledged he too was exposed for failure to comply with the fall arrest standards.

11. Foreman Cortez was in charge of the crew consisting of himself and another TORC employee.

12. Both TORC employees, Cortez and Betancourt, received fall protection training and were aware of TORC safety policies.

13. CSHO Lizarraga felt that TORC's Foreman Cortez chose not to tie off because Foreman Cortez and the employee he supervised were both not in compliance with fall arrest standards.

14. CSHO Lizarraga found no other violations by TORC both during the initial inspection on or about July 22, 2015 and after reinspection.

15. On October 1, 2015, Complainant issued Respondent a Citation and Notification of Penalty, Inspection Number 1081149, alleging one code violation against TORC.

Citation 1, Item 1, charges a violation of 29 CFR 1926.501(b)(11), which provides:

"Steep roofs." Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems or personal fall arrest systems.

CONCLUSIONS OF LAW

1. In all proceedings commenced by the filing of a notice of contest, the burden rests with the Administrator (See NAC 618.788(1)).

2. All facts forming the basis of a complaint must be proved by a preponderance of the evidence.

3. "Preponderance of evidence" means evidence that enables a trier of fact to determine the existence of the contested fact is more probable than the nonexistence of the contested fact. (NRS 233B(2)).

4. To prove a violation of a standard, the Secretary (Chief Administrative Officer), must establish (1) the applicability of the standard, (2) the existence of noncomplying conditions, (3) employee exposure or access, and (4) that the employer knew or with the exercise of reasonable diligence could have known of the violative condition. (citations omitted)

5. A Respondent may rebut allegations by showing:

(1) The standard was inapplicable to the situation at issue;

(2) The situation was in compliance; or lack of access to a hazard. See, Anning-Johnson Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

6. A serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use in that place of employment unless the employer did not and could not, with the exercise of reasonable diligence know of the presence of the violation. (NRS 618.625)

7. The Board concludes that the proof elements required before a finding of violation were met as to applicability, noncompliant conditions, and exposure as demonstrated by photographs in evidence corroborated by the employee written admissions.

8. The Board finds, however, that the required proof element of "employer knowledge" was not satisfied by Complainant's reliance upon the principle of imputation for construction application.

9. The Board finds that no actual employer knowledge was alleged or subject of evidence and must look to the recognized principles to support the required element constructively by imputation to the employer.

10. Generally, violative employee conduct can be imputed to the employer, including that of a supervisory employee charged with the responsibility of enforcing company and OSHA safety standards. The theory is that a responsible employer who does not actually know of violative employee conduct should, through the exercise of due diligence, be aware, and therefore knowledgeable that employees are not complying with company safety policies and/or OSHA standards.

11. Actual knowledge is not required for a finding of a serious violation. Foreseeability and preventability render a violation serious provided that a reasonably prudent employer, i.e., one who is safety conscious and possesses the technical expertise normally expected in the industry concerned, would know the danger. *Chandler-Rusche, Inc.* 40OSH 1232, 1976-1977 OSHD ¶ 20, 723 (1976), appeal filed, No. 76-1645 (D.C. Cir. July 16, 1976).

12. An employer's knowledge must be established, not vicariously, through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with the evidence of lax safety standards]" *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316 (citations omitted).

13. Reliance solely on the supervisor's own misconduct to impute knowledge does not constitute evidence of foreseeability. (*Terra, supra*, page 4)

14. To impute knowledge of Foreman Cortez's violative conduct, i.e. that neither he nor TORC employee Betancourt was tied off, to TORC, as proof of the element of "employer

1 knowledge" requires preponderant evidence. The evidence must establish that TORC should
2 have foreseen and therefore constructively known Foreman Cortez was not or would not perform
3 the job tasks assigned, which included assuring that he and all employees he supervised observe
4 TORC's safety rules and training and OSHA standards.

5 15. The Board finds there was insufficient competent preponderant evidence of
6 foreseeability on the part of TORC upon which to base imputed employer knowledge of
7 violation of the cited standard.

8 16. The Board finds that Complainant failed to present competent evidence that
9 TORC has previously engaged foremen to supervise its jobs who failed to enforce fall arrest
10 safety requirements.

11 17. The Board finds that the previous violation, OSHA inspection number
12 316841196, Citation 01, Item 001, submitted by the Complainant to support a finding of "repeat"
13 under different facts is not preponderant evidence to support constructive imputation of employer
14 knowledge relying upon foreseeability that TORC should have known that Foreman Cortez
15 would not enforce tie off. *Terra Contracting, Inc. vs. Chief Administrative Officer of the*
16 *Occupational Safety and Health Administration, et al., Comtran Grp., Inc. v. U.S. Dep't of*
17 *Labor*, 722 F.3d 1304, 1316 (11 Cir. 2013).

18 18. The Board concludes that there is no violation of Citation 1, 29 CFR
19 1926.501(b)(11), based upon the lack of proof of employer knowledge permitted by imputation
20 to satisfy the Complainant's burden of proof.

