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.	Case No.: 74048 Appeal from the Eighth Judicial District Court, the Honorable Jim Crockett Presiding

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

The Original Roofing Company, LLC ("Original Roofing"), a Nevada limited liability company, is not a publicly traded company, nor is more than 10% of its stock owned by a publicly traded company.

Original Roofing was represented in the District Court by Selman Breitman LLP and Marquis Aurbach Coffing, and it is represented in this Court by Marquis Aurbach Coffing.

Dated this 21st day of December, 2017.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
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I. JURISDICTIONAL STATEMENT

This is an appeal from a District Court order granting a petition for judicial review. 2 Appellant's Appendix ("AA") 355–360. Appellant, the Original Roofing Company, LLC ("Original Roofing"), prevailed before the Nevada Occupational Safety and Health Review Board ("Review Board") against Respondent, the 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"), and now seeks reinstatement of the Review Board's favorable decision. 1 AA 124–132. "A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered" constitutes an appealable order. NRAP 3A(b)(1). NRS 233B.150 specifically allows final judgments from the district courts in judicial review matters to be appealed to the Nevada appellate courts "An order granting or denying a petition for judicial review . . . is an appealable final judgment if it fully and finally resolves the matters as between all parties." *Vill. League to Save Incline Assets, Inc. v. State*, 388 P.3d 218, 223 (Nev. 2017) (citing *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 303, 300 P.3d 724, 726 (2013)). Original Roofing timely appealed from the District Court's final judgment. 2 AA 355–367. Therefore, appellate jurisdiction is properly before this Court.

II. ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals according to NRAP 17(b)(10), as an administrative agency appeal not involving tax, water, or public utilities commission determinations. However, Original Roofing requests that this case be retained by the Supreme Court according to NRAP 17(a)(10) and (11). Orders from the Review Board are not published or available to the public; thus, there is a lack of information available to Nevada employers regarding the implementation and enforcement of OSHA standards. *See* Stephen C. Yohay, *Decisions and Orders of the Nevada Occupational Safety and Health Review Board: Time to Lift the Veil of Secrecy*, 16 NEV. L. J. 1145 (July 22, 2016).

This appeal involves significant issues of first impression on the employer knowledge element required for a showing of a violation of occupational and health standards under Nevada law. In particular, this appeal asks the Court to interpret NRS 618.625[1] and the related provisions in this statutory scheme,

[1] **NRS 618.625 Assessment, payment and recovery of administrative fines; "serious violation" defined.**

1. The Division may assess administrative fines provided for in this chapter, giving due consideration to the appropriateness of the penalty with respect to the size of the employer, the gravity of the violation, the good faith of the employer and the history of previous violations.

2. For purposes of this chapter, 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,

consistent with the Review Board's interpretation. Specifically, this appeal examines the question of when a supervisor, who is also an employee, violates established, communicated, and enforced company safety policies, whether this supervisor's knowledge of his own violation is imputed to his employer.

This appeal also examines to what degree a prior OSHA violation serves to establish "foreseeability" of a violation after a significant amount of time has passed, and when safety programs have been revised and implemented between the prior violation and the violation at issue. The recent case *Terra Contracting Inc. v. Chief Administrative Officer of the Occupational Safety and Health Admin.*, 2016 WL 197128, No. 67270 (Nev. 2016) is unpublished but examined similar issues of supervisors and imputed employer knowledge. But, Nevada does not have published case law on these issues, which are of significant importance to employers in Nevada and the general public. *See* NRS 618.015(2) ("The Legislature finds that such safety and health in employment is a matter greatly

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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**.

3. Administrative fines owed under this chapter must be paid to the Division. The fines may be recovered in a civil action in the name of the Division brought in a court of competent jurisdiction in the county where the violation is alleged to have occurred or where the employer has his or her principal office. (emphasis added).

affecting the public interest of this State."). Therefore, Original Roofing requests that the Supreme Court retain this appeal.

III. ISSUES ON APPEAL

A. WHETHER THIS COURT SHOULD REINSTATE THE REVIEW BOARD'S FAVORABLE DECISION BASED ON THE FINDING THAT OSHA FAILED TO PRESENT A PRIMA FACIE CASE TO SUPPORT ITS CITATION ON THE ELEMENT OF EMPLOYER KNOWLEDGE.

B. WHETHER THIS COURT SHOULD, ALTERNATIVELY, REINSTATE THE REVIEW BOARD'S FAVORABLE DECISION BASED ON ORIGINAL ROOFING'S ESTABLISHED DEFENSE OF EMPLOYEE MISCONDUCT.

IV. STATEMENT OF THE CASE

This is a case in which the Review Board properly found that OSHA's citation against Original Roofing failed both as a matter of fact and law. 1 AA 124–132. Although the District Court granted OSHA's petition for judicial review (2 AA 355–360), this Court looks directly to the agency decision without any deference to the District Court's decision. *See Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006). Original Roofing now asks this Court to reinstate the Review Board's favorable decision.

In July 2015, Nevada Compliance Safety and Health Officer ("CSHO") Aldo Lizarraga ("Lizarraga") conducted an inspection at the Canyon Ridge Apartments. 2 AA 150, 170. He witnessed employees of Original Roofing, Foreman Jose Cortez and Silverio Betancourt, performing roofing activities on a

steep roof without fall protection. 2 AA 170–171. These employees had been trained and instructed on fall protection, were provided with personal fall protection equipment, and were aware of Original Roofing's strict policies on fall protection, which included retraining, financial penalties for violations, and potential termination. *See generally* 2 AA 254–290. These employees, nonetheless, elected to not use fall protection, despite Original Roofing's strict safety standards and safety program designed to ensure compliance with Occupational Safety and Health Administration standards. After his inspection, Lizarraga issued a proposed citation for the employees performing roofing activities without adequate fall protection. 1 AA 126.

