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 REPLY BRIEF

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I. INTRODUCTION

The Review Board correctly found, based on the evidence submitted by both parties, that 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") failed to meet its burden in a citation against Original Roofing Company, LLC ("Original Roofing"). 1 AA 124–132. After the District Court erroneously reversed the Review Board's decision, based on a reweighing of the evidence, Original Roofing filed this appeal. Original Roofing's opening brief set forth the substantial evidence supporting the Review Board's findings and conclusions, which relied upon the evidence. In its answering brief, OSHA attempts to reargue its entire case, and improperly requests that this Court reweigh various findings of fact.

In this reply brief, Original Roofing first redirects this Court to the correct standard of review and explains that OSHA is attempting to reargue the facts of its case. Second, Original Roofing describes the evidence supporting the Review Board's decision and explains why substantial evidence supports the decision of the Review Board, including how previous violations and supervisor conduct were interpreted under the applicable legal standards. Finally, Original Roofing argues, in the alternative, that the defense of employee misconduct applies in this case, and OSHA's argument that Original Roofing did not provide evidence on the elements

is incorrect. Therefore, Original Roofing respectfully requests that this Court reverse the District Court order granting the petition for judicial review, and reinstate the decision of the Review Board.

II. LEGAL ARGUMENT

A. OSHA IMPROPERLY REQUESTS THAT THIS COURT APPLY A DIFFERENT STANDARD BY SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE REVIEW BOARD.

OSHA improperly requests that this Court apply a different standard by substituting its own judgment for that of the Review Board. In an appeal of a petition for judicial review, the "question is whether the board's decision was based on substantial evidence; neither this court, nor the district court, may substitute its judgment for the administrator's determination." *McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982) (citing *Varela v. City of Reno Civil Serv.*, 97 Nev. 575, 635 P.2d 577 (1981); *No. Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 278, 429 P.2d 66 (1967)). OSHA acknowledges this standard (*see, e.g.*, Respondent's Answering Brief ("RAB") 7–8), but does not apply this standard, and, instead, suggests that this Court should reweigh the evidence that was before the Review Board. Yet, substantial evidence supports the Review Board's findings in favor of Original Roofing, and the decision of the Review Board should be reinstated. *See* 2 AA 124–132; *State Emp. Sec. Dept. v. Hilton Hotels Corp.*, 102 Nev. 606, 608 n. 1, 729 P.2d 497, 498 n. 1 (1986) (explaining

that the Court will not reverse an administrative agency's factual finding even if "it is against the great weight and clear preponderance of the evidence"). A reasonable mind could accept the supporting evidence that was before the Review Board to uphold the factual findings favoring Original Roofing. 1 AA 124–132.

Tellingly, OSHA attempts to reframe the issues presented in this appeal to avoid the applicable standards of review. First, OSHA argues that "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." RAB 9. But, this is **not** the principal issue on appeal. The principal issue is whether substantial evidence supports the Review Board's decision, based on a finding that OSHA failed to present a prima facie case to support its citation. Original Roofing has addressed two components for this Court to uphold the Review Board's finding: (1) imputed knowledge based on supervisor actions; and (2) prior actions to establish employer knowledge. Very simply, there was substantial evidence to support the Review Board's findings that OSHA did not meet its burden on the element of employer knowledge. *See Taylor v. State, Dep't of Health & Human Servs.*, 314 P.3d 949, 951 (Nev. 2013).

OSHA argues that Original Roofing "fails to speak to several issues and disregarded evidence that Nevada OSHA raised and addressed." RAB 10. OSHA's misguided approach amounts to engaging in a **reweighing** of the

evidence, which is prohibited. *See State v. Ruscetta*, 123 Nev. 299, 304, 163 P.3d 451, 455 (2007) (stating that this Court does not act as a fact finder). Original Roofing is not required to address every issue OSHA previously raised in the Review Board hearing for this appeal, particularly because Original Roofing prevailed before the Review Board. *See Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 739, 192 P.3d 243, 252 (2008) (prevailing party entitled to inferences). Original Roofing has properly presented the substantial evidence supporting the findings of the Review Board. Therefore, the Review Board's decision should be reinstated.

B. THE 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.

The 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. In its answering brief, OSHA improperly combines the two different issues presented in Original Roofing's opening brief: (1) imputed knowledge based on supervisor actions; and (2) prior actions to establish employer knowledge. *See* RAB 11–19. OSHA argues that a supervisor's actions **can be** imputed to an employer based on prior conduct by other employees of Original Roofing. RAB 13.