21 19. The burden of proof rests with OSHA under Nevada Law (NAC 618.798(1)); but
22 after establishing same, the burden shifts to the Respondent to prove any recognized defenses.
23 See *Jensen Construction Co.*, 70SHC 1477, 1979 OSHD ¶ 23, 664 (1979).

20. To establish the affirmative defense of "unpreventable employee misconduct," the employer must prove four elements: (1) established work rules designated to prevent the violation, (2) adequate communication of those rules to the employees, (3) steps taken to discover any violations of those rules, and (4) effective enforcement of those rules after discovering violations. *Marson Corp.*, 10 BNA OSHC 1660 (No. 78-3491, 1982); see *Pabco Gypsum*, 105 Nev. at 373, 775 P.2d at 703, *Terra*, *supra*.

21. The Board finds that Respondent through its documentary evidence in Exhibit A established a recognized safety plan upon which Respondent is entitled to rely in asserting the defense of employee misconduct. Respondent's Exhibit A not only established work rules designated to prevent violation but also demonstrated adequate communication of the rules to its employees and programs designed to discover violations and enforce the rules were either directly set forth or reasonably inferred from the documents in Exhibit A.

22. The Board finds that the evidence Respondent presented at Exhibit A permits a reasonable inference for support that TORC had, after previous violations, embarked upon a course of retraining and enforcement, to substantially reduce or eliminate past practices, and must be give due weight under the facts and evidence presented including CSHO Lizarraga's testimony that he found no other violations by TORC both initially and after reinspection.

23. The controlling cases have widely recognized the employer defense for the unforeseeable disobedience of an employee who violates the specific duty clause. Further, the Nevada Supreme Court has made it clear that the element of employer knowledge is a critical factor in OSHA constriction violation cases. Without substantial preponderant evidence of foreseeability as an element for reliance upon constructive knowledge imputation to an employer of violative conduct by a supervising employee, this Board cannot confirm a violation.

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

4 CHIEF ADMINISTRATIVE OFFICER
5 OF THE OCCUPATIONAL SAFETY AND
6 HEALTH ADMINISTRATION, DIVISION
7 OF INDUSTRIAL RELATIONS OF THE
8 DEPARTMENT OF BUSINESS AND
9 INDUSTRY,

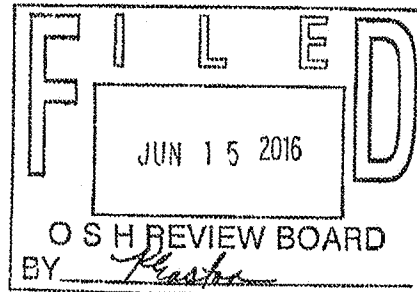
Docket No. LV 16-1830

Complainant,

vs.

10 THE ORIGINAL ROOFING COMPANY, LLC,

Respondent.



12
13 CERTIFICATE OF MAILING

14 Pursuant to NRCP 5(b)(2)(B), I certify that I am an employee of
15 SCARPELLO & HUSS, LTD., and that on June 15, 2016 I deposited for
16 mailing, certified mail/return receipt requested, at Carson City,
17 Nevada, a true copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW AND**
18 **FINAL ORDER** addressed to:

19 Salli Ortiz, Esq.
20 DIR Legal
400 W King St., #201
Carson City NV 89703

21 Don M. Kelly
22 Safety Manager
The Original Roofing Company
23 4515 Copper Sage Street, Suite 100
Las Vegas NV 89115

24 DATED: June 15, 2016

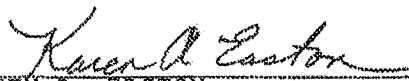
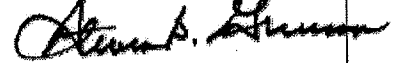
25 
26 KAREN A. EASTON
27
28

Exhibit 2

**Marquis Aurbach Coffing**

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The Original Roofing Company***DISTRICT COURT****CLARK COUNTY, NEVADA**CHIEF ADMINISTRATIVE OFFICER OF THE
OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION, DIVISION OF INDUSTRIAL
RELATIONS OF THE DEPARTMENT OF
BUSINESS AND INDUSTRY, STATE OF
NEVADA,Case No.: A-16-740022-J
Dept. No.: 24 XXIV

Petitioners,

vs.

THE ORIGINAL ROOFING COMPANY, LLC;
NEVADA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD,

Respondents.

**NOTICE OF ENTRY OF ORDER
GRANTING PETITION FOR JUDICIAL REVIEW**

**NOTICE OF ENTRY OF ORDER GRANTING
PETITION FOR JUDICIAL REVIEW**

Please take notice that an Order Granting Petition for Judicial Review was entered in the above-captioned matter on the 31st day of August, 2017, a copy of which is attached hereto.

Dated this 1st day of September, 2017.