Original Roofing successfully appealed this proposed citation. The Review Board found, after a hearing and a review of the evidence, that OSHA failed to establish its prima facie case of a serious violation against Original Roofing because OSHA failed to establish the element of employer knowledge. 1 AA 119–120. OSHA relied upon theories of imputed knowledge based on (1) a supervisor being involved in the incident, and (2) a theory of constructive knowledge based on foreseeability because Original Roofing had a prior violation for failing to utilize fall protection equipment in 2013. 1 AA 111. The Review Board correctly found that OSHA failed to establish its prima facie case, and the evidence for employer knowledge, based on the presence of a supervisor and a prior 2013

violation, was insufficient. 1 AA 124–131. The Review Board also concluded that Original Roofing had provided safety rules, communicated its safety rules and program, and enforced its safety rules to establish the affirmative defense of unpreventable employee misconduct. *Id.* The Review Board found that there was no violation, and no penalty would be assessed against Original Roofing based on this July 2015 inspection. 1 AA 131.

OSHA filed a petition for judicial review in the District Court (1 AA 1–5), which the District Court granted, reversing the Review Board's decision (2 AA 355–360). The District Court second-guessed the Review Board and concluded that there was no substantial evidence to support the Review Board's decision. The District Court purported to reweigh the evidence and claimed that the Review Board was required to "cite" instead of refer to the evidence in the record. *Id.* The District Court then erroneously concluded that Original Roofing failed to prove its affirmative defense of unpreventable employee misconduct. *See id.*

Original Roofing's appeal now requests that this Court reverse the District Court's order granting OSHA's petition for judicial review by reinstating the Review Board's decision as properly based upon substantial evidence and sound legal reasoning. The Court's decision to reinstate the Review Board's decision can be based upon either the reasons articulated by the decision itself (1 AA 124–132) or any other reason supported by the record. *See Hotel Riviera, Inc. v. Torres*, 97

Nev. 399, 403, 632 P.2d 1155, 1158 (1981) ("If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons."). Upon these grounds, Original Roofing respectfully requests relief from this Court.

V. STANDARDS OF REVIEW

On appeal from an order deciding a petition for judicial review, this Court "reviews the administrative decision in the same manner as the district court." *Valenti v. State, Dep't of Motor Vehicles*, 362 P.3d 83, 85 (Nev. 2015) (citing *Nassiri v. Chiropractic Physicians' Bd.*, 327 P.3d 487, 489 (Nev. 2014); *see also Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) (affording "**no deference to the district court's ruling in judicial review matters**") (emphasis added).

On appeal, the administrative decision is reviewed for an abuse of discretion, giving deference to the administrative agency's factual findings that are supported by substantial evidence. *Taylor v. State, Dep't of Health & Human Servs.*, 314 P.3d 949, 951 (Nev. 2013). Substantial evidence is evidence that a reasonable person could accept as adequate to support a conclusion. *Century Steel, Inc. v. State, Div. of Indus. Relations, Occupational Safety and Health Section*, 122 Nev. 584, 590, 137 P.3d 1155, 1159 (2006). Legal questions are reviewed de novo. *Id.* But, an agency's conclusions of law, which are closely related to the agency's view

of the facts, are entitled to deference and will not be disturbed if they are supported by substantial evidence. *See Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986). This legal standard regarding deference to an agency's conclusions of law is grounded upon the policy that an agency charged with the duty of administering an act is impliedly clothed with the power to construe the act as a necessary precedent to administrative action. *See Local Gov't Emp. v. General Sales*, 98 Nev. 94, 97, 641 P.2d 478, 480 (1982) (citing *Clark Cty. Sch. Dist. v. Local Gov't*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974)).

This Court will review evidence presented to the agency to determine whether the agency's decision was arbitrary or capricious and was, therefore, an abuse of discretion. *See Century Steel*, 122 Nev. at 590, 137 P.3d at 1159. However, the Court will not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *Id.* (citing *Nevada Serv. Employees Union v. Orr*, 119 P.3d 1259, 1261 (Nev. 2005)); NRS 233B.135(3).

VI. FACTUAL AND PROCEDURAL BACKGROUND

A. OSHA'S PROPOSED CITATION AGAINST ORIGINAL ROOFING.

On July 22, 2015, at approximately 8:45 a.m., CSHO Lizarraga conducted an inspection at the Canyon Ridge Apartments. 2 AA 150, 170. He witnessed employees of Original Roofing, Foreman Jose Cortez and Silverio Betancourt, performing roofing activities on a steep roof without fall protection. 2 AA 170–

171. The employee told Lizarraga that he knew he was required to be tied off at heights of greater than six feet. 2 AA 172–173. The employee also stated that he had received fall protection and training. 1 AA 173. Lizarraga alleged a violation of 29 CFR § 1926.501(b)(11), a regulation requiring fall protection for employees on steep roofs.[2] 2 AA 170.

Don Kelly, Original Roofing's Safety Manager, informed Lizarraga that the employees were scheduled to go over the inspection process and to be retrained on that same day at 3:00 p.m., but the employees did not attend the retraining and did not return to work the following day. 2 AA 170, 221. Valentin Perez, the Superintendent of Original Roofing, informed Don Kelly that both employees had quit after the OSHA inspection. 2 AA 150, 170–171, 221–222.

OSHA issued a proposed citation to Original Roofing on October 1, 2015. 2 AA 176–185. This proposed citation was classified as a "repeat-serious" violation because Original Roofing was previously cited for a violation of an equivalent standard, more than two years earlier. 2 AA 185. The date of the previous inspection and citation was June 17, 2013, involving an incident documented on March 25, 2013. *Id.*; 2 AA 218. No other previous OSHA

[2] 29 CFR § 1926.501(b)(11) states, "'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."

inspection or citation was included in OSHA's proposed citation beyond the June 17, 2013 order. 2 AA 185.

