BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 74048

THE ORIGINAL ROOFING COMPANY, LLC

Appellant,

vs.

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

Respondents.

Appeal from an Order Granting Petition for Judicial Review
Eight Judicial District Court of Nevada
District Court Case No. A-16-740022-J

RESPONDENT'S ANSWERING BRIEF

SALLI ORTIZ, ESQ.
Nevada Bar No. 9140
E-mail: sortiz@business.nv.gov
400 W. King Street, Ste. 201
Carson City, NV 89703
Telephone: (775) 684-7286
Facsimile: (775) 687-1621
Attorney for Respondent
DIVISION OF INDUSTRIAL RELATIONS

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 judges of this court may evaluate possible disqualification or recusal.

Appellant, THE ORIGINAL ROOFING COMPANY, LLC is a Nevada domestic limited liability Company, at all times in active status with the Nevada Secretary of State. THE ORIGINAL ROOFING COMPANY, LLC was represented in the District Court by Resnick & Louis, P.C.[1], but is represented in this Court by attorneys Micah S. Echols and Adele V. Karoum, of the law firm of MARQUIS AURBACH COFFING.

///

///

///

///

///

///

[1] In its Opening Brief, Original Roofing states that it was represented in the District Court by Selman Breitman LLP and Marquis Aurbach Coffing however, all of the submitted documents show only Resnick & Louis, P.C., as representatives. Original Roofing Opening Brief, pg. ii (NRAP 26.1 Disclosure); *see* 2 AA 319.

The NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION is a government agency, under the DIVISION OF INDUSTRIAL RELATIONS ("DIR") of the DEPARTMENT OF BUSINESS AND INDUSTRY. The NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION is represented by Division Counsel Salli Ortiz.

NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
DIVISION OF INDUSTRIAL RELATIONS

Salli Ortiz, Division Counsel
Nevada Bar No. 9140
Division of Industrial Relations
400 West King Street, Suite 201
Carson City, NV 89703
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

REGULATIONS

I. JURISDICTIONAL STATEMENT

This is an appeal of an underlying administrative agency Final Order issued by the Nevada Occupational Safety and Health Review Board ("Review Board") on June 14, 2016. Petitioner, Nevada Occupational Safety and Health Administration ("Nevada OSHA") filed a Petition for Judicial Review in the Eighth Judicial District Court of Nevada on July 14, 2016. The District Court issued an Order Granting Petition for Judicial Review by way of Summary Judgment on August 31, 2017. The Notice of Entry of Order was filed on September 1, 2017. Original Roofing timely filed its notice of appeal to the Supreme Court on September 22, 2017.

II. ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(4), being that this is an appeal involving an administrative agency.

III. STATEMENT OF THE ISSUES

The issue before the Supreme Court is whether the Review Board committed an error of law or was arbitrary or capricious in reversing Nevada OSHA's October 1, 2015, Citation and Notification of Penalty issuing a "Repeat Serious" violation of 29 CFR 1926.501(b)(11), and imposing a $5,600 penalty.

///

///

IV. STATEMENT OF THE CASE

This matter arises from an administrative Decision after a hearing conducted by the Review Board. Pursuant to Chapter 618 of the Nevada Revised Statutes, on October 1, 2015, Nevada OSHA issued a Citation and Notification of Penalty ("Citation") against The Original Roofing Company, LLC ("Original Roofing"), for a repeat serious violation relating to fall protection. 2 AA 175-186. On October 28, 2015, Original Roofing contested the Citation and, on November 18, 2015, Nevada OSHA filed its Complaint with the Review Board. 1 AA 69-89.

On December 8, 2015, Original Roofing provided its Answer to said Complaint. On December 10, 2015, the Review Board set the matter to be heard on March 9, 2015, later issuing a Corrected Notice of Hearing, scheduling the matter to be heard on March 9, 2016. 1 AA 89; 1 AA 92; 1 AA96.

The matter went before the Review Board on March 9, 2016. 1 AA 107:16. On April 19, 2016, the Review Board issued its Decision denying the Citation in its entirety. 1 AA106-120. The Findings of Fact, Conclusions of Law and Final Order was signed by the Chairman of the Review Board on June 13, 2016, and filed on June 14, 2016. 1 AA 131; 1 AA123. On July 14, 2016, Nevada OSHA filed its Petition for Judicial Review pursuant to NRS 233B.130. 1 AA 1-15. The District Court issued an Order Granting Petition for Judicial Review by way of Summary

Judgment on August 31, 2017. 2 AA 355-360. On September 22, 2017, Original Roofing filed its appeal from that Decision. 2 AA 361-372.

V. STATEMENT OF THE FACTS

On July 22, 2015, a Nevada OSHA Compliance Safety and Health Officer ("CSHO"), Aldo Lizarraga ("CSHO Lizarraga"), was assigned a programmed planned inspection of a multi-employer worksite located at 930 Carnegie Street, Henderson, Nevada. 2 AA 162. On that day, CSHO Lizarraga conducted an Opening Conference with the General Contractor, Juliet Property Company, and several sub-contractors, one of which was Original Roofing. 2 AA 149-150; 2 AA 164.

During the inspection, CSHO Lizarraga observed and photographed Original Roofing employees working on a roof, without fall protection. 2 AA 196-209. CSHO Lizarraga obtained statements from both of the Original Roofing employees who were not tied off, one of which was the Foreman. 2 AA 168-169. In these statements, both employees admitted they were not tied off. *Id.* The Foreman's statement said "it is easier to chalk the lines without [fall protection]". 2 AA169.