OSHA's entire analysis requests a prohibited reweighing of the evidence. *See Ruscetta*, 123 Nev. at 304, 163 P.3d at 455. First, OSHA argues that evidence from violations in 2013 and 2011 demonstrated that the conduct in 2015 was foreseeable. RAB 13–14. Second, OSHA argues that Original Roofing did not provide information of the conduct of new-hire training, the length of the training, who provided it, or where it was provided. RAB 14. Third, OSHA asks this Court to look at 2011 and 2013 citations for this Court to reweigh these citations to show knowledge, contrary to the findings of the Review Board. *See* RAB 14; 1 AA 116:23–27. Fourth, OSHA presents evidence and arguments about when the Original Roofing foreman was trained, as supporting its own arguments. RAB 14. Finally, OSHA generally asks this Court to take a different view of the evidence (e.g., arguing that Original Roofing "did nothing to verify safety policies were being followed and enforced") (RAB 14), despite clear evidence outlined in the opening brief demonstrating just the opposite. Appellant's Opening Brief ("AOB") 10–15. Therefore, the Review Board's decision on OSHA's failure to prove a prima facie case is supported by substantial evidence.

C. OSHA INCORRECTLY ARGUES THAT THE REVIEW BOARD "NEGLECTED" OSHA'S POSITION ON PRIOR VIOLATIONS.

OSHA incorrectly argues that the Review Board "neglected" OSHA's position on prior violations. For example, OSHA claims that the "Review Board

negates the existence of nearly 30 pages of Nevada OSHA's documentary support detailing Original Roofing's previous violations. . . ." RAB 15–16 (citing 2 AA 211–240). However, it is clear from the Review Board's findings that previous violations were considered. *See, e.g.*, 1 AA 116:21–27 (Review Board Order stating, "The previous violation at Exhibit 1, page 68, submitted as evidence to support a finding of "repeat" under different facts is not preponderant evidence to support constructive imputation of employer knowledge relying upon foreseeability that this employer should have known that foreman Cortez would not enforce tie off."). OSHA is requesting this Court to tell the Review Board **how** it should have considered OSHA's evidence of prior violations. *See, e.g.*, RAB 17 ("The 2011 Citation not only contributes in imputing employer knowledge, it further emphasizes foreseeability of violative conduct amongst Original Roofing's foreman."). In an appeal of a petition for judicial review, this Court defers to the findings of the administrative body. *See* AOB 7–8; *Taylor*, 314 P.3d at 951; *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986). Very simply, this Court cannot direct the fact finder to believe or disbelieve certain evidence. *See Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 487, 117 P.3d 219, 223 (2005); *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004).

1. Substantial Evidence Supports the Review Board's Conclusion That Employer Knowledge Could Not Be Inferred Due to Lack of Foreseeability.

Substantial evidence supports the Review Board's conclusion that employer knowledge could not be inferred due to lack of foreseeability. *See* 1 AA 7–15; AOB 23–29. NRS 618.625(2) clearly states the requirements for the existence of a serious violation. Its plain language excludes violations when "the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation." NRS 618.625(2); AOB 24. The statute specifically refers to the presence of "**the violation**," not just any violation. The Review Board, examining the evidence before it, found that there was insufficient evidence to establish imputed knowledge of the specific violation in this case. 1 AA 127:18–24; AOB 25. The Review Board relied upon *Terra Contracting v. Chief Administrative Officer of the Occupational Safety and Health Admin*., 2016 WL 197128, No. 67270 (Nev. 2016) (unpublished), and concluded that reliance on the supervisor's own misconduct to impute knowledge to the employer does not constitute evidence of foreseeability. 1 AA 128, ¶13. A supervisor's misconduct is not imputable for employer knowledge "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) (citations omitted); *see also* 1 AA 115:21–116:16. Federal case law has also explained that to prove imputed knowledge, evidence of lax safety standards is a key to whether the unsafe conduct of a supervisor was foreseeable. *See id*; AOB 27–28. The *Terra Contracting* case relied upon by the Review Board cites this federal case law, and the Review Board's decision quotes this case law, discussing foreseeability as relating to evidence of "lax safety standards." *See* 1 AA 115:21–116.

The opening brief discussed the federal case law on this issue. *See* AOB 26–28. However, OSHA failed to address any of this federal case law,[1] instead rearguing its rejected evidence on the issue of imputed knowledge, namely that the past violations from 2011 and 2013 are allegedly sufficient support for foreseeability of this violation. *See* RAB 12–14.