B. THE REVIEW BOARD HEARING.

On March 9, 2016, the Review Board held a hearing on OSHA's proposed citation. 1 AA 124. In the administrative hearing, Lizarraga testified that when he interviewed the two Original Roofing employees on July 22, 2015, both Cortez and Betancourt informed him that they had received fall protection training from Original Roofing and were aware of company policies. 1 AA 47:20–48:5; 2 AA 173. Lizarraga testified, during cross examination:

> Q. Were they knowledgeable about fall protection, personal fall arrest systems?
>
> A. They both said that they needed a personal fall arrest system at heights greater than six feet.
>
> Q. Did they say anything about being trained, any training that they were…
>
> A. Yes, they both mentioned that they had fall protection training from you [Original Roofing].
>
> Q. Were they aware of company policy?
>
> A. Yes.

1 AA 47:30–48:5. Lizarraga testified that Cortez and Betancourt said that they knew they "needed a personal fall arrest system at heights greater than six feet" and that they had received fall protection training from Original Roofing. 1 AA 47:17–48:3, 50:8–9. Lizarraga testified that Cortez and Betancourt were aware of

company policies, but they said "it was easier to chalk the lines without a personal fall arrest system." 1 AA 48:4–11. Lizarraga testified that Cortez, the foreman, "had a choice" to tie off or not tie off, and he "chose not to tie off." 1 AA 48:15–19, 49:19–23.

Lizarraga also testified that he inspected the Canyon Ridge jobsite after July 22, 2015 and he believed he came across Original Roofing working at Canyon Ridge. 1 AA 47; 2 AA 176 (showing "inspection Date(s) as 7/22/2015–9/11/2015"). Lizarraga did not recall any fall protection or fall arrest issues the second time around. 1 AA 47:4–16.

C. THE EVIDENCE BEFORE THE REVIEW BOARD CONFIRMED ORIGINAL ROOFING'S ESTABLISHED SAFETY PROGRAM.

At the hearing before the Review Board, Original Roofing presented evidence of a safety training program, safety policies, and its adequate communication and enforcement of policies. 2 AA 254–290. OSHA and Original Roofing stipulated to the admission of four exhibits as documentary evidence for the OSHA hearing: Petitioner's Exhibits 1, 2, and 3; and Respondent's Exhibit A. 1 AA 124:23–24. Original Roofing also provided information from Don Kelly, the Safety Manager, regarding on-site inspections and how employees receive written violations and retraining if a violation is found on a jobsite audit. 1 AA 56–58 (referring to exhibits presented in the hearing at 2 AA 260–270); 2 AA 255. This

evidence included examples of internal written safety violation write-ups, which dated back to 2012, and employee retraining which included employee misconduct statements. *Id.*; 2 AA 263, 268–269.

Original Roofing provided evidence that OSHA had performed 48 on-site inspections involving Original Roofing in the year 2015, and the company passed 47 of the inspections without a violation. 2 AA 271. Additionally, Original Roofing demonstrated its dedication to ensuring safety in the workplace and compliance with OSHA violations, having spent $171,513 in 2015 in safety related costs. 2 AA 256. This amount included $62,818 invested in Personal Protective Equipment or PPE, and a nearly doubled amount in investment for safety manager salaries from 2013. *Id*. The evidence reflects a significant increase in safety expenditures between 2013 and 2015. *See id.*

The $171,513 in safety-related costs also included Original Roofing having its own 1,650 square foot training facility located at 4515 Copper Sage Street, Suite 300, Las Vegas, Nevada, 89115. 2 AA 256–257. The training facility is used for new hire orientation, OSHA training classes, Miller/HD Supply Competent Person Fall Protection programs, crew training sessions, and specific topic training certifications. *Id.* The training facility includes a mock roof, and training is performed using this mock roof to provide instruction on how to anchor. 1 AA 59 (referring to 2 AA 270).

The evidence before the Review Board demonstrated that Cortez and Betancourt received training from Original Roofing regarding compliance with state and federal law and regulations. 1 AA 273, 282. Both Cortez and Betancourt also received orientation and new hire training in the following areas:

1. Safety in the work place, DBI/SALA Harness Donning;
2. The Original Roofing Company Fall Protection Plan;
3. Company Safety Rules;
4. Hazard Communication Program;
5. Hand/Power Tools Policy;
6. Accident Reporting Procedures;
7. Drug Testing Program;
8. Disciplinary Action Policy;
9. Weekend work Policy; and
10. Payroll Policies.

2 AA 276, 283. Both Original Roofing employees signed the safety equipment issued form and acknowledging receiving a brand new safety PFAs bucket by Guardian Fall Protection. 2 AA 274, 277.

Cortez and Betancourt signed and acknowledged Original Roofing's Fall Protection Agreement, which provides: "It is company policy that all employees working above 6 feet must be tied off NO EXCEPTIONS." 2 AA 278, 285.

Cortez and Betancourt also signed Original Roofing's Safety Violations & Longevity Bonus Policy. 2 AA 279, 286. This document provides:

> 1. Any individual who is singularly responsible for an O[SH]A citation, whether it results in a fine or not **is subject to immediate termination** and will forfeit any longevity bonus they may have qualified for.

Id. (emphasis added). Original Roofing's Safety Violations & Longevity Bonus Policy provides enforcement by holding foremen, the foremen's immediate supervisor, and the safety manager responsible for employees they are in charge of by including the following provisions:

> A) If that individual is a crew member working under a Foreman on the site in question, the Foreman will lose any longevity bonus earned for that year.
>
> B) The Foreman's immediate Supervisor will lose 25% of any longevity bonus earned for that year.
>
> C) The Safety manager and/or Safety supervisor will each lose 10% of any longevity bonuses earned for that year.

2 AA 279. This enforcement and bonus program not only related to OSHA citations but also penalized individuals receiving **informal** safety violations, including those that resulted in injury or "may have resulted in an injury (fall protection)." 2 AA 279, ¶3.

At the Review Board hearing, Original Roofing presented evidence of its site inspection procedures for enforcement of its safety policies. The procedures included site inspections by a Superintendent, Valentin Perez. 2 AA 150, 287. On

the day of the OSHA inspection, Valentin Perez was on schedule to walk the worksite at the Canyon Ridge Apartments after his 9:00 a.m. morning meeting at another job site. If Valentin Perez had performed that inspection and found the employees on the roof without fall protection, Perez was trained to bring the employees down from the roof, to question them, to confirm they have all equipment required to work safely, and to prepare a written company violation to schedule the employees for retraining. 2 AA 287. The OSHA visit and proposed citation occurred just prior to Perez's scheduled site inspection. *Id.*; 2 AA 150.