Based on CSHO Lizarraga's observations, photographic evidence, and employee and supervisor statements, Nevada OSHA issued a Citation to Original Roofing on October 1, 2015. 2 AA 176-184. The Citation contained the following alleged violation:

Citation 1, Item 1: 29 CFR 1926.501(b)(11):

> "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.
>
> At the Canyon Ridge Apartments, The Original Roofing Company, LLC., employees were performing roofing activities on a steep roof (slope of 5/12) without any means of fall protection in place. Without fall protection, employees were exposed to a fall hazard of approximately 23 feet and 1 ¾ inches. Employees were exposed to serious injuries in the event of a fall to the rocks and dirt below.
>
> The Original Roofing Company, LLC was previously cited for a violation of this occupational safety and health standard or its equivalent standard which was contained in OSHA inspection number 316841196, Citation 01, Item 001. The Final Order date of this inspection was 6-17-13.

The Citation item was classified as "Repeat Serious", with a proposed penalty of $5,600. 2 AA 185.

By letter received on October 28, 2015, Original Roofing contested the Citation. 2 AA 187. Nevada OSHA filed its Complaint with the Review Board on November 18, 2015. 2 AA 68-88. Original Roofing submitted its Answer to the Complaint on December 8, 2015. 1 AA 89. The matter was heard before the Review Board on March 9, 2016. 1 AA 107:16.

At the hearing, CSHO Lizarraga testified on behalf of Nevada OSHA. He testified as to his experience, investigation, direct observations, photographs, interview statements, Citation, and calculation of penalty. 1 AA 28:1-46:8.

CSHO Lizarraga testified that he personally observed employees (later identified as belonging to Original Roofing) working on a roof without any means of fall protection. 1 AA 32:4-13. CSHO Lizarraga stated that, during the inspection, one of those employees was identified to him as an Original Roofing foreman. 1 AA 33:11-15. In CSHO Lizarraga's interview with the Foreman, the Foreman admitted to working on the roof without fall protection. 1 AA 34:16-23. The other employee was interviewed and also admitted to working without fall protection. 1 AA 36:9; 2 AA168. Additionally, CSHO Lizarraga testified as to the photographs taken during the inspection, which clearly depict two individuals working on a roof without fall protection, once again identifying one of the individuals in the photographs as the Original Roofing Foreman. 1 AA 37:4-17; 2 AA196-209.

In further testimony, CSHO Lizarraga stated that employer knowledge of the fall protection violation at that time was established because the Foreman was present on the site and admitted that neither employee was wearing fall protection. 1 AA 39:12-24. In fact, testimony specifically discusses that Original Roofing had *actual* employer knowledge of the fall protection violation as the Foreman was present on site, and also *constructive* employer knowledge due to Original Roofing's previous history. 1 AA 39:20 through 40:3. Original Roofing was previously cited for two other similar violations in the past three years, in which the foremen present in each case also exposed themselves to the fall hazard. 1 AA 39:16-19; 1 AA 39:25

through 1 AA 40:3; 1 AA 41:8-9; 2 AA 211-239. CSHO Lizarraga admitted that, due to an oversite, only one of the previous violations was used to calculate the penalty in the current Citation. 1AA 42:3-19.

In cross examination, CSHO Lizarraga established that the employees did appear to have received training on fall protection (though both admitted they were not using it at that time of the inspection). 1 AA 47:22 through 1 AA 48:11.

Original Roofing presented no witness testimony, but did submit documentary evidence. 1 AA 56:7 through 1 AA 61:2; 2 AA 254-290.

The Review Board issued its Decision on April 19, 2016. 1 AA 106.

The Decision ultimately concluded that OSHA was unable to prove the "required proof element of 'employer knowledge'". 1 AA 112:23. To reach that conclusion, the Review Board had to ignore the evidence regarding the previous 2013 and 2011 Nevada OSHA inspections, which showed multiple foreman similarly involved in fall protection violations. *See* 2 AA 218-219; 2 AA 221; 2 AA 238. Instead, by disregarding the fact that OSHA had a signed statement and witness testimony that the Original Roofing Foreman himself was working without fall protection, and allowing an employee to do the same, the Review Board concluded that there was insufficient evidence to impute employer knowledge. 1 AA114:5-9 and 1 AA 119:11-15.

///

Assuming arguendo that employer knowledge of the violative condition was established, the Review Board further concluded by "reasonable inference" that Original Roofing had satisfied the affirmative defense of "employee misconduct", which would also negate the citation. 1 AA 116-129.

On June 14, 2016, the Findings of Fact, Conclusions of Law, and Final Order was entered, denying OSHA's Citation in its entirety. 1 AA 123-130.

VI. SUMMARY OF THE ARGUMENT

The District Court Order properly reversed the Review Board's Decision as the Review Board committed an error of law in reaching its Decision, which is also arbitrary, capricious, and characterized by abuse of discretion. The Review Board denied the existence of nearly 30 pages of evidence in order to conclude that Nevada OSHA had not established its prima facie case. In stark contrast, the Review Board found Original Roofing had met its burden to establish the affirmative defense of employee misconduct by "inferring" the required factors from documents generated *after* this 2015 inspection.