MARQUIS AURBACH COFFING

By Adele Karoum

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Adele V. Karoum, Esq.
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*Attorneys for Respondent,
The Original Roofing Company*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER GRANTING PETITION FOR JUDICIAL REVIEW** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 1 day of September, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

n/a

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

Adam Laxalt, Esq.
Attorney General
100 N. Carson Street
Carson City, Nevada 89701

Jess Lankford, CAO OSHA
Division of Industrial Relations
1301 N. Green Valley Parkway, Suite 200
Henderson, Nevada 89074

Steve George, Administrator
Dept. of Business & Industry
Division of Industrial Relations
400 W. King Street, Suite 400
Carson City, Nevada 89703

Nevada Occupational Safety and Health
Review Board
c/o Fred Scarpello, Esq.
600 E. William Street, Suite 300
Carson City, Nevada 89701

Salli Ortiz, Division Counsel
Dept. of Business & Industry
Division of Industrial Relations
400 W. King Street, Suite 201
Carson City, Nevada 89703

Donald C. Smith, Esq.
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1301 N. Green Valley Pkwy., Suite 200,
Henderson, NV 89074


an employee of Marquis Aurbach Coffing

¹ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

Steven D. Grierson

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18 Facsimile: (702) 997-3800
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20 *Attorneys for Respondent,*
21 *The Original Roofing Company*

22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 CHIEF ADMINISTRATIVE OFFICER OF THE
25 OCCUPATIONAL SAFETY AND HEALTH
26 ADMINISTRATION, DIVISION OF INDUSTRIAL
27 RELATIONS OF THE DEPARTMENT OF
28 BUSINESS AND INDUSTRY, STATE OF
NEVADA,

Case No.: A-16-740022-J
Dept. No.: 24

Petitioners,

**ORDER GRANTING PETITION FOR
JUDICIAL REVIEW**

vs.

THE ORIGINAL ROOFING COMPANY, LLC;
NEVADA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD,

Hearing Date: January 10, 2017
Hearing Time: 9:00 A.M.

Respondents.

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

ORDER GRANTING PETITION FOR JUDICIAL REVIEW

Petitioner, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, State of Nevada's petition for judicial review having come before this Court on January 10, 2017, and the Court having heard and considered the arguments of counsel, pleadings and papers submitted by the parties, and good cause appearing hereby determines as follows:

1. On October 1, 2015, Nevada OSHA issued a Citation and Notification of Penalty ("Citation") against The Original Roofing Company, LLC.

2. The Original Roofing Company, LLC contested the Citation and, on November 18, 2015, Nevada OSHA filed its Complaint with the Review Board.

3. On June 14, 2016, the Review Board's Findings of Fact, Conclusions of Law and Final Order was entered, denying the Citation. The Review Board concluded, as a matter of fact and law, no violation occurred and denied the proposed penalty.

4. The Nevada Occupational Safety and Health Review Board found that OSHA failed to establish a prima facie case.

5. OSHA filed a petition for judicial review on July 14, 2016.

6. The Nevada Occupational Safety and Health Review Board's Findings of Fact, Conclusions of Law and Final Order is reversed in its entirety.

7. The Nevada Occupational Safety and Health Review Board had insufficient evidence to support the findings of fact and conclusions of law in its prior Order.

8. The Nevada Occupational Safety and Health Review Board did not cite to any of the evidence.

9. The Original Roofing Company, LLC failed to establish the affirmative defense of employee misconduct.

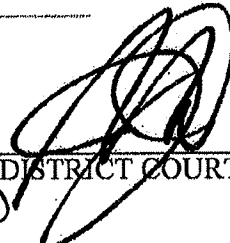
10. With respect to reasonable diligence, the supervisory employee violated the safety rule.

11. Original Roofing's request for remand for the Review Board to clarify the order is denied, and the denial of the citation is reversed.

1 ~~12 This order will remain suspended, consistent with Westside Chester Service, Inc.~~
 2 ~~v. Gray Line Tours of Southern Nevada, 99 Nev. 456, 664 P.2d 951 (1983). OSHA is not~~
 3 ~~permitted to take any action on the issues of this case until all appeals are exhausted.~~

4 IT IS SO ORDERED.

5 Dated this 29 day of August, 2017.


 DISTRICT COURT JUDGE

8 Respectfully submitted by:
 9 MARQUIS AURBACH COFFING

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 11 Micah S. Echols, Esq.
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15 Bernadette A. Rigo, Esq.
 16 Nevada Bar No. 7882
 17 Resnick & Louis, P.C.
 5940 S. Rainbow Boulevard
 Las Vegas, Nevada 89118

18 *Attorneys for Respondent,*
 19 *The Original Roofing Company*

20 Approved as to form and content:

21 STATE OF NEVADA
 22 DEPARTMENT OF BUSINESS AND INDUSTRY
 DIVISION OF INDUSTRIAL RELATIONS

23 By no response
 24 Salli Ortiz, Division Counsel
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 25 400 W. King Street, Suite 201
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 26 *Attorneys for Petitioner*
 27 *Chief Administrative Officer of the*
 28 *Occupational Safety and Health Administration,*
Division of Industrial Relations of the Department
of Business and Industry, State of Nevada