D. THE REVIEW BOARD'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER.

On June 14, 2016, the Review Board entered its findings of fact, conclusions of law and final order in favor of Original Roofing. 2 AA 124–132. In its decision, the Review Board concluded that no violation occurred and denied the proposed penalty of $5,600 for the Citation 1, under 29 CFR § 1926.501(b)(11). 1 AA 131. OSHA's proposed citation and penalty were denied based on the Review Board's conclusions on employer knowledge. Specifically, the Review Board found that under relevant case law including *Terra Contracting Inc. v. Chief Administrative Officer of the Occupational Safety and Health Admin.*, 2016 WL 197128, No. 67270 (Nev. 2016) (unpublished) and *Comtran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316 (11th Cir. 2013), OSHA failed to satisfy its

burden due to a lack of proof of employer knowledge by imputation. 1 AA 129:18–22. To prove a violation of the standard, OSHA was required to 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.

1 AA 127:4–12 (citations omitted). *See Sec'y of Labor v. Atl. Battery Co.*, 16 O.S.H. Cas. (BNA) ¶2131, 1994 WL 682922, at *6 (O.S.H.R.C. Dec. 5, 1994). While knowledge, one of the elements to prove a violation, may be imputed to an employer even if the employer lacks actual knowledge under specific circumstances, the Review Board found in this case that OSHA failed to satisfy its burden of proof. This Review Board's decision is consistent with the stated exception for avoiding a "serious violation" in NRS 618.625(2): ". . . unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation." Specifically, the Review Board found that reliance solely on a supervisor's own misconduct to impute knowledge was not sufficient evidence of foreseeability. 1 AA 128:21–22. Additionally, the prior citation from 2013 was not preponderant evidence to support "constructive imputation of employer knowledge." 1 AA 129:11–15.

If OSHA, as complainant, satisfies its burden of proof, the Review Board may look to any recognized defenses by Original Roofing. 1 AA 129:22–24. Here, although the Review Board found that OSHA did not satisfy its burden of proof, the Review Board still discussed Original Roofing's evidence and the affirmative defense of unpreventable employee misconduct. The Review Board found that Original Roofing had presented evidence establishing the elements for unpreventable employee misconduct. *See* 1 AA 129–130. The Review Board found that without substantial preponderant evidence of foreseeability as an element to rely upon for constructive knowledge, it could not confirm a violation. 1 AA 130:21–24. Therefore, the Review Board found that no violation occurred, and OSHA's proposed penalty of $5,600 was denied. 1 AA 131.

E. OSHA'S PETITION FOR JUDICIAL REVIEW TO THE DISTRICT COURT.

OSHA filed a petition for judicial review of the Review Board's decision to the District Court. 1 AA 1–15. OSHA submitted its opening brief (2 AA 291–314) and reply brief (2 AA 344–353), and Original Roofing submitted its answering brief (2 AA 341–343). After a hearing on January 10, 2017 (2 AA 354) before Judge Jim Crockett, the District Court reversed the Review Board's decision and granted the petition for judicial review. 2 AA 354. Original Roofing timely filed its notice of appeal and case appeal statement in the District Court on September 14, 2017. 2 AA 361–372.

VII. LEGAL ARGUMENT

A. SUMMARY OF ARGUMENT.

The finding of the Review Board was correct: OSHA failed to provide preponderant evidence of an employee safety violation in this case because it could not prove the element of employer knowledge. The Review Board correctly applied the standard to this issue based on the evidence before it. Knowledge, for purposes of OSHA standards, is based on whether "the employer knew or with the exercise of reasonable diligence could have known of the violative condition." 1 AA 127:4–12 (citations omitted). *See Sec'y of Labor v. Atl. Battery Co.*, 16 O.S.H. Cas. (BNA) ¶2131, 1994 WL 682922, at *6 (O.S.H.R.C. Dec. 5, 1994). NRS 618.625(2), the standard for a serious violation under Nevada law, similarly considers whether the "employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation." In an employee-safety violation case, OSHA has the burden to establish four elements, one of which was employer knowledge. OSHA failed to do so in this case.

OSHA only relied upon alleged constructive knowledge, but the Review Board properly found that OSHA's claim of constructive knowledge was insufficient. First, OSHA incorrectly argued that since a supervisor was one of the employees not wearing fall protection, knowledge was somehow imputed to Original Roofing. Second, OSHA also erroneously argued that since Original

Roofing had previously been cited two years earlier somehow equated to constructive knowledge. But, OSHA did not provide evidence of lax safety standards to prove Original Roofing's constructive knowledge but instead focused on the supervisor and the previous citation as supposedly creating heightened knowledge or awareness that there was "a problem."

The Review Board properly found that supervisor involvement in the incident was not preponderant evidence to support the element of "knowledge" under the legal standards. Specifically, under *Terra Contracting Inc.*, 2016 WL 197128, this Court concluded that reliance on a supervisor's own misconduct to impute knowledge to the employer does not constitute evidence of foreseeability. Federal case law has similarly held that a "supervisor's knowledge of his own malfeasance is not imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable." *Byrd Telcom, Inc. v. Occupational Safety & Health Review Comm'n*, 657 Fed. Appx. 312, 316, 26 O.S.H. Cas. (BNA) 1001, 2016 WL 6407300 (5th Cir. 2016) (discussing *W.G. Yates & Sons Constr. Co. Inc. v. Occupational Safety & Health Review Comm'n*, 459 F.3d 604, 608–609, 21 O.S.H. Cas. (BNA) 1609, 2006 WL 2193045 (5th Cir. 2006) and *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976) (internal quotation marks omitted)). OSHA did not present evidence of lax safety standards or anything

other than Cortez's status as a foreman. The Review Board properly found that a prima facie case for a violation, with respect to the element of employer knowledge, was not satisfied by imputed knowledge from Original Roofing's supervisor.