VII. ARGUMENT

A. Standard of Review

A reviewing court shall not substitute its judgment for that of an agency in regards to the weight of the evidence on a question of fact, nor may it revisit any credibility determinations. NRS 233B.135(3); Law Offices of Barry Levinson, P.C.

v. Milko, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008). The standard for such review is whether the agency's decision was clearly erroneous, arbitrary, capricious, or characterized by abuse of discretion. NRS 233B.135(3)(e) and (f); *see* Ranieri v. Catholic Community Services, 111 Nev. 1057, 1061, 901 P.2d 158, 161 (1995).

The court's review is confined to the record before the agency. Law Offices of Barry Levinson, 124 Nev. 355, 362. To be valid, the agency's decision must be supported by substantial evidence in the record. McCracken v. Fancy, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982). "The agency's fact-based conclusions of law are entitled to deference, and will not be disturbed if they are supported by substantial evidence." Law Offices of Barry Levinson, 124 Nev. 355, 362 (internal quotes and citations omitted). Substantial evidence has been defined as that evidence "which a reasonable mind might accept as adequate to support a conclusion." Schepcoff v. SIIS, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993).

Questions of law are reviewed de novo. *See* SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993). Statutory construction is a question of law which invites independent appellate review of the administrative decision. Maxwell v. SIIS, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993). However, the court must give deference to the agency's interpretation of statutes

that it administers. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694, 703 (1984).

In the instant case, the principal issue is whether substantial evidence supports the Review Board's conclusion that employer knowledge could not be imputed because the Foreman himself was engaging in the violative conduct. The Review Board's Decision was based on an analysis of a Nevada Supreme Court unpublished opinion, Terra Contr., Inc. v. Chief Administrative Officer of the OSHA, No. 67270, 2016 Nev. Unpub. Lexis 41, WL 197128 (Nev. Jan. 14, 2016).

In its Opening Brief, Original Roofing speaks to the standard of review established in Century Steel, Inc. v. Div. of Indus. Rels., 122 Nev. 584, 137 P. 3d 1155 (2016). However Original Roofing fails to acknowledge that a reviewing court shall not substitute its judgment for that of an agency in regards to the **weight** of the evidence on a question of fact, nor may it revisit any **credibility** determinations. NRS 233B.135(3); Law Offices of Barry Levinson, P.C. v. Milko, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008). The standard for such review is whether the agency's decision was clearly erroneous, arbitrary, capricious, or characterized by abuse of discretion. NRS 233B.135(3)(e) and (f); *see* Ranieri v. Catholic Community Services, 111 Nev. 1057, 1061, 901 P.2d 158, 161 (1995). Thus *only* the weight the Review Board attributed to the factual evidence submitted and any credibility determinations are not the subject of review in a higher court.

The Review Board made ***no*** credibility determinations in its April 19, 2016, Decision. Further, the weight the Review Board accorded to the evidence does not invalidate the complete misstatement of the evidence that was referenced in the Decision or Findings of Fact, Conclusions of Law and Final Order, nor does it validate a Decision that is arbitrary and capricious, or characterized by an abuse of discretion.

The issue before this Court is whether the Review Board's Decision is based upon substantial evidence in the record and whether the Review Board's Decision is arbitrary and capricious, or characterized by an abuse of discretion. While Original Roofing argues that the Review Board's Decision is "based on testimonial and documentary evidence in the record", it fails to speak to several issues and disregarded evidence that Nevada OSHA raised and addressed. Each of these issues will be taken in turn below.

B. Discussion

1. Nevada OSHA Properly Met Its Burden to Establish a Prima Facie Case of an OSHA Violation.

Nevada Administrative Code 618.788 places the burden of proof on Nevada OSHA, in order to establish a citable violation occurred. Specifically, Nevada OSHA must prove by a preponderance of the evidence that: (i) the cited standard applied to the condition; (ii) the terms of the standard were violated; (iii) one or more employees had access to the cited condition; and (iv) the employer knew, or

with the exercise of reasonable diligence could have known, of the violative condition. *See also* Astra Pharmaceutical Prods., 9 BNA OSHC 2126, 1981 CCH OSHD P25, 578 (No. 78-6247, 1981); Am. Wrecking Corp. v. Sec'y of Labor, 351 F.3d. 1254, 1261 (2003).

The Decision and Findings of Fact both acknowledge that factors (i) through (iii), as outlined above, were met by Nevada OSHA. The last factor, employer knowledge, remains contested. 1 AA 112:20-25 and 1 AA 126:19-24.

Knowledge that a work condition or policy violates an OSHA standard is not required, only knowledge of the work condition or policy itself. *See*, e.g., Phoenix Roofing Inc., 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) (Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation; it need not be shown that the employer understood or acknowledged that the physical conditions were actually hazardous), aff'd without published opinion, Phoenix Roofing v. Occupational, 79 F.3d 1146, U.S. App. Lexis 5107 (5th Cir. Tex. Feb. 16, 1996) (internal citations omitted). To be clear, a supervisor's knowledge of a hazardous condition is ordinarily properly imputable to the employer. Terra Contr., Inc. v. Chief Administrative Officer of the OSHA, No. 67270, 2016 Nev. Unpub. Lexis 41, *2-3 (Nev. Jan. 14, 2016); Dun-Par Engineered Form Co., 12 BNA OSHC 1962 (No. 82-928, 1986). Knowledge may also be established constructively by

showing that an employer could have known of the violative conditions if it had exercised reasonable diligence. *Id.*

As stated, constructive knowledge can be established by showing the employer could have known of the violative conditions if it had exercised reasonable diligence. While no Nevada court has done so, the Federal OSHA Review Commission has set forth criteria to be considered when evaluating "reasonable diligence":

> Reasonable diligence involves several factors, including an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence. . . Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe.