In discussing the issue of safety programs or policies, OSHA simply argues that all, or nearly all, of the evidence presented by Original Roofing should be disregarded because it was after the inspection date or was otherwise not reliable.

[1] OSHA does not address the standards presented at AOB 26–27 in *ComTran Grp., Inc. v. U.S. Dept. of Labor*, 722 F.3d 1304, 1316 (11th Cir. 2013) (cited in the Review Board's decision at 1 AA 114, 116); *Byrd Telecom, 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); or *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987). OSHA's failure to respond to these authorities amounts to a confession of error. *See* NRAP 31(d); *Bates v. Chronister*, 100 Nev. 675, 681–682, 691 P.2d 865, 870 (1984).

See RAB 23–26. For example, OSHA argues "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." RAB 23 (citing 2 AA 263–269). In fact, OSHA now argues that 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**." RAB 26 (emphasis added). But, OSHA's argument contains no citation to legal authority to support it, and there is no reference to OSHA's own objection on the record to the evidence (including the documentary evidence and the information provided in the hearing by Safety Manager Kelly) when it was presented to the Review Board. *See* RAB 25–26. Thus, OSHA's arguments are not properly before the Court. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n. 38 (2006) (concluding that this Court does not consider arguments that are not cogently made); *Nevada State Bank v. Snowden*, 85 Nev. 19, 21, 449 P.2d 254, 255 (1969) ([U]nless specifically objected to at trial, objections to a substantive error in the absence of constitutional considerations are waived and no issue remains for this court's consideration.").

Safety Manager Kelly stated at the beginning of the Review Board hearing, "We do not have any witnesses. . . we will be showing you guys our due diligence on how we train, what our safety program is, what our culture is." 1 AA 27: 5–10.

At this time, OSHA (through its attorney, Ms. Ortiz) did not say anything in response to Mr. Kelly's statement that Original Roofing did not have a witness but planned to have Mr. Kelly present on the safety program and training. *See* 1 AA 27. OSHA did not request an opportunity to rebut or challenge Mr. Kelly's statements, if there was a problem with the presentation of the evidence after OSHA presented its case. Furthermore, the Review Board's Mr. Adam's stated, "Mr. Kelly, we'll try to give you some leeway. We understand you're not an attorney and neither am I." *See id*.

Original Roofing's opening brief did refer to statements by Mr. Kelly in the hearing transcript, but certainly did not rely exclusively on Mr. Kelly's statements in the hearing, as the brief discussed several pieces of relevant documentary evidence. Mr. Kelly's "closing" was presented as a summary of Original Roofing's stipulated-to evidence packet, which was presented on behalf of Original Roofing. *See, e.g.*, 1 AA 56–59. For example, Mr. Kelly made statements, such as, "[I]n our packet, if you guys could go to page 7, we're going to show you guys the four factors of employment. Page 7, Cite Inspections. And what we have is safety. We do daily jobsite visits. We take pictures. We have tailgate meetings with the employees to go over good practices and bad habits." 1 AA 56 (referring to 2 AA 260). These statements are drawn from the stipulated-to evidence in the record before the Review Board. *See* 2 AA 260. There were no objections by

OSHA on the record to the manner in which Original Roofing or Mr. Kelly provided this information, or to the "present tense" statements. *See* 1 AA 56–59. Yet now, OSHA argues that **none** of Original Roofing's evidence could have been relied upon by the Review Board. *See* RAB 26. But, OSHA does not provide any legal authority to suggest that this Court can now disregard admitted evidence, just because OSHA did not like the Review Board's decision.

The documentary evidence presented by Original Roofing was stipulated to by both parties. *See* 1 AA 124 ("**Complainant and Respondent stipulated to the admission of the following documentary evidence**. . . Respondent's Exhibit A"). Furthermore, Original Roofing and OSHA presented evidence of an **existing** safety plan at the time of this inspection and violation, including:

- Lizarraga (the inspector) testified that **both workers said "they needed a personal fall arrest system at heights greater than six feet."** 1 AA 47:30–48:5 (emphasis added).
- Lizarraga testified that **both workers** told the inspector they **had "fall protection training."** *Id.* (emphases added).
- Lizarraga testified the two workers told the inspector they were aware **of company policy**. *Id.* (emphasis added).