The Review Board correctly found that a prior violation by Original Roofing, under different circumstances two years prior, was not sufficient preponderant evidence to establish Original Roofing's knowledge by "foreseeability." NRS 618.625(2) looks to the "reasonable diligence" of the employer and whether there was an exercise of reasonable diligence, such that the employer could not know of the presence of the violation. Federal case law, applying a similar standard, holds that foreseeability must look to whether there was an exercise of reasonable diligence by the employer, which depends in great part on whether the employees had received adequate safety instructions. *See Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 564, 569, 3 O.S.H. Cas. (BNA) 2060 (5th Cir. 1976) (citing *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1018 (7th Cir. 1975)). Here, the past violation was under different circumstances. There was evidence before the Review Board indicating that significant changes in rules, policies, safety expenditure, and supervision had occurred at Original Roofing between 2013 and 2015. Given these different circumstances, the Review Board, upon weighing the

evidence, determined that the evidence of a past citation alone was not sufficient to satisfy the element of employer knowledge for a prima facie case. The Review Board's finding, reached as a result of weighing the facts, was supported by substantial evidence.

Since OSHA failed to prove all four elements for a prima facie case, it failed to satisfy its burden, and the burden never shifted to Original Roofing to establish its affirmative defense. However, in the event that this Court determines that employer knowledge was established for OSHA's prima facie case, the Court should, alternatively, reinstate the Review Board's decision since Original Roofing satisfied the elements of its defense of unpreventable employee misconduct. Original Roofing provided detailed evidence of its work rules designed to prevent the violation; adequate communication of those rules to the employees; steps taken to discover any violation of those rules; and effective enforcement of those rules after discovering violations. *See Terra Contracting*, 2016 WL 197128, at *2 (citing *Secretary of Labor v. Marson Corp.*, 10 BNA OSHC 1660 (No. 78–3491, 1982); *Adm'r of Div. of Occupational Safety & Health v. Pabco Gypsum*, 105 Nev. 371, 373, 775 P.2d 701, 703 (1989)). Detailed evidence of Original Roofing's extensive program to prevent fall hazards, including safety rules, communication of those rules, training, and enforcement of the rules for violators was set forth in detailed documentary evidence before the Review Board. This is a clear case

involving two employees who admitted to the inspector that they knew the rules, had received training, and, nonetheless, decided to not tie down because it was "easier" not to do so. These two employees made a choice, despite signing contracts that their compensation would be affected by violations, and despite understanding that any safety violations could result in their own immediate termination. In light of Original Roofing's evidence before the Review Board, the Court should, alternatively, conclude that Original Roofing has satisfied its defense of unpreventable employee misconduct as another basis to reinstate the Review Board's decision. *See Torres*, 97 Nev. at 403, 632 P.2d at 1158. Upon these grounds, Original Roofing respectfully requests relief from this Court.

B. THIS COURT SHOULD REINSTATE THE REVIEW BOARD'S FAVORABLE DECISION BASED ON THE FINDING THAT OSHA FAILED TO PRESENT A PRIMA FACIE CASE TO SUPPORT ITS CITATION ON THE ELEMENT OF EMPLOYER KNOWLEDGE.

This Court should reinstate the Review Board's decision based on the finding that OSHA failed to present a prima facie case to support its citation on the element of employer knowledge. The Review Board's factual findings on employer knowledge should be sustained because they are supported by substantial evidence. 1 AA 7–15; *Taylor*, 314 P.3d at 951. First, the Review Board correctly found that OSHA did not satisfy its burden of proof to establish a prima facie case against Original Roofing. Substantial evidence supports the Review Board's

finding that OSHA had insufficient proof to establish the element of employer knowledge as to Original Roofing. Because OSHA did not set forth a prima facie case, Original Roofing was not required to prove its affirmative defense. However, an alternative basis for reversing the District Court order exists because Original Roofing provided ample evidence to establish the affirmative defense of "unpreventable employee misconduct" in light of its detailed safety plan, adequate communication of that plan, and demonstrated enforcement mechanisms. Therefore, this Court should reinstate the Review Board's decision and reverse the District Court's order granting OSHA's petition for judicial review.

Substantial evidence supports the Review Board's finding that OSHA did not satisfy its burden of proof on the element of Original Roofing's knowledge of an employee safety violation. In the case of an employee safety violation, the burden of proof rests with the administrator (OSHA in this case), and all facts forming the basis of a complaint must be proved by a preponderance of the evidence. 1 AA 126:19–23; NAC 618.788. Preponderance of the 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.0375; 1 AA 127.

To prove a violation of the standard, OSHA was required to 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.

1 AA 127:4–12 (citations omitted). *See Sec'y of Labor v. Atl. Battery Co.*, 16 O.S.H. Cas. (BNA) ¶2131, 1994 WL 682922, at *6 (O.S.H.R.C. Dec. 5, 1994).

NRS 618.625(2) sets forth the requirements for the existence of a serious violation:

> For purposes of this chapter, 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**.

(emphasis added); 1 AA 127:12–18.[3] Notably, this standard, by its clear language, relates to the "presence of the violation," meaning **the violation** at issue (not any

[3] Because NRS 618.625(2) for serious violations mirrors the federal statute for serious violations (29 U.S.C. § 666(k)), federal case law and interpretation is persuasive on the issues presented in this brief. *Cf. Executive Mgmt. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002). 29 U.S.C. § 666(k) states, in pertinent part:

> (k) Determination of serious violation
>
> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which

possible violation, generally). Thus, the inquiry in this case is whether Original Roofing did not and could not, with the exercise of **reasonable** diligence, know of the presence of **the violation** on July 22, 2015, in which two employees did not use proper fall protection.