Pride Oil Well Service, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992) (internal quotes and citations omitted).

It was unrebutted that Nevada OSHA proved Original Roofing's supervisory foreman on site at the time of the inspection was working without fall protection, and that he supervised an employee who he knew was also working without fall protection. 1 AA 115: 5-7; 1 AA 126:1-5.

The Review Board acknowledged that, when a supervisor is aware of an employee's violation of a safety standard, imputation to the employer of constructive knowledge is generally proper. The Review Board goes further and states:

///

> [I]f a supervisory employee is involved in self-misconduct or failures (sic) to enforce safety compliance, that too can be subject of imputation under established Review Commission, Federal District Court, and Nevada Law. *Division of Occupational Safety and Health vs. Pabco Gypsum*, 105 Nev. 371, 775 P. 2d 701 (1989). *Terra Contracting, Inc. vs. Chief Administrative Officer of the Occupational Safety and Health Administration, et al., citing ComTran Grp., Inc. V. U.S. Dep't of Labor*, 722 F. 3d 1304, 1316 (11 Cir. 2013).

1 AA 114:21 through 1 AA 114:1.

Further citing the unpublished Terra Contracting case, the Review Board clarified that, when the supervisor is himself involved in the violative behavior, employer knowledge turns on the issue of **foreseeability** by the employer that the supervisor would fail to adhere to, or enforce the safety standards.

Though the Decision correctly states that the Terra Contracting Court gave guidance on when this imputation is appropriate, the Review Board concluded that the submitted evidence did not support a finding of foreseeability.

> In applying the facts in evidence to the rationale set forth by the Nevada Supreme Court in *Terra, supra*, there was insufficient competent preponderant evidence of foreseeability on the part of the … employer upon which to base imputed employer knowledge of violation of the cited standard.

1 AA 115:14-18.

However, this broad statement ignores Original Roofing's *history* of foremen not following and/or enforcing fall protection standards. 2 AA 211- 239. Nevada OSHA provided documentary and testimonial support of two separate

inspections (Numbers 316841196 and 315998567, conducted in 2013 and 2011, respectively) which involve foremen and employees actively engaging in the same violative conduct at issue in the current inspection. 2 AA 218-219; 2 AA 221; 2 AA 238; 1 AA 39:16-19. Of note, even the fall protection citation issued as a result of the 2011 inspection was also classified as "repeat", due to two previous fall protection citations, in 2007 and 2008. 2 AA 237. While those two citations were outside of the five-year period for enhancing the current Citation, that information still speaks to Original Roofing's actual or constructive knowledge of its employees', and more specifically its foremen's, failure to abide with its safety policies. 2 AA 211-239.

Based on this history of its foremen failing to follow and enforce fall protection standards, Original Roofing through reasonable diligence should have been able to foresee violative conduct amongst its current foremen. **Yet it did nothing to verify safety policies were being followed and enforced.**

Additionally, the Foreman of the subject inspection only completed his new hire training on June 16, 2015, barely one month prior to this OSHA inspection. 2 AA 280. No information was provided by Original Roofing regarding the content of that new-hire training, the length of the training, who it was provided by, or where it was provided. Regardless, the Foreman of the subject inspection was still under a 90-day probationary period. 2 AA 281. Despite this, Original Roofing

again took no steps to ensure its ***newly-hired*** Foreman knew, and was following and enforcing, safety rules[2].

Although Nevada OSHA provided unrefuted documentary and testimonial support of Original Roofing's history of foremen involved in the fall protection violations, and the fact that the specific Foreman involved in this case was newly-hired, the Review Board conversely concluded that there was no foreseeability:

> [T]here was insufficient competent preponderance evidence of foreseeability on the part of [Original Roofing] upon which to base imputed employer knowledge of violation of the cited standard. **[Nevada OSHA] asserted in closing argument, *but offered no evidence*, that the employer had previously engaged foremen to supervise its jobs in the past who failed to enforce fall arrest safety requirements.**

1 AA 115:15-21 (emphasis added); *accord* 1 AA 116:17-20; *see* 1 AA 129:5-11. Further, the Review Board states "There was no competent evidence, (sic) the employer had previously engaged foremen to supervise its jobs who failed to enforce fall arrest safety requirements." 1 AA 116:21-23; *see* 1 AA 128:8-10.

On its face, the Review Board negates the existence of the nearly 30 pages of Nevada OSHA's documentary support detailing Original Roofing's previous

---

[2] Despite Original Roofing's contention that the Superintendent was due to visit the worksite on the day of the Nevada OSHA inspection, there was no evidence submitted to support that. *See* Original Roofing's Opening Brief, pg. 37.

violations in which foremen were supervising, and engaged in, the violative conduct. *See* 2 AA 211-240. The violation Worksheet for each citation, in 2013 and 2011, even provide the specific names of the foremen involved in the violative conduct. 2 AA 218-219; 2 AA 238.

Original Roofing raised no argument to question or invalidate these prior, properly-issued Nevada OSHA citations, nor the respective 2013 and 2011 inspection documents. Original Roofing blatantly ignores the 2011 Citation, Inspection No. 315998567, issued to Original Roofing. Throughout its Opening Brief, Original Roofing only makes mention of the 2013 Citation, Inspection No. 316841196, as a basis for classifying the citation at issue as "Repeat Serious". Though this was the only citation used in the calculation of the penalty (adding a 2 times multiplier), this certainly was not the only citation used to impute employer knowledge. *See* 2AA 171.

Nevada OSHA provided 19 pages of documentary support of an additional substantially similar citation issued in 2011, Inspection No. 315998567, noting this 2011 Citation was also classified as a "Repeat Serious" due to two previous fall protection citations in 2007 and 2008. 2 AA 231-250. Most importantly, the 2011 Citation ignored by Original Roofing and the Review Board involved facts similar to the Citation at issue. Both the testimonial and documentary evidence submitted to the Review Board, regarding the 2011 Citation, provided that Original Roofing's

foremen and employees were *actively* engaging in the *same* violative conduct. 2 AA 218-219; 2 AA 221; 2 AA 238; 1 AA 39:16-19. **This evidence was *undisputed.*** *Id.* The 2011 Citation not only contributes in imputing employer knowledge, it further emphasizes foreseeability of violative conduct amongst Original Roofing's foremen.

This complete disregard of the 2011 Citation by Original Roofing in its Opening Brief reflects the identical action by the Review Board which found there was "no evidence [offered], that the employer had previously engaged foremen to supervise its jobs in the past who failed to enforce fall arrest safety requirements." 1 AA 114:15:21; *accord* 1 AA 115:17-20; *see* 1 AA 128:5-7. Because this Review Board finding/conclusion is *blatantly against* the unrefuted facts and evidence submitted before it, its findings are not entitled to deference. **Denying the existence of the evidence that was submitted and undisputed, renders the Review Board's Decision as arbitrary and capricious, and characterized by abuse of discretion.** NRS 233B.135(3)(e) and (f); *see* Raineri v. Catholic Community Services, 111 Nev. 1057, 1061, 901 P.2d 158, 161 (1995).

An agency's fact-based conclusions of law that are supported by substantial evidence are entitled to deference. Law Offices of Barry Levinson, 124 Nev. at 362. Here, the Review Board finds, and then concludes as a matter of law, that Nevada OSHA "offered no evidence, that [Original Roofing] had previously engaged foremen to supervise its jobs in the past who failed to enforce fall arrest

safety requirements". 1 AA 114:15-21. There is no evidence in the record to support this fact-based conclusion of law. In fact, the only uncontested evidence that was submitted to the Review Board indicates that Original Roofing has had *multiple* such incidents wherein its foremen either failed to enforce or were actually in violation of fall arrest safety requirements. 2 AA 211-240. The Review Board utilized its erroneous finding to then conclude that it was not foreseeable that Original Roofing's **newly-hired** Foreman in this 2015 inspection would fail to enforce its safety standards. 1 AA 116:17-23; 1 AA128:5-17. **As such, the Review Board's conclusion regarding foreseeability is *not* supported by substantial evidence and not entitled to deference.**

Furthermore, the Review Board acted in an arbitrary and capricious manner and abused its discretion because it effectively ignored the uncontested evidence regarding Original Roofing's history of incidents involving foremen failing to follow and enforce fall protection standards, by stating that Nevada OSHA "offered no evidence".

The Review Board made no mention of the fact the Foreman was newly-hired. It did, however, "assume" said foreman was "qualified...to supervise employees" when hired. 1 AA 120:6. There is no support in the record for this assumption.

///

By denying the existence of the substantial documentary evidence on this point, that unequivocally proves the past failure by multiple foremen of Original Roofing to enforce fall protection standards, the Review Board's Decision is arbitrary, capricious, and characterized by abuse of discretion.

NRS 233B.135(3)(e) and (f); *see* Ranieri, 111 Nev. 1057. Accordingly, the District Court found that the Review Board "had insufficient evidence to support the Findings of Fact and Conclusions of law", and that it did not cite to any evidence to support its Decision. 2 AA 359:19-22.

2. Original Roofing DID NOT Establish the Affirmative Defense Of Employee Misconduct.

To establish the affirmative defense of employee misconduct, four (4) factors must be shown by the employer:

- The employer established work rules to prevent the violation from occurring;
- The employer adequately communicated those rules to its employees;
- The employer took steps to discover violations of those rules; and
- The employer effectively enforced the safety rules and took disciplinary action when violations were discovered.

See Capform, Inc., 16 OSHC BNA 2040, 2043 (No. 91-1613, 1994); Randy S. Rabinowitz, Occupational Safety and Health Law, 156 (2d Ed. 2002); Tr. 49:15-22. **If any one of these factors is lacking, the defense fails.**

///

Original Roofing does have a rule prohibiting the violative conduct, i.e., working above six feet without being tied off. *See* 2 AA 278. That is the only "employee misconduct" factor shown by Original Roofing.

The remaining three factors were not established.

Ordinarily, training records can be used to establish "effective communication" of a safety rule. Here, Original Roofing submitted **no evidence** of what training it provided to its foremen/employees **prior** to this July 2015 Nevada OSHA inspection. There was no information offered regarding the content, frequency, or length of any training, nor who training was provided by, or where it was provided.

No other information was provided to establish that the fall protection safety rule was adequately communicated to the employees. Instead, Original Roofing simply provided several forms given to the employees as part of the new-hire packet. 2 AA 273-286. One of those forms indicated that, by their signatures, the employee and the Foreman each read and understood that policy. 2 AA 278-285. Just because an employees' signature is affixed to a form does not constitute "adequate" communication, it simply establishes "communication". Additionally, these forms were signed just before the Nevada OSHA inspection; 2 days before by the employee, and 37 days before by the Foreman. *Id.* The almost immediate

violation of the policy by both new employees indicates the policy was *not* adequately communicated.

Throughout its Opening Brief, Original Roofing states that the employees involved in the citation were present at orientation and signed substantial documents acknowledging they received fall protection training and equipment. 2 AA 327:8-27. Nevada OSHA is not disputing that these employees did indeed sign the voluminous new-hire packet. However, Nevada OSHA is questioning the *adequacy* of communication of such training received on that date, a key element in establishing the affirmative defense of employee misconduct. Simply because an employer can provide signed documents does not establish adequacy of training. *See* Capform, Inc., 16 OSHC BNA 2040, 2043 (No. 91-1613, 1994); Randy S. Rabinowitz, Occupational Safety and Health Law, 156 (2d Ed. 2002); s*ee also* 1 AA 59:15-22. As these forms are dated days prior to the OSHA inspection, it is *reasonable* to question the adequacy of such training given the almost immediate violation of the policy by both employees. *See* 2 AA 273-286. Once again, though the Employer provided signed documents, there was no evidence presented regarding content, frequency, length of training, nor who the training was provided by, or where it was provided.

///

///

Again, both employees were new-hires, still within the 90-day probationary period, who had each signed these forms as part of a voluminous new-hire packet. *See* 2 AA 274-281.

Despite this, Original Roofing also did not establish that it took steps to discover violations of that rule. **No evidence** was submitted regarding the supervision of these two new hires, to ensure their compliance with safety standards. In fact, no information was given regarding Original Roofing's policy on supervising new-hires in general, making it impossible to determine if there was a breakdown of that policy in this case.

Similarly, **no evidence** was given regarding Original Roofing's policies on worksite inspections, checklists, or any proposed method in which to verify in general employees' compliance, or lack thereof, with safety standards.

What was submitted was a brief outline of a "site inspection" strategy[3], a photograph of a single safety audit, and a photograph of a "final" safety audit, all of which were dated *months after* the Nevada OSHA inspection. 2 AA 260; 2 AA 261; 2 AA 262. As such, each would be considered part of the abatement of the Citation. **No evidence** was provided of any steps taken *before* the Nevada OSHA inspection to discover safety violations by the two newly-hired employees.

---

[3] While undated, the site inspection strategy, which places the duty to ensure workers are following safety policies on the superintendents, contains pictures date stamped "10/08/2015", two and a half months after the Nevada OSHA inspection.

The final factor, effective enforcement of any rule violations discovered, was also not established.

Original Roofing did not provide any evidence regarding its disciplinary policy, if one exists. Without that, there is no information on what range of disciplinary actions Original Roofing utilizes, whether it's a progressive disciplinary plan, what triggers disciplinary action, whether discipline differs based on the type of offense, or even who is responsible for administering it. More importantly, there is no showing the employees involved in this inspection were made aware or understood the disciplinary policy, if any existed at that time.

Instead, Original Roofing only provided several written safety violation sheets. 2 AA 263-269. However with the exception of one illegible one, which Original Roofing indicates was written in 2012, all of the disciplinary records are dated ***after*** this Nevada OSHA inspection. *Id.* Moreover, as these are all the disciplinary records provided, there is no indication that either the employees or foremen involved in the previous 2011 or 2013 Nevada OSHA inspections were disciplined for working at heights without fall protection.

Again, Original Roofing provided a lone disciplinary record allegedly done in 2012. No disciplinary records were provided for any employees involved in the established fall protection violations found in the 2011 and 2013 inspections. As such, the lone 2012 disciplinary record, with undeniable fall-protection violations

by several employees before and after 2012, cannot establish "effective" enforcement of the safety rule.

The bulk of the remainder of Original Roofing's documentary evidence details several irrelevant factors for establishing an employee misconduct defense. 2 AA 254-290. These include the names of personnel, safety expenses, its training facility, and various photographs, which depict neither the relevant time, date, nor context. 2 AA 255-259; 2 AA 270-271.

Across the board, the documentary evidence submitted by Original Roofing does not provide substantial evidentiary support of an effectively-communicated work rule, steps to discover violations, or of consistent/progressive disciplinary action, prior to this inspection. At most, Original Roofing shows it is *now* addressing those issues, following this 2015 Nevada OSHA inspection.

Of note, Original Roofing had no witness testimony to supplement its submitted evidence. Instead, Safety Manager Kelly expounded on Original Roofing's documents exclusively in the Closing Argument. 1 AA 56-61:2. Per the standard practice at the Review Board's hearings, Nevada OSHA did not have the opportunity to rebut the allegations and assumptions forwarded by Original Roofing during its Closing Argument, which it claimed were supported by its submitted documents.

///

In an effort to establish steps Original Roofing took to discover violations, a factor in establishing the affirmative defense of employee misconduct, Original Roofings's Opening Brief ignores the fact that most of Original Roofing's "disciplinary records" are dated ***after*** the subject OSHA inspection. 2 AA 260; 2 AA261; 2 AA 262; 2 AA 264-269. Original Roofing broadly states that it "presented evidence of a safety training program, safety policies, and its adequate communication and enforcement of policies." Original Roofing Opening Brief, pg. 11. Original Roofing fails to address the fact that its training records, penalty structure, incentive policy and steps to find and prevent misconduct were primarily **dated after the inspection date**. 2 AA 260; 2 AA261; 2 AA 262; 2 AA 264-269. Original Roofing attempts to discredit NV OSHA's argument, regarding the lack of testimony to support Original Roofing's position, based solely on Safety Manager Kelly's Closing Arguments. Not only are Closing Arguments not given under oath but, pursuant to the Review Board's standard practice, there was no opportunity to rebut the allegations and assumptions forwarded by Safety Manager Kelly in his Closing Arguments. By accepting these unsupported arguments as "substantial evidence" of Original Roofing's position, the Review Board inappropriately shifts the burden from Original Roofing to establish its defense. *See* Capform, Inc., 16 OSHC BNA 2040, 2043 (No. 91-1613, 1994); Randy S. Rabinowitz, Occupational Safety and Health Law, 156 (2d Ed. 2002). Instead,

Original Roofing chose to rely solely on its submitted evidence, the majority of which was dated ***after*** the inspection date. 2 AA 260; 2 AA261; 2 AA 262; 2 AA 264-269. As discussed previously, **the Review Board cannot rely on post-dated evidence to substantiate an *existing* policy or plan**. As such, there is no deference to be given to the findings and conclusions of the Review Board, when there was no testimony or documentary evidence submitted that can be relied upon.

Any documents submitted by Original Roofing dated *after* the inspection date are wholly irrelevant to the Review Board's determination. Furthermore, Original Roofing's reliance on its safety costs, plan, discipline records or other evidence is irrelevant when taken as whole, if the Employer fails to establish any of the four factors of employee misconduct. As detailed supra, Nevada OSHA asserts that the factors of adequate communication, steps to discover violations, and enforcement/disciplinary actions were not established by Original Roofing at the time of the 2015 Nevada OSHA inspection.

Overall, Original Roofing did not meet its burden to establish an employee misconduct defense.

Of note, Original Roofing does not explain what *pre-inspection* evidence establishes each of the necessary factors required for the affirmative defense, simply stating "The Review Board found that Original Roofing had presented evidence establishing the elements for unpreventable employee misconduct."

Original Roofing Opening Brief, pg. 17.

As stated, despite the fact that Original Roofing did not establish three out of the four requirements of the affirmative defense, and that the lack of even one factor negates the entire defense, the Review Board concludes that this documentary evidence:

> [E]stablished a recognized safety plan upon which [Original Roofing] is entitled to rely in asserting the defense of employee misconduct. The Exhibit established "work rules designated to prevent violation." The evidence of training and references at [Original Roofing's] Exhibit A demonstrated adequate communication of the rules to its employees. The programs identified to discover violations and enforce the rules were either directly set forth or reasonably inferred from the documentation.

1 AA 117:25 through 118:4; 1 AA130:7-17.

Nowhere in Original Roofing's Exhibit is there a detailed "safety plan". The documents provided regarding safety information, while undated, provide clues that the packet was put together *after* this July 2015 Nevada OSHA inspection. 2 AA 254-262. Specifically: 1) the title sheet lists the date of the inspection, along with the inspection number; 2) the 2015 Safety Costs include December 2015 costs; 3) the pictures included in the Site Inspections page are date-stamped 10/08/2015; 4) the Job Site Safety Audit is dated 1/19/16; and 5) the Final Safety Audit is dated 2/9/16. 2 AA 254; 2 AA 256; 2 AA 260-262. The rest of Original Roofing's Exhibit consists of the two exposed employees' new-hire packets and, with the possible exception of one disciplinary record allegedly written in 2012,

documents generated *after* the July 2015 Nevada OSHA inspection. As such, it is unclear how the Review Board could properly rely on this Exhibit to find Original Roofing established the four factors necessary for an employee misconduct defense.

There is no evidence to support "adequate communication" of the safety rule, beyond a signature on a page. While this establishes communication, it is unclear how it establishes the *adequacy* of that communication.

There is no evidence of any steps Original Roofing took, prior to this Nevada OSHA inspection, to discover violations of the safety rule.

While there is one disciplinary write-up, allegedly written in 2012, there is nothing following the 2011 and 2013 OSHA inspections. All other disciplinary records were written ***after*** this Nevada OSHA inspection.

The Review Board states that Original Roofing's Exhibit "permits reasonable inference from the documentary evidence for support of its opposing argument that the employer had, after previous violations, embarked upon a course of retraining and enforcement". 1 AA 118:5-10; 1 AA 130:13-17. The Review Board gave no explanation on how that was possible, given the fact that the vast majority of relevant documents were created/dated after the 2015 Nevada OSHA inspection.

/ / /

As shown above, the submitted safety information and training documents were created, and all but one disciplinary record were dated, ***after*** the 2015 Nevada OSHA inspection. No information was provided regarding employee training, steps to discover safety rule violations, or a disciplinary policy before the July 2015 Nevada OSHA inspection. Because of that, it is arbitrary, capricious and an abuse of discretion to *infer* that Original Roofing embarked on an adequate course of retraining and enforcement ***prior*** to this inspection.

At most, the Review Board would have only Original Roofing's Closing Argument on which to rely to sustain this inference. As those are unsworn statements, unsupported by the documentary evidence and with no opportunity for Nevada OSHA to have challenged them, exclusive reliance on the Closing Argument of counsel to establish these requirements is an error of law.

Overall, since the Review Board does not cite specifically to any of the submitted evidence, it is uncertain what the Review Board relied on to conclude Original Roofing had met its burden to establish this defense.

In order for Original Roofing to rely on the affirmative defense of employee misconduct, it had the burden to establish each of the four requirements through the evidence. That was not done here.

The Review Board concluded "reasonable inference from the documentary evidence for support of" Original Roofing's affirmative defense argument. 1 AA

118:5-10. **Employee misconduct cannot be inferred based on speculation by the Review Board.** As shown by the entire Decision, the Review Board did not, and cannot, cite to specific documents in the record which support three out of the four necessary elements for that defense.

As such, the Review Board committed an error of law in reaching its Decision. Alternatively, in regards to Original Roofing's affirmative defense, the Review Board's Decision is also arbitrary, capricious, and characterized by abuse of discretion. NRS 233B.135(3)(e) and (f); *see* Ranieri, 111 Nev. 1057.

3. The Review Board's Finding, that the 2013 Violation Found in Inspection 316841196 Involved Different Facts, is Against the Submitted Evidence.

In its Decision, and the Findings of Fact/Conclusions of Law, the Review Board states that the 2013 violation, upon which this Citation's "repeat" classification is based, occurred under "different facts". 1 AA 116:23-27; 1 AA 129:11-18. Because of that, there is no "preponderant evidence to support constructive imputation of employer knowledge relying upon foreseeability". *Id.*

This position is unequivocally against the submitted evidence.

One of the required documents that must be filled out for any citation issued is a violation Worksheet. This document provides specific information that establish the citation.

The Worksheet for the 2013 citation, inspection number 316841196, specifically states under "Employer Knowledge" and "Comments" that the Foreman and his employee were both working on a roof without fall protection. 2 AA 218-219.

In the Settlement Agreement for that inspection, the only change to the citation was the penalty amount. 2 AA 211-212; *see* 2 AA 213-215.

Thus the Review Board's finding that the facts of the 2013 inspection were different, leading to the conclusion that no preponderant evidence supported constructive employer knowledge now, is against the substantial evidence.[4]

This premise was what the Review Board stated it was relying on in finding and concluding that there was no support for constructive employer knowledge of the violative condition. That premise is indisputably against the submitted evidence. Accordingly, the Review Board committed an error of law in reaching its Decision.

VIII. CONCLUSION

For the reasons set forth above, the Decision, Findings and Fact, Conclusions of Law and Final Order of the Review Board, denying Citation 1, Item 1, should be REVERSED.

---

[4] Additionally the 2011 citation, inspection number 315998567, contained the information that the foreman was working on a roof without fall protection in the language of the citation itself. 2 AA 234. This was supported by the violation Worksheet. 2 AA 238-239. This inspection was also resolved with a Settlement Agreement. 2 AA231-232.

The Review Board committed an error of law in reaching its Decision, which is also arbitrary, capricious, and characterized by abuse of discretion. The Review Board denied the existence of nearly 30 pages of evidence in order to conclude that Nevada OSHA had not established its prima facie case. In stark contrast, the Review Board found Original Roofing had met its burden to establish the affirmative defense of employee misconduct by "inferring" the required factors from documents generated *after* this 2015 inspection.

Accordingly, the District Court's August 31, 2017, Order should be AFFIRMED.

NEVADA OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION
DIVISION OF INDUSTRIAL RELATIONS

Salli Ortiz, Division Counsel
Nevada Bar No. 9140
Division of Industrial Relations
400 West King Street, Suite 201
Carson City, NV 89703
Telephone: (775) 684-7286
Attorney for Respondent

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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 or

[ ] This brief has been prepared in a monospaced typeface using Microsoft Word with _____.

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:

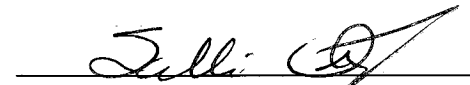
[X] Proportionately spaced, has a typeface of 14 points or more, and contains 8362 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate 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 19th day of January, 2018.



Salli Ortiz, Esq.,
Nevada Bar No. 9140
Division of Industrial Relations
400 West King Street, Suite 201
Carson City, NV 89703

AFFIRMATION

PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Respondent Division of Industrial Relations' Answering Brief filed in or submitted for Supreme Court Case **74048.**

[X] Does not contain the social security number of any person

or

Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____

or

B. For the Administration of a public program or for an application for a federal or state grant.

Dated this 19th day of January, 2018.

Salli Ortiz, Division Counsel
Nevada Bar No. 9140
Division of Industrial Relations
400 West King Street, Suite 201
Carson City, NV 89703
Attorney for Respondent

PROOF OF SERVICE

Pursuant to NRAP 16, I hereby certify that I am an employee of the State of Nevada, Department of Business and Industry, Division of Industrial Relations, and that on this date, I caused to be served the true and original document described herein by the method indicated below, and addressed to the following:

Document Served: **Respondent's Answering Brief**

Jess Lankford CAO OSHA
Division of Industrial Relations
1301 N. Green Valley Pkwy #200
Henderson, NV 89074
(Courtesy Copy)

_____ **Via State Mail room** (regular or certified) circle one
_____ **Deposited directly with U.S. Mail Service**
_____ **Overnight Mail**
__X__ **Interdepartmental Mail**
_____ **Hand Deliver**
_____ **Facsimile fax number:** _____

Marquis Aurbach Coffing
Micah S. Echols, Esq.,
Adele V. Karoum, Esq.
10001 Park Run Drive
Las Vegas, NV 89145

__X__ **Via State Mail room** (regular or certified) circle one
_____ **Deposited directly with U.S. Mail Service**
_____ **Overnight Mail**
_____ **Interdepartmental Mail**
_____ **Hand Deliver**
_____ **Facsimile fax number:** _____

DATED this 19th day of January, 2018.

_____
State of Nevada Employee

R:\Legal\Supreme Court 1999 to current\FINAL Sup Ct-DIR Answering Brief Original Roofing.docx