- Lizarraga testified the two workers were aware of company policies but said it was easier to do the task at hand without a personal fall arrest system. 1 AA 48.
- **Cortez and Betancourt received training from Original Roofing** regarding compliance with law and regulations, and new hire orientation. 2 AA 273, 276, 282–283 (emphasis added). The certifications of the training are clearly **dated before the inspection in 2015**. 2 AA 273, 282 (emphasis added).
- **Cortez and Betancourt signed documents stating they reviewed and received safety training policies including fall protection information**, specifically referring to a "Fall Protection Plan" and referring to the Fall Protection Agreement as a "Policy" with "No exceptions." 2 AA 276, 278, 285, 286 (emphasis added).

The documents referencing the training, fall protection plan, and fall protection policies were signed by the two employees involved in the inspection. *See id.* The evidence included documentation that the two Original Roofing employees quit their jobs after the inspection and did not return to work, so clearly these documents were not prepared after the inspection date. *See* 2 AA 253, 288. Notably, NRS 618.625(2) focuses on "the violation," which the Review Board did. Therefore, the Review Board properly relied upon substantial evidence in

evaluating the **existing** safety and discipline policies at Original Roofing prior to the inspection/citation, particularly evidenced by the two workers' own statements and documents demonstrating that they were aware of the policy and procedures prior to the inspection. Original Roofing's policy of required fall protection at heights over six feet had been "communicated to" the employees, since there is written documentation that they received and signed policies, in both English and Spanish, and both employees stated that they were aware of the policy when they were interviewed by Lizarraga. *See* 1 AA 47:30–48:5; 2 AA 273, 276, 278, 282–283, 285–286. OSHA is simply grasping at straws by claiming that more "detail" was required about the training provided. RAB 14.[2] Contrary to OSHA's argument, the issue before this Court is not what evidence **could have been** provided, but whether there was substantial evidence to support the findings of the Review Board.

Finally, OSHA argues that Original Roofing did not provide "any evidence" regarding its disciplinary policy, if one exists. RAB 23. OSHA's assertion is simply false, as Original Roofing provided evidence that violations for fall protection could result in termination (2 AA 279, 286); signed documents stating

[2] The details that OSHA argues were absent from the evidence, such as where the training was provided or the length of the training (RAB 21) are also inaccurate, as the documents include information on some of these topics. *See* 2 AA 273 (new safety orientation log, showing 1.5 hours of training time on that day for safety orientation); 2 AA 257 (address of training facility).

there were "no exceptions" for the fall protection above six feet rules (2 AA 287); a bonus program that provided longevity pay but financially penalized any individuals receiving even "informal safety violations" including those which "may have resulted" in an injury for fall protection. 2 AA 279. Original Roofing also provided evidence that it performed regular site inspections. *See* 2 AA 260, 287. Thus, OSHA's argument that there was no evidence of a discipline policy is simply incorrect and should be disregarded. *See Edwards*, 122 Nev. at 330 n. 38, 130 P.3d at 1288 n. 38.

2. OSHA's Claim of a Prior Violation Was Not Sufficient for Foreseeability of "This Violation."

OSHA's claim of a prior violation was not sufficient for foreseeability of "this violation." *See* RAB 17. OSHA takes parts of sentences from the Review Board's decision out of context in an attempt to characterize the decision as arbitrary and capricious. *See id.* However, in its full context, it is clear that the Review Board's decision was not arbitrary and capricious. 1 AA 124–132. The Review Board acknowledged the evidence provided by OSHA, but simply decided that it was not preponderant evidence for foreseeability under the standard it applied. *Id*.; *Sheehan*, 121 Nev. at 487, 117 P.3d at 223.

OSHA points to a statement in the Review Board's decision that 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 115:18–21. OSHA then points to its claim of prior citations for failure to utilize proper fall protection in 2011 and 2013 to argue that it did present evidence on this topic. *See* RAB 15. But, the Review Board thoroughly addressed the issue of what was expected for evidence of knowledge and foreseeability. The Review Board applied *Terra*, 2016 WL 197128, No. 67270 (Nev. 2016), and required specific supportive, preponderant evidence to establish constructive employer knowledge. 1 AA 115:21–23. The Review Board quoted *Terra* and several federal cases interpreting these standards and what evidence was required. *Terra* and the cited federal cases looked at whether "the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards].'" *Id.* (citing *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316 (11th Cir. 2013) (additional citations omitted)). After additional analysis, and even specifically discussing the previous 2013 violation, the Review Board explained that the previous violation was not "**preponderant** evidence to support constructive imputation of employer knowledge relying upon foreseeability that this employer should have known that foreman Cortez would not enforce tie off." 1 AA 116:23–117:2 (citing *Terra* and *ComTran Grp.*, 722 F.3d at 1316) (emphasis added). The Review Board simply did not agree with OSHA that the weight of the evidence of prior violations was preponderant evidence that the employer should

have known Cortez would not enforce a tie off. The Review Board's decision was not arbitrary and capricious but well-reasoned, relying upon a great deal of law (specifically addressing the relevant inquiry of foreseeability as evidence of "lax safety standards") (*see* 1 AA 116:4–16), which OSHA has elected to ignore in addressing these issues. OSHA instead focuses its arguments on the misguided position that past violations and a supervisor's actions imputed knowledge in every situation, despite different individuals, the passage of several years, and Original Roofing's reemphasized safety rules and procedures for enforcement.