Applying these standards, the Review Board found that the first three elements of proof for the violation were met, but OSHA did not meet its burden of proof on the "employer knowledge" element. OSHA relied upon the principle of imputed knowledge for constructive application, but the Review Board found that the evidence to establish imputed knowledge was insufficient in this case. 1 AA 127:18–24; *see Terra Contracting Inc. v. Chief Administrative Officer of the Occupational Safety and Health Admin.*, 2016 WL 197128, No. 67270 (Nev. 2016) (unpublished) (cited at 2 AA 301).

1. Substantial evidence supports the Review Board's finding that OSHA did not meet its burden of proof to establish imputed employer knowledge based on a supervisor not using fall protection.

Substantial evidence supports the Review Board's finding that OSHA did not meet its burden of proof to establish the imputed employer knowledge based on

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> exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

a supervisor not using fall protection. The Review Board provided the following standard for employer knowledge to establish a violation:

> Actual knowledge is not required for a finding of a serious violation. Foreseeability and preventability render a violation ser[i]ous, 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.

1 AA 128, ¶11 (citing *Candler-Rusche, Inc.*, 4 OSHC 1232, 1979–1977 OSHD ¶20, 723 (1976), appeal filed, No. 76-1645 (D.C. Cir. July 16, 1976)). In cases involving a supervisor's violation of a safety standard, OSHA does not establish a prima facie case 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 (e.g., with evidence of lax safety standards). *See ComTran Grp., Inc. v. U.S. Dept. of Labor*, 722 F.3d 1304, 1316 (11th Cir. 2013) (citing *W.G. Yates & Sons Constr. Co., Inc.*, 459 F.3d at 609 n. 8. (5th Cir. 2006); 1 AA 128, ¶12.

Reliance on a supervisor's own misconduct to impute knowledge to the employer does not constitute evidence of foreseeability. 1 AA 128, ¶13 (citing *Terra Contracting Inc.*, 2016 WL 197128). A "supervisor's knowledge of his own malfeasance is not imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation

of the policy unforeseeable." *Byrd Telcom, Inc. v. Occupational Safety & Health Review Comm'n*, 657 Fed. Appx. 312, 316, 26 O.S.H. Cas. (BNA) 1001, 2016 WL 6407300 (5th Cir. 2016) (internal quotation marks omitted) (discussing *W.G. Yates*, 459 F.3d at 608–609 and *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976)).

Federal case law interpreting these issues on the cognate federal statute has stated, "[T]he proper focus of employee misconduct cases is on the effectiveness of the employer's implementation of its safety program and not on whether the employee misconduct is that of a foreman as opposed to an employee." *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987). Nonetheless, OSHA relied upon the foreman/supervisor status of Cortez in arguing that Original Roofing had imputed knowledge. *See, e.g.*, 1 AA 51:22–52:1 ("[W]e do have a foreman who was present and who was—he, himself, was working without fall protection, but more importantly, he was supervising an employee who was not complying with the standard."); *see also* 1 AA 54:4–8 ("Each of those citations involved that foreman supervising another employee who was also not tied off. That gives the employer a heightened knowledge that this is a problem they have within their ranks . . . .").

The Review Board properly found even though Cortez was a foreman and chose not to tie off did not automatically impute knowledge to Original Roofing.

Imputed knowledge is based on foreseeability, and federal case law applying the same standard has explained that evidence of **lax safety standards** is the evidence that an employer could foresee the unsafe conduct of the supervisor. *See ComTran Grp., Inc. v. U.S. Dept. of Labor*, 722 F.3d 1304, 1316 (citations omitted) (citing *W.G. Yates & Sons Constr. Co., Inc.*, 459 F.3d at 609 n. 8). Here, OSHA did not present preponderant evidence of "lax safety standards" to justify imputing Cortez's knowledge to Original Roofing, but instead relied only upon the fact that Cortez was a foreman. *See, e.g.,* 1 AA 51:22–52:1, 54:4–8. Instead of presenting evidence of lax safety standards, OSHA asserted that it did not have information on the employer's rules or discipline for this conduct on the date of the investigation. *See* 1 AA 53. However, OSHA's arguments neglected the stipulated evidence admitted before the Review Board, which was provided by Original Roofing. *See* 1 AA 124:23–24; 2 AA 251–290.

OSHA also neglects the evidence in Lizarraga's own report indicating that he had received information that Original Roofing did provide fall protection training and personal fall protection equipment to its employees, and that they were aware that fall protection was required above six feet. 2 AA 172–173; 1 AA 47:20–48:5. Substantial evidence supports the Review Board's finding that OSHA did not meet its burden of proof to establish the imputed employer knowledge based on a supervisor not using fall protection.

The conduct of a supervisor alone is insufficient to establish imputed employer knowledge where the violation in issue relates to the supervisor's own conduct. *See Terra Contracting*, 2016 WL 197128; *see also Byrd Telcom, Inc. v. Occupational Safety & Health Review Comm'n*, 657 Fed. Appx. 312, 316, 26 O.S.H. Cas. (BNA) 1001, 2016 WL 6407300 (5th Cir. 2016) (internal quotation marks omitted) (discussing *W.G. Yates*, 459 F.3d at 608–609 and *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976)).

2. Substantial evidence supports the Review Board's finding that a prior violation from 2013, under different facts and circumstances, was not sufficient to show foreseeability.

Substantial evidence supports the Review Board's finding that a prior violation from 2013, under different facts and circumstances, was not sufficient to show foreseeability. OSHA also failed to satisfy its burden of proof for foreseeability to satisfy the employer knowledge element, based on a 2013 violation. OSHA argued that a violation in 2013 supported the notion that "previous history has given them [Original Roofing] the foreseeability that this is a problem they have." 1 AA 55:1–3. OSHA's citation in 2013 was distinct since it involved different employees, and that citation stated that the employer had not provided documentation of any fall protection. *See* 2 AA 218–219. Neither employee, in the documents related to the 2013 citation, referred to knowledge of a policy requiring fall protection at a certain height, as they did in this case. *Id.*;

compare 2 AA 172–173. If a 2013 citation for fall protection for roofing were to create "foreseeability" for constructive knowledge for **any** future citation for fall protection, this skewed test would change the elements for establishing a violation. The weighing of this fact suggested by OSHA would convert "knowledge" into strict liability for any employer after only a single prior violation.

The Review Board found that Original Roofing's previous violation "under different facts is not preponderant evidence to support constructive imputation of employer knowledge relying upon foreseeability." 2 AA 129:11–17 (citing *Terra Contracting Inc. v. Chief Administrative Officer of the Occupational Safety and Health Admin.*, 2016 WL 197128 (Nevada 2016) (unpublished); *Comtran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316 (11th Cir. 2013)). Substantial evidence supports the Review Board's factual finding on this point.

The Nevada statute for a serious violation, NRS 618.625(2), in pertinent part, states:

> [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**.

(emphasis added); 1 AA 127:12–18. The Review Board relied on the standard that foreseeability and preventability render a violation serious if 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." 1 AA 128, ¶11 (citing *Candler-Rusche, Inc.*, 4 OSHC 1232, 1979–1977 OSHD ¶20, 723 (1976), appeal filed, No. 76-1645 (D.C. Cir. July 16, 1976)).

Since the Nevada statute mirrors the federal statute, federal case law on this issue is also persuasive. *Cf. Executive Mgmt.*, 118 Nev. at 53, 38 P.3d at 876. The Fifth Circuit has stated, "[W]hether a serious violation of the standard was foreseeable with the exercise of reasonable diligence depends in great part on whether (the) employees . . . had received adequate safety instructions." *Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 564, 569, 3 O.S.H. Cas. (BNA) 2060 (5th Cir. 1976) (citing *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1018 (7th Cir. 1975)).

In *Byrd Telcom, Inc. v. Occupational Safety & Health Review Comm'n*, 657 Fed. Appx. 312, 315–16, 26 O.S.H. Cas. (BNA) 1001, 2016 WL 6407300 (5th Cir. 2016), the Fifth Circuit looked to the Occupational Safety and Health Act, 29 U.S.C. § 666(k), on serious violations and discussed the element of employer knowledge. Like the Nevada standard, the Fifth Circuit explained that under the federal statute, "[D]angerous practices will constitute a serious violation 'unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.' 29 U.S.C. § 666(k). Because the statute

holds employers accountable for violations that they could have uncovered through reasonable diligence, it incorporates both actual and constructive knowledge." *Id.*

In *Byrd Telcom*, the court concluded that substantial evidence supported the administrative law judge's ("ALJ") findings of constructive knowledge of a serious violation as a result of an inadequate safety program, which did not include any work rules to address the violation at issue (related to proper rigging of a gin pole), any training for employees on rigging the gin pole, and any discipline for an employee for a hazardous choice in an improper use of a carabiner to rig a gin pole. *Id.*, 657 Fed. Appx at 316. Under those circumstances, and where the employer did not adequately respond to that evidence by proving the employee conduct was unpreventable, the ALJ's decision that there was sufficient evidence of the employer's constructive knowledge was upheld. *Id*., 657 Fed. Appx at 318.

Here, in contrast, the Review Board correctly found that the evidence of a single incident in 2013, under different circumstances, was insufficient as preponderant evidence of constructive knowledge that Original Roofing knew or should have known of the subject violation. *See* 2 AA 129. OSHA did not provide evidence demonstrating that Original Roofing had no safety rules or no training, like the *Byrd* case. Instead, OSHA attempted to shift its own burden, by arguing in its own case that Original Roofing did not prove employee misconduct. *See* 1 AA 53:11–55. The Review Board correctly found that OSHA failed to establish its

prima facie case on the element of employer knowledge with only a reference to a separate incident in 2013. Therefore, this Court should reinstate the Review Board's decision and reverse the District Court's order granting OSHA's petition for judicial review.

C. THIS COURT SHOULD, ALTERNATIVELY, REINSTATE THE REVIEW BOARD'S FAVORABLE DECISION BASED ON ORIGINAL ROOFING'S ESTABLISHED DEFENSE OF EMPLOYEE MISCONDUCT.

This Court should, alternatively, reinstate the Review Board's decision based on Original Roofing's established defense of employee misconduct. Under the standards outlined by the Review Board and under federal case law, OSHA was first required to prove a prima facie case, and **if** it did, Original Roofing may present evidence on the affirmative defense of "unpreventable employee misconduct." 1 AA 12–13, ¶¶18–20; *see also New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 108, 17 O.S.H. Cas. (BNA) 1650, 1995–1997 (2d Cir. 1996) ("Contrary to the Secretary's suggestion, the view of the majority of the Circuits—that unpreventable misconduct is an affirmative defense—**does not compel a holding that the employer bears the burden on the adequacy of its safety policy** in this case. The Secretary must first make out a *prima facie* case before the affirmative defense comes into play.") (citing *See L.E. Myers*, 818 F.2d at 1277) (emphasis added); *see also Terra*, 2016 WL 197128, at *2 (concluding that because OSHA failed to present evidence of foreseeability and relied solely on

imputed knowledge of misconduct from a supervisor's misconduct, the employer was not required to present rebuttal on its affirmative defense of employee misconduct); *W.G. Yates & Sons Constr. Co. Inc. v. Occupational Safety & Health Review Comm'n*, 459 F.3d 604, 609, 21 O.S.H. Cas. (BNA) 1609, 2006 WL 2193045 (5th Cir. 2006) ("By failing to conduct the foreseeability analysis before imputing [the supervisor's] knowledge, the ALJ effectively relieved the government of its burden of proof to establish a violation of the Act and placed on [the employer] the burden of defending a violation that had not been established).

Here, the Court found that OSHA failed to establish the element of knowledge, and, therefore, no prima facie case was established. As such, OSHA did not shift the burden for Original Roofing to establish the affirmative defense of "unpreventable employee misconduct." *See* 1 AA 12, ¶18–19.