OSHA suggests that the Review Board's finding that the 2013 violation in inspection 316841196 involved "different facts" "is against the submitted evidence." RAB 30 (citing 1 AA 116:23–27, 129:11–18). OSHA's argument is a prohibited request for this Court to reweigh the evidence. *See State Emp. Sec. Dept. v. Hilton Hotels Corp.,* 102 Nev. 606, 608 n. 1, 729 P.2d 497, 498 n. 1 (1986). In its answering brief, OSHA discusses the 2013 citation for working on a roof without fall protection (2 AA 218–219) and argues that 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." RAB 30–31. While both prior citations involved working on a roof without fall protection, there certainly was substantial evidence that the 2013 and 2015 citations were based on "different

facts." For example, the employee involved in the 2013 violation was David Cervantes. 2 AA 218. During the 2013 incident, the employees said they did not tie off because they were concerned about getting their retractable cables crossed with the string. 2 AA 219. In the 2013 incident, the employees did not make any statements about fall protection or fall protection training, and the employer did not provide any information on fall protection training or retraining. *Id*. In contrast, in 2015, the employees involved were Jose Cortez and Silverio Betancourt. 2 AA 171. During the 2015 incident, the employees said they did not tie off because it "was easier." 2 AA 173. After the 2015 incident, the employees made statements that they were provided with fall protection training, and they were required to be tied off when working at heights of six feet or above. *Id.* In 2015, the safety manager also provided a statement, admitting that the employees were provided fall protection training, a personal fall arrest system was issued to each employee, and that Cortez directed the work. *Id.* The 2015 incident worksheet provided to OSHA, unlike the 2013 documents, indicated that the employees were scheduled for retraining after the incident. *Id.* Therefore, even focusing exclusively on the evidence provided by OSHA for 2013 and 2015, there was substantial evidence for the Review Board to find that the two prior events were based on "different facts" and to conclude, when considering those facts and applying the law on knowledge and foreseeability, that OSHA failed to make its prima facie case.

In summary, the Review Board's decision should be reinstated because it was supported by substantial evidence and was, therefore, not arbitrary and capricious. The Review Board's election to not treat any prior violation as automatic "foreseeability" for any future citation was well-reasoned and not arbitrary or capricious due to Original Roofing's safety standards and policies, and, most importantly, the testimony from OSHA's own inspector and worksheet, stating that the Original Roofing employees knew that they were required to use fall protection, knew of the safety policy, and had attended training. *See* 2 AA 172–173; 1 AA 47:30–48:5.

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

The Court should, alternatively, reinstate the Review Board's favorable decision based on Original Roofing's established defense of employee misconduct. In the event that this Court concludes that the Review Board's decision on OSHA's prima facie case was erroneous, Original Roofing requests that this Court consider whether the Review Board's decision should be upheld on the alternative basis of employee misconduct.

As set forth in Original Roofing's opening brief, 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 *Secretary of Labor v. Marson Corp.*, 10 BNA OSHC 1660 (No. 78-3491, 1982)); *see Adm'r of Div. of Occupational Safety & Health v. Pabco Gypsum*, 105 Nev. 371, 373, 775 P.2d 701, 703 (1989). The specific evidence supporting this defense was outlined in the opening brief in detail. *See* AOB 36–38.

Similar to its arguments in other sections of the answering brief, OSHA attempts to challenge the adequacy and relevance of the documents and evidence provided by Original Roofing. *See* RAB 27–28. But, both parties stipulated to the admission of this evidence. 1 AA 124. In any event, OSHA cannot challenge the Review Board's factual findings by emphasizing its own claims and ignoring Original Roofing's evidence. *Taylor*, 314 P.3d at 951 (Nev. 2013).

OSHA, in conclusory fashion, now attempts to argue that there is "no evidence" for the elements, despite the opening brief setting forth ample evidence for the elements. AOB 33–38. For example, OSHA argues that there is "no evidence" to support the "'adequate communication' of the safety rule beyond a signature on a page." OSHA neglects the clear evidence that the signatures were not just "signatures on a page." RAB 28. The "signatures on a page" acknowledged participation in safety training (including a signature

acknowledging attendance at a 1.5-hour class), and were clear and simple agreements to always use fall protection over six feet with no exceptions. *See* 2 AA 270, 273, 278–279, 282, 285–287; 1 AA 59. The communication was also adequate, as Original Roofing provided it in both English and Spanish. 2 AA 273–274, 284–286. The "adequate communication" is further supported by the testimony on cross-examination of OSHA inspector Lizarraga, consistent with his inspection worksheet, which documented that both Original Roofing workers indicated that they (1) knew they were in violation of their training and policies; (2) had attended training; and (3) were supposed to be tied off. *See* 2 AA 172–173; 1 AA 47:30–48:5. There was sufficient evidence before the Review Board to conclude that the safety information was **adequately** communicated. OSHA's argument that there was "no evidence" of these elements is simply false and should be disregarded. *Edwards*, 122 Nev. at 330 n. 38, 130 P.3d at 1288 n. 38 (concluding that this Court does not consider arguments that are not cogently made).

Similarly, OSHA also argues there is supposedly no evidence that Original Roofing took steps to discover violations of the safety rules. *See* RAB 28. OSHA suggests that Original Roofing did not provide a disciplinary write-up after the 2011 and 2013 OSHA inspections. *See* RAB 28. But, OSHA cannot now argue for the first time on appeal that Original Roofing did not provide sufficient

evidence about disciplinary write-ups for other violations involving different employees that were not the focus of OSHA's claim. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52–53, 623 P.2d 981, 983–984 (1981) (disallowing new issues to be raised for the first time on appeal). Such a finding was not required for the Review Board, nor is it an appropriate argument for this Court's consideration. The issue before this Court is whether there was evidence to support the Review Board's finding that steps were taken to discover violations of the safety rule. Original Roofing provided ample evidence of this element, including descriptions of its daily site inspections and the site inspection that was to occur the day of this incident (2 AA 260, 287); documentation of its increasing safety budgets with salaries for "safety managers" focused specifically on discovering safety violations on worksites (2 AA 256); and documents demonstrating that safety violations are written up at Original Roofing and have been both before and after this violation. 2 AA 263–265.

Similarly, OSHA argues that the Review Board "gave no explanation of how that was possible" to conclude that the evidence permitted the inference that the employer had, after previous violations, "embarked upon a course of training and enforcement, to substantially reduce or eliminate past practices." RAB 28 (citing 1 AA 118:5–10, 130:13–18). However, Original Roofing provided evidence that permits this inference. *See, e.g.*, 2 AA 256–257 (demonstrating increase in safety

management, budget, and training facilities from 2010 to 2015); 2 AA 176; 1 AA 47 (evidence that Lizarraga found no other violations, including on reinspection). OSHA also complains that the Review Board did not "cite to specific documents in the record" to support the elements for the defense of employee misconduct. RAB 30. The Review Board is not required to cite to the record or otherwise "explain" "how that was possible" to OSHA, but is simply required to have substantial evidence supporting its conclusions. *See Taylor*, 314 P.3d at 951. In this case, the Review Board had substantial evidence supporting the elements of employee misconduct. *See* AOB 33–38 (with citations to the record for each element). Therefore, on this alternative basis of employee misconduct, the Court should reinstate the Review Board's decision that is favorable to Original Roofing.

III. CONCLUSION

The Review Board properly found that OSHA's citation against Original Roofing failed as a matter of fact and law. The Review Board's findings of fact and conclusions of law were based upon substantial evidence and were legally sound. OSHA, however, has requested that this Court engage in a reweighing of the evidence to come to factual findings contrary to those of the Review Board—a prohibited inquiry according to the applicable standards of review. The Review Board correctly found that OSHA failed to establish its prima facie case, and the evidence for employer knowledge presented by OSHA was insufficient in this

case. Alternatively, the Review Board correctly found that Original Roofing proved its defense of employee misconduct as a secondary basis to deny OSHA's citation. Therefore, Original Roofing 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.

Dated this 22nd day of March, 2018.

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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 5,361 words; or

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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 22nd day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S REPLY BRIEF** was filed electronically with the Nevada Supreme Court on the 22nd day of March, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Donald C. Smith

/s/ Leah Dell
Leah Dell, an employee of
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