Even if, however, this Court determines that substantial evidence did not support the Review Board's conclusion on OSHA's prima facie case, Original Roofing's affirmative defense of unpreventable employee misconduct was established. *Cf Terra Contracting Inc. v. Chief Administrative Officer of the Occupational Safety and Health Admin.*, 2016 WL 197128 (Nevada 2016) (unpublished); *Comtran Grp., Inc.*, 722 F.3d at 1318. Substantial evidence supports the Review Board's conclusion that Original Roofing had satisfied the

elements for the defense of unpreventable employee misconduct. *See* 1 AA 13, ¶¶20–23.

To establish the affirmative defense of "unpreventable employee misconduct," the employer must prove four elements: (1) established work rules designed to prevent the violation; (2) adequate communication of those rules to the employee; (3) steps taken to discover any violations of those rules; and (4) effective enforcement of those rules after discovering violations. *Terra Contracting*, 67270, 2016 WL 197128, at *2 (citing *Marson Corp.*, 10 BNA OSHC 1660 (No. 78–3491, 1982)); *see Pabco Gypsum*, 105 Nev. at 373, 775 P.2d at 703).

The Review Board found that Original Roofing, through its documentary evidence, established a safety plan to assert the defense of employee misconduct. 1 AA 13, ¶21. The Review Board foundd that Original Roofing's exhibit (2 AA 254–290) established, either directly or through reasonable inference: Work rules to prevent violation, adequate communication of the rules to its employees, programs designed to discover violations, and programs to enforce the rules. 1 AA 13, ¶21. Additionally, the Review Board found that the evidence that Original Roofing presented (s*ee* 2 AA 254–290) permitted a reasonable inference for support that Original Roofing had, after previous violations, embarked upon a course of retraining and enforcement to substantially reduce or eliminate past practices and must be given due weight under the facts and evidence presented,

including CSHO Lizarraga's testimony that he found no other violations by Original Roofing both initially and after reinspection. 1 AA 13, ¶22.

Substantial evidence supports the Review Board's findings on Original Roofing's defense of unpreventable employee misconduct. On appeal, this Court is to review the evidence that was before the Review Board and is not limited to only the specific evidence cited in the Review Board Decision. First, Original Roofing submitted evidence of detailed work rules and safety standards that were in place. 2 AA 278–279, 285–286; *see* generally 2 AA 254–290. These standards included significant training (*see* 1 AA 59; 2 AA 256–257, 270, 274, 276–277, 283), supervision (*see* 2 AA 150, 263, 268–269, 279, 287), and the employees' own statements revealing immediate awareness they violated an enforced company policy. *See* 1 AA 47:20–48:5; 2 AA 172–173. Original Roofing presented evidence that OSHA had performed 48 on-site inspections involving Original Roofing in 2015, and the company passed 47 of the inspections without a violation. 2 AA 271. This evidence supports the inference that there was a safety program in place requiring fall protection. *See id.* Lizarraga also testified that he inspected the Canyon Ridge jobsite after July 22, 2015, and he believed that he came across Original Roofing working at Canyon Ridge. 1 AA 47; 2 AA 176 (showing inspection "Date(s)" as 7/22/2015–9/11/2015). Lizarraga testified that he did not

recall there being fall protection or fall arrest issues the second time around. 1 AA 47:4–16.

Second, substantial evidence supports the Review Board's finding that Original Roofing adequately communicated those rules to its employees. *See* 2 AA 270, 273, 278–279, 282, 285–287; 1 AA 59. Original Roofing required employees to attend extensive training and thoroughly and repeatedly communicated fall prevention rules to employees. *See id.*

Third, substantial evidence supports the Review Board's finding that Original Roofing took steps to discover violations of the rules. Original Roofing presented evidence of a superintendent visiting worksites, who was actually scheduled to visit this worksite shortly after OSHA issued the proposed citation, and Original Roofing had a policy of writing up violations. 2 AA 150, 263, 268–269, 279, 287.

Finally, substantial evidence supports the Review Board's finding that Original Roofing provided effective enforcement of safety rules involving fall protection after discovering violations. Original Roofing had a bonus/incentive program based on safety compliance. 2 AA 279. Original Roofing also had a clear written policy that it would terminate any employee involved in an OSHA violation. 2 AA 279, 286. Workers also had their bonus pay impacted by informal violations including those that "may have resulted in an injury" specifically noted

as "fall protection." 2 AA 279, ¶3. The fact that the two workers involved here did not return to work and immediately quit their positions (*see* 2 AA 150, 221–222) demonstrates that Original Roofing had clearly set forth its enforcement policy, such that these two employees knew there was no tolerance for failure to follow the safety standards. Additionally, Original Roofing provided evidence of its detailed investment in safety and its training center, which included a mock roof to practice placing anchors. 2 AA 256–257; 1 AA 59 (referring to 2 AA 270). The safety program incorporated a retraining program for any violations. *See* AA 268–269, 287. In sum, Original Roofing provided ample evidence of its safety program, its strict requirements, its enforcement mechanisms in place, including regular site inspections and consequences for failure to follow its safety policies. Under these circumstances, substantial evidence supports the Review Board's finding that elements for Original Roofing's affirmative defense of "unpreventable employee misconduct" were established. Therefore, the Court should, alternatively, reinstate the Review Board's decision based on Original Roofing's established defense of employee misconduct.

VIII. CONCLUSION

In summary, the Court should reverse the District Court's order denying OSHA's petition for judicial review and reinstate the Review Board's decision favoring Original Roofing. The Review Board's decision is consistent with the

plain language of NRS 618.625 and the overall statutory scheme. As the Review Board correctly found, OSHA failed to present a prima facie case to support its proposed citation on the element of employer knowledge. Alternatively, the Court should reinstate the Review Board's decision based on Original Roofing's established defense of employee misconduct. Upon these grounds, Original Roofing respectfully requests relief from this Court.

Dated this 21st day of December, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 8,953 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S OPENING BRIEF** and **APPELLANT'S APPENDIX (Volumes 1–2)** were filed electronically with the Nevada Supreme Court on the 21st day of December, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Donald C. Smith

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

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/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing