

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3  
4

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

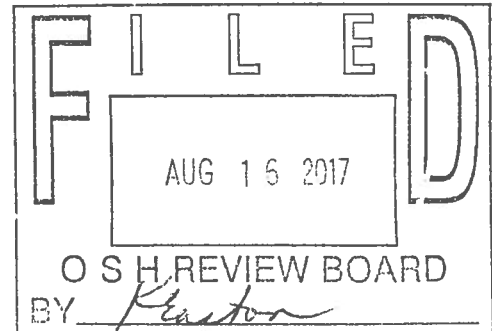
Docket No. LV 17-1872

Complainant,

vs.

11 ACCELERATED CONSTRUCTION, INC.,

Respondent.



12  
13  
14 **DECISION**

15 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
16 **REVIEW BOARD** at a hearing commenced July 12, 2017, in furtherance of  
17 notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel  
18 appearing on behalf of the Complainant, **Chief Administrative Officer of**  
19 **the Occupational Safety and Health Administration, Division of**  
20 **Industrial Relations** (OSHA). MR. BRIAN V. WATKINS, ESQ., appearing on  
21 behalf of Respondent, **Panelized Structures**.

22 Jurisdiction in this matter has been conferred in accordance with  
23 Chapter 618 of the Nevada Revised Statutes.

24 The complaint filed by the OSHA sets forth allegations of violation  
25 of Nevada Revised Statutes as referenced in Exhibit "A", attached  
26 thereto.

27 Citation 1, Item 1, charges a violation of 29 CFR 1926.451(b)(1)  
28 which provides in pertinent part:

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1 "Scaffold platform construction." Each platform on  
2 all working levels of scaffolds shall be fully  
3 planked or decked between the front uprights and  
4 the guardrail supports.

5 Complainant alleged:

6 On September 27, 2016, an inspection was initiated  
7 with Accelerated Construction, at the jobsite  
8 located at 3720 North Durango Drive in Las Vegas.  
9 On the south side of the building, three employees  
10 were observed working from a two tiered, 14'6",  
11 tubular welded frame scaffold (make unknown) on two  
12 different platforms. The platforms employees were  
13 working from were not fully planked or decked. The  
14 top tier had 2 of the 3 planks and the lower tier  
15 had 1 of 3 planks. The employees were exposed to  
16 potential serious injuries in the event of a fall.

17 The citation was classified as Serious. The proposed penalty was  
18 in the amount of \$1,200.00.

19 Citation 1, Item 2, charges a violation of 29 CFR 1926.451(f)(3)  
20 which provides in pertinent part:

21 Scaffolds and scaffold components shall be  
22 inspected for visible defects by a competent person  
23 before each work shift, and after any occurrence  
24 which could affect a scaffold's structural  
25 integrity.

26 Complainant alleged:

27 On September 27, 2016, an inspection was initiated  
28 with Accelerated Construction, at the jobsite  
located at 3720 North Durango Drive in Las Vegas.  
It was determined that there was no competent  
person on site to inspect the scaffold prior to the  
work shift. On the south side of the building,  
three employees were observed working from a two  
tiered, 14'6", tubular welded frame scaffold (make:  
unknown) which was not fully planked. The  
employees were exposed to potential serious  
injuries related to the employer failing to ensure  
the scaffold was inspected prior to the work shift.

The citation was classified as Serious. The proposed penalty was  
in the amount of \$1,200.00.

Citation 1, Item 3, charges a violation of 29 CFR 1926.451(g)(1)

1 which provides in pertinent part:

2 Each employee on a scaffold more than 10 feet (3.1  
3 m) above a lower level shall be protected from  
4 falling to that lower level. Paragraphs (g)(1)(i)  
5 through (vii) of this section establish the types  
6 of fall protection to be provided to the employees  
7 on each type of scaffold. Paragraph (g)(2) of this  
8 section addresses fall protection for scaffold  
9 erectors and dismantlers. Note to paragraph  
10 (g)(1): The fall protection requirements for  
11 employees installing suspension scaffold support  
12 systems on floors, roofs, and other elevated  
13 surfaces are set forth in subpart M of this part.

14 Complainant alleged:

15 On September 27, 2016, an inspection was initiated  
16 with Accelerated Construction, at the jobsite  
17 located at 3720 North Durango Drive in Las Vegas.  
18 On the south side of the building, an employee was  
19 observed working from the upper tier of a two  
20 tiered tubular welded frame scaffold (make:  
21 unknown) at a height of approximately 14'6" without  
22 any means of fall protection. The employee was  
23 exposed to potential serious injuries in the event  
24 of a fall at a height greater than 10 feet.

25 The citation was classified as Serious. The proposed penalty was  
26 in the amount of \$600.00.

27 Citation 1, Item 4, charges a violation of 29 CFR 1926.454(a) which  
28 provides in pertinent part:

19 The employer shall have each employee who performs  
20 work while on a scaffold trained by a person  
21 qualified in the subject matter to recognize the  
22 hazards associated with the type of scaffold being  
23 used and to understand the procedures to control or  
24 minimize those hazards.

25 Complainant alleged:

26 On September 27, 2016, an inspection was initiated  
27 with Accelerated Construction, at the jobsite  
28 located at 3720 North Durango Drive in Las Vegas.  
Three employees were observed working from a  
scaffold. It was determined that employees were  
not trained in work with scaffolding. Employees  
were exposed to potential serious injuries while  
working from the scaffold without training  
necessary to recognize hazards associated with  
scaffolds.

1 The citation was classified as Serious. The proposed penalty was  
2 in the amount of \$1,200.00.

3 Counsel for the complainant and respondent stipulated to the  
4 admission of evidence at complainant Exhibits 1 and 2 and respondent  
5 exhibits Tabs 1 through 6.

6 Counsel for the Chief Administrative Officer presented witness  
7 testimony and documentary evidence with regard to the alleged  
8 violations.

9 NVOSHES Compliance Supervisor, Mr. Jamal Sayegh testified with  
10 regard to the citations, violations and inspection report conducted by  
11 NVOSHES. The actual Compliance Safety and Health Officer (CSHO) who  
12 conducted the inspection, Mr. Mark Nester, was not present at the  
13 hearing. Mr. Sayegh referenced complainant Exhibits 1 and 2 stipulated  
14 in evidence and testified with reference to the reportings. A referral  
15 inspection commenced at approximately 9:55 a.m. on September 27, 2016  
16 at a construction site located at 3720 North Durango Drive in Las Vegas,  
17 Nevada. Contact was made with Mr. Ryan Sheets, the superintendent of  
18 the respondent, Accelerated Construction, Inc. (Accelerated).

19 CSHO Nester reported he observed an employee working from a top  
20 tier of a tubular welded scaffold without any means of fall protection.  
21 He further reported two additional employees working on the middle level  
22 of the scaffold attempting to climb the cross-bracing to reach the upper  
23 level. Superintendent Sheets was requested, and agreed, to remove the  
24 employees from the scaffolding. Mr. Sayegh identified photographs in  
25 evidence at Exhibit 1, pages 84-103. Mr. Sayegh referenced the reported  
26 observations of CSHO Nester as confirmed in the photographs in Exhibit  
27 1 at pages 84, 86, 87 and 88, to demonstrate the scaffold was not fully  
28 planked, noting there were two planks per platform on the top tier. One

1 employee was depicted working from the top tier of the scaffold. The  
2 middle tier had only one plank per platform. Two employees were observed  
3 working on the middle tier of the scaffold. Each platform measured  
4 approximately 36" in width; each plank measured approximately 9" in  
5 width. The CSHO report and photographic exhibits supported the  
6 **applicability** of the cited standard at Citation 1, Item 1, 29 CFR  
7 1926.451(b)(1) which required scaffold platforms be fully planked or  
8 decked.

9 Mr. Sayegh testified from the Exhibit 1 inspection narrative at  
10 page 14 that the employer did not ensure that the scaffold was inspected  
11 by a **competent person** before use. Mr. Fredrico Mondragon, identified  
12 himself as "working for Accelerated Construction" in his interview  
13 statement, at Exhibit 1, page 19; and further stated there were no other  
14 contractors on the site. No credentials or training support were  
15 provided by or on behalf of Mr. Mondragon, nor the respondent or any  
16 other individuals to establish a qualified **competent person** had been or  
17 was on the site to inspect the scaffolding prior to the workshift. Mr.  
18 Sayegh testified the cited violation at Item 2 under 29 CFR  
19 1926.451(f)(3) was appropriate because scaffolds and scaffold components  
20 are to be inspected for visible defects by a competent person before  
21 each workshift.

22 Mr. Sayegh again referenced the photographs in Exhibit 1 at page  
23 95 and CSHO Nester's reporting of having observed and photographed an  
24 employee working from the top tier of the scaffold without any means of  
25 fall protection. The top tier of the scaffold was measured at  
26 approximately 14'6"; there were no guardrails or personal fall arrest  
27 systems depicted or utilized. The employee was exposed to potential  
28 serious injury in the event of a fall. The photographs and CSHO

1 reporting supported recommendation for a violation at Citation 1, Item  
2 3 under 29 CFR 1926.451(g)(1) which requires that each employee on a  
3 scaffold more than 10 feet above a lower level shall be protected from  
4 falling to that level.

5 CSHO Nester reported requesting scaffold training records for all  
6 employees working from the scaffold on the site. Two requests were  
7 sent, one on September 27<sup>th</sup> and another on October 4<sup>th</sup>. No training  
8 records were provided by the employer. Mr. Sayegh referenced the  
9 requirements of 29 CFR 1926.454(a) which provides the employer shall  
10 have each employee who performs work while on a scaffold trained by a  
11 person qualified in the subject matter to recognize hazards associated  
12 with the type of scaffold being used and demonstrate an understanding  
13 of the procedures to control and minimize those hazards. Citation 1,  
14 Item 4, was recommended for issuance accordingly.

15 Mr. Sayegh referenced the reported interview statements at Exhibit  
16 1 noting particularly the statement of Mr. Ryan Sheets at page 17. Mr.  
17 Sheets identified himself as the superintendent of the jobsite, had no  
18 training beyond an OSHA 30 and no specialized scaffold training. Mr.  
19 Fredrico Mondragon provided a statement at Exhibit 1, page 19, which  
20 provided the scaffolding was unsafe because not tied off to the  
21 building. He admitted fall protection is required for scaffolding above  
22 10 feet. In a follow up interview Mr. Mondragon reported the ". . .  
23 scaffolding guys . . ." were getting paid directly through Accelerated  
24 (the respondent herein). Mr. Mondragon further reported he does not  
25 have a business or a contractor's license; and that the respondent  
26 Accelerated never requested one from him.

27 At Exhibit 1, page 23, Mr. Joe Maturino identified himself as the  
28 respondent foreman on the jobsite. He stated the scaffolding crew was

1 supposed to finish the scaffolding so they "work off the lift today."  
2 He reported he did not see the two guys on the scaffold "I should have  
3 checked . . . two guys on the lift and two guys on the roof . . . ." He  
4 further reported "I did not work on the scaffold at all . . . there were  
5 three guys working on the scaffold . . . ." Mr. Maturino further  
6 reported at Exhibit 1, page 24 of his statement that "The guy in the  
7 white (from photo) was working for about 1 hour. He was installing  
8 chicken wire." He further identified "The guy that built the scaffold  
9 was our competent person . . . Fredrico (Mondragon) . . . ."

10 Mr. Sayegh continued testimony in response to direct examination  
11 and identified photographic exhibits and reported testimony on the  
12 elements required to prove violations under each of the cited  
13 violations. He testified at Citation 1, Item 1, that 29 CFR  
14 1926.451(b)(1) was applicable based upon the insufficient planking  
15 depicted in the photographic exhibits which clearly established the  
16 violations. The inspector observed and reported the condition of the  
17 planking corroborated through the photographs. Mr. Sayegh testified the  
18 employees depicted in the photographs were exposed to the hazards as  
19 reported and observed. He further referenced the element of employer  
20 knowledge based upon the interviews with the co-superintendent at page  
21 30, where Mr. Ryan Sheets stated

22 "Scaffold was set up just yesterday. Our crew set  
23 it up. The guy on top has been on the scaffold top  
24 tier for about 1 hour. The scaffold guys started  
25 about 7-8:00 a.m."

26 Mr. Sayegh further referenced Exhibit 1, page 30 the statement from  
27 foreman Joe Maturino who stated:

28 "There were 3 guys working on the scaffold. The  
guy in white (from photo) was working for about 1  
hour. He was installing chicken wire."

1 Further, from Exhibit 1, page 30, Fredrico Mondragon identified by  
2 the employer as a the competent person stated:

3 ". . . they build the second level. I only got on  
4 site after you (OSHA) showed up. Tuesday they  
5 assembled the second tier of scaffold without me."

6 Mr. Sayegh further testified with regard to the element of employee  
7 exposure. There was actual exposure by individuals working off the  
8 scaffolding at the jobsite under the control of the cited respondent  
9 employer in plain view which was proof of violations. He continued  
10 similar testimony on the exposure element with regard to Citation 1,  
11 Item 3, and testified the photographs demonstrated employees working  
12 without any means of fall protection. At item 4 there was no evidence  
13 of training provided by respondent nor any documentation to establish  
14 a competent person inspected the scaffolding at Citation 1, Item 2.

15 On cross-examination, Mr. Sayegh responded to questions regarding  
16 the penalty calculations and considerations for reductions to the  
17 respondent employer. Mr. Sayegh testified the violations were abated  
18 the same day and admitted respondent should have been given some  
19 credits. He testified there is ". . . no requirement that quick fix  
20 credits be given; . . . and . . . the safety plan not reviewed, because  
21 it was not within the scope of the referred complaint, . . . so . . .  
22 no good faith reductions could be given under the structured enforcement  
23 policies . . ."

24 Mr. Sayegh testified on the **serious** classification for each of the  
25 violations. He described the serious injuries that would reasonably be  
26 expected to result from fall through a defectively planked scaffold, and  
27 the lack of tie-off protection for fall hazard. He further reviewed  
28 Exhibit 1, page 28, and testified on the determinations made with regard  
to penalty calculations for severity, gravity and probability.



1 Mr. Sayegh explained the **multi-employer worksite citation policy**  
2 of Nevada OSHES. He testified that based upon the investigative facts,  
3 evidence and documentation provided, the respondent was in **control of**  
4 **the worksite** and could have been appropriately classified as a **creating,**  
5 **exposing, and controlling employer.** However NVOSHES based its citations  
6 on only the respondent being a **controlling employer.**

7 On redirect examination, Mr. Sayegh testified that the employer  
8 knew or should have known with the exercise of reasonable diligence that  
9 the safety violations were existent and occurring. Supervisor Maturino  
10 was on the site and observed employees working off the scaffolding.  
11 Superintendent Ryan Sheets was on the site and working with his crews  
12 in the general area on various sides of the building.

13 Respondent presented witness testimony and referred to the  
14 documentary evidence at Exhibit 1. Mr. Ryan Sheets, the company  
15 superintendent, testified ". . . my crew did not set up the scaffold  
16 . . . ." He further testified that Mr. Mondragon was not an employee of  
17 respondent but rather an independent contractor. He denied portions of  
18 his witness statement but admitted it was signed in the presence of the  
19 CSHO on the day of inspection. He testified the provisions were ". . .  
20 not consistent with anything I would have said . . . ." Mr. Sheets also  
21 testified the CSHO and he drove up to the site at the same time, that  
22 he only supervised four guys in his crew, and he was working only on the  
23 south side of the building doing demolition while erecting work was  
24 occurring on the west side. Mr. Sheets admitted the scaffolding was not  
25 assembled correctly ". . . that's why we took it down to do it right  
26 . . . ."

27 On cross-examination, Mr. Sheets testified that Mr. Mondragon "was  
28 a sub on site . . . not an employee of respondent . . . ." He further

1 testified that ". . . some of Mondragon's workers disappeared when the  
2 CSHO arrived on the site . . . ." Mr. Sheets admitted under direct  
3 examination to the question ". . . were you aware as the general  
4 contractor . . . you have liability for violations on your site . . . ." He  
5 responded "yes, but not . . . if . . . someone goes **rogue** and I call  
6 him down . . . ."

7 Respondent presented witness testimony from Mr. Carl Sheets,  
8 president of respondent. He testified Mr. Mondragon was not an employee  
9 of the respondent company. He was once employed a couple of years ago,  
10 but not on the payroll at the time of inspection. Mr. Sheets further  
11 testified he has never had an OSHA violation previously. In reference  
12 to questions directed from the Exhibit 1 reports, Mr. Sheets testified  
13 he told OSHA we ". . . have no scaffolding company . . . ." He also  
14 referenced the photographic evidence depicting scaffold erection and  
15 planking occurring from a boom lift. He testified the photograph was  
16 not taken by the CSHO but he sent it to CSHO Nester three or four times.

17 On cross-examination Mr. Sheets testified his company is primarily  
18 a general contractor, never hires unlicensed subcontractors, and that  
19 Mr. Mondragon worked for a subcontractor company identified as "Select."  
20 He had no knowledge of his (Mondragon's) lack of licensure. He  
21 testified that Select was paid directly and he expected Mr. Mondragon  
22 and his workers were compensated by his subcontractor Select. He  
23 further testified that he has no written contract or purchase order with  
24 Select; and reconfirmed Select was the company actually hired to do the  
25 scaffold erection rather than Mr. Mondragon who he did not hire.

26 At the conclusion of evidence and testimony, counsel presented  
27 closing argument.

28 Complainant asserted the elements to prove a violation under the

1 multi-employer worksite citation policy were established under the  
2 burden of proof based upon the number of employers present on the site;  
3 and Accelerated in control. Counsel argued in reference to page 121 of  
4 Exhibit 1, that NVOSHA made every attempt to initially determine whether  
5 there were any subcontractors on the site. They were repeatedly told  
6 there were no subcontractors therefore there was no way to know for whom  
7 the various employees worked, other than the respondent general  
8 contractor. Mr. Mondragon informed OSHA that his employer was the  
9 respondent. Counsel argued that while there are some conflicting  
10 statements throughout this case, it does not change the respondent's  
11 liability as the controlling employer on a multi-employer worksite.  
12 There is no question Mr. Maturino, the respondent foreman, was in  
13 control of the worksite. Mr. Maturino admitted in his statement that  
14 he saw three people working on the scaffold which established the proof  
15 element of employer knowledge.

16 Counsel referenced the photographs in evidence and asserted they  
17 clearly depict men in company green shirts worn by respondent employees,  
18 onsite at the same time as three men were up on the scaffold without  
19 fall protection. The objective evidence from the photographs, together  
20 with the measurements taken and materials at the site, support the  
21 violative conditions for complainant's burden of proof. Counsel argued  
22 the multi-employer worksite doctrine does not require any evidence of  
23 constructive employer knowledge because Mr. Maturino was actually  
24 present; so employer knowledge was actual and direct without any  
25 requirement to impute or establish same constructively. ". . . Mr.  
26 Maturino was in charge of the respondent worksite and the workers were  
27 working on the scaffold . . . ." Counsel further asserted there is no  
28 requirement the employer be provided any "quick fix" credit as it is

1 discretionary under the NVOSHES enforcement plan.

2 Respondent presented closing argument. Counsel asserted that CSHO  
3 Nester was not present at the hearing, and his reported writings and  
4 actions demonstrate a lack of credibility. ". . . They were conflicting  
5 . . . he was not in attendance at the hearing and Ryan Sheets testified  
6 that some of the reportings were just plain false . . . ." Counsel  
7 argued ". . . you can't use employer knowledge of the respondent for a  
8 recognized specialized work of scaffold building and assembly . . . ." He  
9 asserted that because work was ". . . underway around all sides of  
10 the building the CSHO couldn't see the total of what was going  
11 on . . . ." Counsel further argued the subcontracted individuals on the  
12 site were engaged in erecting or disassembling scaffolding when the CSHO  
13 arrived and therefore exempted from the requirements which apply to only  
14 **working** on the scaffolding. He asserted that had the CSHO arrived later  
15 the scaffolding work would have been completed. Counsel challenged the  
16 proof element as to employer knowledge, actual or constructive, and  
17 asserted that ". . . all happened very quickly and the evidence shows  
18 only the building of scaffolding . . . (A)ll the violations were abated  
19 within 24 hours . . . the testimony showed scaffolding was taken down  
20 by the very next day . . . ."

21 In reviewing the testimony, documents and exhibits including  
22 arguments of counsel, the Board is required to measure the evidence  
23 against the required elements to establish violations under occupational  
24 safety and health law based upon the statutory burden of proof.

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

27 All facts forming the basis of a complaint must be  
28 proved by a preponderance of the evidence. See  
*Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD

1 §16,958 (1973).

2 Preponderance of the evidence means evidence that  
3 enables a trier of fact to determine that the  
4 existence of the contested fact is more probable  
5 than the nonexistence of the contested fact. NRS  
6 233B, Sec. 2. *Nassiri v. Chiropractic Physicians'*  
7 *Board of Nevada*, 130 Nev. Adv. Op. No. 27, 327 P.3d  
8 487 (2014)

9 A "serious" violation is established in accordance with NRS  
10 618.625(2) which provides in pertinent part:

11 . . . a **serious violation** exists in a place of  
12 employment if there is a substantial probability  
13 that death or serious physical harm could result  
14 from a condition which exists or from one or more  
15 practices, means, methods, operations or processes  
16 which have been adopted or are in use at that place  
17 of employment **unless the employer did not and could  
18 not, with the exercise of reasonable diligence,  
19 know the presence of the violation.** (emphasis added)

20 To establish a prima facie case, the Secretary  
21 (Chief Administrative Officer) must prove the  
22 **existence of a violation**, the **exposure of  
23 employees**, the reasonableness of the abatement  
24 period, and the **appropriateness** of the penalty.  
25 *Bechtel Corporation*, 2 OSHC 1336, 1974-1975 OSHD  
26 §18,906 (1974); *Crescent Wharf & Warehouse Co.*, 1  
27 OSHC 1219, 1971-1973 OSHD §15,047. (1972).  
28 (emphasis added)

To prove a violation of a standard, the Secretary  
must establish (1) the **applicability** of the  
standard, (2) the existence of **noncomplying  
conditions**, (3) **employee exposure or access**, and  
(4) that the **employer knew or with the exercise of  
reasonable diligence** could have known of the  
violative condition. See *Belger Cartage Service,  
Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
CCH OSHD §23,400, p.28,373 (No. 76-1948, 1979);  
*Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC  
1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
(No. 76-1408, 1979); *American Wrecking Corp. v.  
Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.  
2003). (emphasis added)

A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation  
at issue;
2. The situation was in compliance; or lack of

1 access to a hazard. See *Anning-Johnson Co.*,  
2 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

- 3 3. Proof by a preponderance of substantial  
4 evidence of a recognized defense.

5 OSHA's **multi-employer citation policy** describes  
6 four classes of employers that may be cited:  
7 exposing, creating, correcting, and **controlling**.  
8 A "**controlling**" employer is an employer that could  
9 **reasonably be expected to prevent or detect and**  
10 **abate the violative condition by reason of its**  
11 **control over the worksite or its supervisory**  
12 **capacity**. The reasonable efforts that a controlling  
13 employer must make to prevent or detect and abate  
14 violative conditions depend on multiple factors,  
15 including the **degree of its supervisory capacity**,  
16 its constructive or actual **knowledge of**, or  
17 expertise with respect to, the **violative condition**,  
18 the cause of the violation, the **visibility of the**  
19 **violation** and length of time it persisted, and what  
20 the **controlling employer knows about a**  
21 **subcontractor's safety programs**. It does not  
22 **depend on whether the controlling employer has the**  
23 **manpower or expertise to abate the hazard itself**.  
24 *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998);  
25 *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 6  
26 OSH Cases 1077 (8<sup>th</sup> Cir. 1977). See *Blount Int'l*  
27 *Ltd.*, 15 OSH Cases at 1899-1900; *Sasser Elec. &*  
28 *Mfg. Co.*, 11 OSH Cases 2133 (Rev. Comm'n 1984);  
*Grossman Steel & Aluminum Corp.*, 4 OSH Cases 1185  
(Rev. Comm'n 1976) *Marshall v. Knutson*, 566 F.2d at  
601. *McDevitt Street Bovis*, 19 OSH Cases 1108 (Rev.  
Comm'n 2000); *David Weekley Homes*, 19 OSH Cases at  
1119-20; *Centex-Rooney*, 16 OSH Cases at 2130. *R.P.*  
*Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 18 OSH  
Cases 1551 (6<sup>th</sup> Cir. 1998). *Blount Int'l Ltd.*, 15  
OSH Cases 1897 (Rev. Comm'n 1992) (citing *Red*  
*Lobster Inns of Am., Inc.*, 8 OSH Cases 1762 (Rev.  
Comm'n 1980)). *IBP Inc.*, 144 F.3d at 867, 18 OSH  
Cases 1353. *United States v. MYR Grp. Inc.*, 361  
F.3d 364, 20 OSH Cases 1614 (7<sup>th</sup> Cir. 2004); cf.  
*Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1,  
16 OSH Cases 131 (1<sup>st</sup> Cir., 1993) (same holding  
based on 29 CFR §1910.12). See, e.g. *Summit*  
*Contractors Inc.*, 20 OSH Cases 1118 (Rev. Comm'n J.  
2002), *Homes by Bill Simms, Inc.*, 18 OSH Cases 2158  
(Rev. Comm'n J. 2000). Occupational Safety and  
Health Law, 3<sup>rd</sup> Ed., Dale & Schudtz. (emphasis  
added)

27 In construction industry cases, several courts  
28 have, to one degree or another, held that **general**  
**contractors** or certain higher level subcontractors  
may in some circumstances be cited under Section

1 5(a)(2) **even if the exposed employees are not**  
2 **theirs.** *Secretary of Labor v. Trinity Indus.*, 504  
3 F.3d 297 (3d Cir. 2007); *Universal Constr. Co. v.*  
4 *OSHRC*, 182 F.3d 726, 728-31, 18 OSH Cases 1769 (10<sup>th</sup>  
5 Cir. 1999); *United States v. Pitt-Des Moines Inc.*,  
6 168 F.3d 976, 18 OSH Cases 1609 (7<sup>th</sup> Cir. 1999);  
7 *R.P. Carbone Const., Co. v. OSHRC*, 166 F.3d 815, 18  
8 OSH Cases 1551 (6<sup>th</sup> Cir. 1998); *New England Tel. &*  
9 *Tel. Co. v. Secretary of Labor*, 589 F.2d 81, 81-82  
10 (1<sup>st</sup> Cir. 1978); *Equip. Leasing Inc. v. Secretary of*  
11 *Labor*, 577 F.2d 534, 6 OSH Cases 1699 (9<sup>th</sup> Cir.  
12 1978); *Marshall v. Knutson Constr. Co.*, 566 F.3d  
13 596, 6 OSH Cases 1077 (8<sup>th</sup> Cir. 1977); *Brennan v.*  
14 *OSHRC (Underhill Constr. Corp.)*, 513 F.3d 1032,  
15 1038, 2 OSH Cases 1641 (2d Cir. 1975).  
16 Occupational Safety and Health Law, 3<sup>rd</sup> Ed., Dale &  
17 Schudtz. (emphasis added)

18 The U.S. Department of Labor Instruction under Occupational Safety  
19 and Health Administration has issued guidance on the multi-employer  
20 citation policy. In addition to the case law and treatise commentary  
21 above referenced, the guidance on determination of a **controlling**  
22 **employer** recognizes the realistic principles often practiced by the  
23 construction industry. The OSHA enforcement guidance provides:

24 . . . **Control can be established by contract or, in**  
25 **the absence of explicit contractual provisions, by**  
26 **the exercise of control in practice . . . .**

27 To be a **controlling employer**, the employer must  
28 itself be **able to prevent or correct a violation or**  
to **require another employer to prevent or correct**  
the **violation.** One source of this ability is  
explicit contract authority. This can take the  
form of a specific contract right to require  
another employer to adhere to safety and health  
requirements and to correct violations the  
controlling employer discovers. U.S. Dept. Of  
Labor, Multi-Employer Citation Policy (emphasis  
added)

Occupational safety and health law has long  
recognized the **inability of an employer to avoid**  
**employee OSHA safety protection by contract or**  
**agreement.** *Frohlick Crane Service, Inc. v.*  
*Occupational Safety and Health Review Commission*,  
521 F.2d 628 (1975).

The testimony of record reflects merely a purported verbal

1 agreement between the respondent and a subcontractor company identified  
2 only as "Select." However even if a separate subcontractual employment  
3 status could be found, both employer's would still be liable to citation  
4 for the same violation under the **multi-employer doctrine** which applies  
5 to **controlling, creating, exposing, or correcting employers**.

6 **Employer knowledge** was established through the unrefuted evidence  
7 of Mr. Maturino having observed the individuals, as photographed, and  
8 in **plain view** while engaged in violative conduct at Citation 1, Items  
9 1 and 3. Under principles well recognized in occupational safety and  
10 health law **supervisory knowledge** is imputed to the respondent employer.

11 **Employee exposure** was proven both directly and through access to the  
12 hazardous conditions as depicted in the photographs. The exposure was  
13 unrefuted; the parties merely disputed by whom the depicted employees  
14 working on the scaffolding were employed.

15 In Citation 1, Items 2 and 4, violations were established by the  
16 preponderant evidence. 29 CFR 1926.451(f)(3) was charged for the lack  
17 of a **competent person** on the site to inspect the scaffolding. 29 CFR  
18 1926.454 was cited due to no evidence of training for employees observed  
19 working from the scaffold. Clearly the elements of violation were  
20 established because there was no evidence of a competent person on the  
21 site. The respondent witnesses did not testify they were classified as  
22 competent persons in scaffolding work, nor could Mr. Mondragon who was  
23 either an independent contractor to the respondent or employee of the  
24 subcontractor Select, produce any documentation to support any such  
25 qualification as a competent person. Further, at Item 4, no training  
26 documents were provided by anyone to establish compliance with the  
27 applicable standards.

28 The primary defensive position asserted on behalf of respondent was



1 based upon lack of employer knowledge of the violative conditions.  
2 However the respondent employer knew, or with the exercise of reasonable  
3 diligence could have known of the violative conditions. Further, the  
4 violations occurred in **plain view**, and photographed with respondent  
5 foreman Maturino present in the pictures.

6 In general, **the actual or constructive knowledge of**  
7 **a supervisory employee will be imputed to the**  
8 **employer, and thus constitute a prima facie showing**  
9 **of employer knowledge.** Where supervisory knowledge  
10 can be imputed, OSHA need not also show that there  
11 were deficiencies in the employer's safety program.  
12 *Halmar Corp.*, 18 OSH Cases 1014, 1016-17 (Rev.  
13 Comm'n 1997), *aff'd on other grounds*, 18 OSH Cases  
14 1359 (2d Cir. 1998). *But see L.R. Willson & Sons*  
15 *Inc. v. OSHRC*, 134 F.3d 1235, 1240-41, 18 OSH Cases  
16 1129 (4<sup>th</sup> Cir. 1998), and cases cited therein at  
17 footnote 31. Occupational Safety and Health Law, 2<sup>nd</sup>  
18 Ed., Rabinowitz at page 87. (emphasis added)

19 ". . . (A) **supervisor's knowledge** of deviations  
20 from standards . . . is properly **imputed to the**  
21 **respondent employer.** . . ." *Division of Occupational*  
22 *Safety and Health vs. Pabco Gypsum*, 105 Nev. 371,  
23 775 P.2d 701 (1989). (emphasis added)

24 Actual knowledge is not required for a finding of  
25 a serious violation. **Foreseeability and**  
26 **preventability** render a violation serious provided  
27 that a **reasonably prudent employer**, i.e., one who  
28 is safety conscious and possesses the technical  
expertise normally expected in the industry  
concerned, would know of the danger. *Candler-*  
*Rusche, Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723  
(1976), appeal filed, No. 76-1645 (D.C. Cir. July  
16, 1976); *Rockwell International*, 2 OSHC 1710,  
1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d  
1283 (6<sup>th</sup> Cir. 1976); *Mountain States Telephone &*  
*Telegraph Co.*, 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365  
(1973). (emphasis added)

29 NVOSHA safety compliance for **all employees** on a **multi-employer**  
30 **worksite is** deemed to be the responsibility of a **controlling employer**  
31 under well established occupational safety and health law.

32 The testimonial, and stipulated documentary evidence established  
33 the subject worksite was appropriately classified a **multi-employer**

1 **worksite.** The respondent bore the responsibility of worksite safety for  
2 **any employees** on the job site, whether those of an unlicensed  
3 subcontractor, an independent contractor, or employee of another  
4 subcontractor. The evidence further established the respondent general  
5 contractor was a **controlling employer.** Respondent was in **control** of the  
6 overall jobsite operation. This includes safety compliance for the  
7 erection, dismantling, rigging and safety of scaffolding. Through  
8 foreman Maturino, **employer knowledge** is imputed to the respondent.

9 "... liability is imposed ... on a contractor who  
10 creates a hazard **or who has control over the**  
11 **condition on a multi-employer worksite ...**". See,  
12 *Brennan v. OSHRC (Underhill Construction Corp.)*,  
13 513 F.2d 1032 (2<sup>nd</sup> Cir. 1975). The commission and  
14 courts have recognized that protection from hazard  
exposure to employees is the responsibility of the  
employer and confirmed that "... policy is best  
effectuated by placing responsibility for hazards  
on those who create them."

15 The standards cited were clear and unambiguous. Absent ambiguity  
16 a statute's **plain meaning** controls and no further analysis is permitted.  
17 *State Farm Mut. Auto. Ins. Co. v. Commissioner of Ins.*, 114 Nev. 535,  
18 540, 958 P.2d 733, 736 (1998). *Leven v. Frey*, 123 Nev. 399, 404, 168  
19 P.3d 712, 716 (2007).

20 Based upon the facts, evidence and applicable law, the Citation 1,  
21 Items 1 through 4 violations and classifications of **serious** must be  
22 confirmed.

23 NRS 618.625 provides in pertinent part:

24 "... a serious violation exists in a place of  
25 employment if there is a **substantial probability**  
26 **that death or serious physical harm could result**  
27 **from a condition** which exists, or from one or more  
28 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."

1 In reviewing the citations, the Board finds the cited violative  
2 conditions at Items 1 and 3 similar or very closely inter-related giving  
3 the appearance of duplicative penalty assessments. Further, the  
4 evidence in the record supports this Board's finding that a fair penalty  
5 assessment practice is warranted due to insufficient considerations,  
6 credits and/or adjustments that might have been rendered under NVOSHES  
7 enforcement policies. The goal of the Occupational Safety and Health  
8 Act in Nevada is to assure workplace safety. Neither the number of  
9 violations nor the amount of monetary penalties necessarily correlate  
10 to correction or resolution of unsafe working conditions. Given the  
11 evidence and facts of violation, it is appropriate that the violative  
12 conditions and classifications be confirmed at Citation 1, Items 1  
13 through 4; however adjustments made in the amount of the monetary  
14 penalties.

15 The Federal courts recognize the exclusive authority of the  
16 Commission (Board) to assess or adjust penalties.

17 If an employer contests the Secretary's proposed  
18 penalty, the Review Commission has **exclusive**  
19 authority to assess the penalty, the Secretary's  
20 penalty is considered merely a proposal. Relying  
21 on the language of Section 17(j), the Commission  
22 and courts of appeal have consistently held that it  
23 is for the Commission to determine, **de novo**, the  
24 **appropriateness of the penalty** to be imposed for  
25 violation of the Act or an OSHA standard. (Emphasis  
26 added)

27 The Review Commission has held that the criteria to  
28 be considered cannot always be given equal weight  
and that no single factor is controlling in  
assessing penalties. . . ." Occupational Safety and  
Health Law, 2013, Bloomberg/BNA 3<sup>rd</sup> Ed., pages 295-  
297, citing cases, *U.S. Ladish Malting Co.*, 135  
F.3d 484, 18 OSH Cases 1133 (7<sup>th</sup> Cir. 1998); *Reich*  
*v. Arcadian Corp.*, 110 F.3d 1192, 17 OSH Cases 1929  
(5<sup>th</sup> Cir. 1997) (citing 29 U.S.C. §§666(j), 659(a),  
659(c)); *Bush & Burchett Inc. V. Reich*, 117 F.3d  
932, 939, 17 OSH Cases 1897, 1903 (6<sup>th</sup> Cir.), cert.  
denied, 118 S. Ct. (1997). *Quality Stamping Prods.*



1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3

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

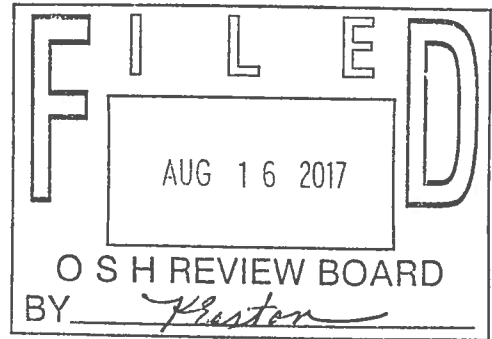
Docket No. LV 17-1872

Complainant,

vs.

10 ACCELERATED CONSTRUCTION, INC.,

Respondent.



12  
13 CERTIFICATE OF MAILING

14 Pursuant to NRCP 5(b)(2)(B), I certify that I am an employee of  
15 SCARPELLO & HUSS, LTD., and that on August 16, 2017 I deposited for  
16 mailing, certified mail/return receipt requested, at Carson City,  
17 Nevada, a true copy of the **DECISION** addressed to:

18 Salli Ortiz, Esq.  
19 Division of Industrial Relations  
20 400 W. King Street, #201  
21 Carson City NV 89703

22 Brian V. Watkins, Esq.  
23 Harold P. Gewerter, Esq., Ltd.  
24 1212 S. Casino Center  
25 Las Vegas NV 89104

26 DATED: August 16, 2017

27 *Karen A Easton*  
28 KAREN A. EASTON

RECEIVED  
AUG 21 2017  
DIR LEGAL  
CARSON CITY OFFICE

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3  
4

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

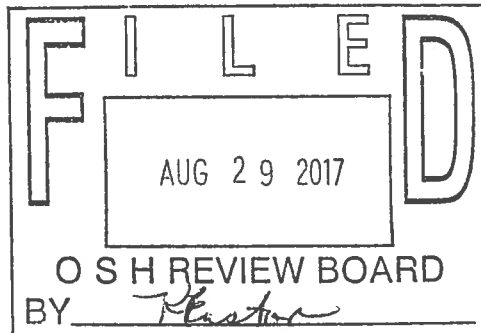
Docket No. LV 17-1889

Complainant,

vs.

11 JETSTREAM CONSTRUCTION, INC.,

Respondent.



13  
14 **DECISION**

15 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
16 **REVIEW BOARD** at a hearing commenced Thursday, July 13, 2017, in  
17 furtherance of notice duly provided according to law. MS. SALLI ORTIZ,  
18 ESQ., counsel appearing on behalf of the Complainant, **Chief**  
19 **Administrative Officer of the Occupational Safety and Health**  
20 **Administration, Division of Industrial Relations (OSHA).** MR. TROY  
21 MCKNIGHT, appearing on behalf of Respondent, **Jetstream Construction,**  
22 **Inc.**

23 Jurisdiction in this matter has been conferred in accordance with  
24 Chapter 618 of the Nevada Revised Statutes.

25 The complaint filed by the OSHA sets forth allegations of violation  
26 of Nevada Revised Statutes as referenced in Exhibit "A", attached  
27 thereto.

28 Citation 1, Item 1, charges a violation of 29 CFR 1926.501(b) (4) (i)

1 which provides in pertinent part:

2 Holes: Each employee on walking/working surfaces  
3 shall be protected from falling through holes  
4 (including skylights) more than 6 feet (1.8 m)  
5 above lower levels, by personal fall arrest  
6 systems, covers, or guardrail systems erected  
7 around such holes.

8 Complainant alleged:

9 Jetstream Construction, Inc. Employees were  
10 observed installing drywall near holes without  
11 being protected from falls at the Arville Mesa  
12 Verde Elementary School project located at 7950  
13 Arville Street, Las Vegas, Nevada 89139.

14 OSHES alleged:

15 "Twenty (20) holes, ten (10) with rectangular  
16 dimensions of 1 foot, 4-3/4 inches by 2 feet 9-  
17 13/16 inches and ten (10) with rectangular  
18 dimensions of 2 feet by 2 feet, 9-13/16 inches  
19 inside rectangular curbs approximately 18 inches  
20 high were created by a sub-contractor (creating  
21 employer) for the HVAC equipment that they were  
22 scheduled to install. They were cut, curbed and  
23 covered with thin plastic sheets marked with words  
24 "Hole" and "Danger". They were not covered with  
25 plywood or other material that is capable of  
26 supporting without failure to at least twice the  
27 weight of employees, equipment, or materials that  
28 may be imposed on the cover at any one time. The  
holes exposed employees to possible falls of 14  
feet to the ground below which could cause serious  
injuries such as contusions, fractures, and even  
death."

The citation was classified as Serious. The proposed penalty was  
in the amount of \$800.00.

Citation 1, Item 2, charges a violation of 29 CFR 1926.501(b)(14)  
which provides in pertinent part:

"Wall openings." Each employee working on, at,  
above, or near wall openings (including those with  
chutes attached) where the outside bottom edge of  
the wall opening is 6 feet (1.8 m) or more above  
lower levels and the inside bottom edge of the wall  
opening is less than 39 inches (1.0 m) above the  
walking/working surface, shall be protected from  
falling by the use of a guardrail system, a safety  
net system, or a personal fall arrest system.

1 Complainant alleged:

2 "At the second floor, building 4 of Arville Mesa  
3 Verde Elementary School project located at 7950  
4 Arville Street, Las Vegas, Nevada 89139, Jetstream  
5 Construction, Inc. employees were installing  
6 drywall in one of the classrooms near and around  
7 wall openings without being protected from falls.  
8 The height of the wall openings were measured to be  
9 32 inches high. Four (4) wall openings measured to be  
10 7 feet 4 inches wide and 6 feet 8 inches high  
11 did not have additional guardrails to meet the  
12 minimum height requirement of 39 inches for  
13 protection. The employees were exposed to a fall of  
14 approximately 12 feet to the ground below which  
15 could cause serious injuries such as contusions,  
16 fractures and even death."

17 The citation was classified as Serious. The proposed penalty was  
18 in the amount of \$800.00.

19 Citation 2, Item 1, charges a violation of 29 CFR 1926.403(b)(2)  
20 which provides in pertinent part:

21 Installation and use. Listed, labeled, or certified  
22 equipment shall be installed and used in accordance  
23 with instructions included in the listing,  
24 labeling, or certification.

25 Complainant alleged:

26 "At the Arville Mesa Verde Elementary School  
27 project located at 7950 Arville Street, Las Vegas,  
28 Nevada 89139, building 4, first floor hallway,  
electrical equipment was not used in accordance  
with instructions included in the listing, labeling  
or certification. An energized relocatable power  
tap (RPT) was used to charge power tool batteries.  
The relocatable power tap was connected to a spider  
box. The relocatable power tap (RPT) were used at  
this construction site outside of its labeling,  
listing or certification, which states relocatable  
power taps are not intended to be series connected  
(daisy chained) to other relocatable power taps or  
extension cords, and are not intended for use at  
construction sites and similar locations."

The citation was classified as Other with no proposed penalty.

Counsel for the complainant and respondent stipulated to the  
admission of evidence at complainant Exhibits 1 through 3. Respondent



1 Exhibit A, 1-18.

2 Counsel for the Chief Administrative Officer presented witness  
3 testimony and documentary evidence with regard to the alleged  
4 violations.

5 Compliance Safety and Health Officer-Safety Specialist (CSHO) Mr.  
6 Renato Magtoto testified he conducted a **programmed** inspection of a  
7 construction job site where an elementary school was being built located  
8 at 7950 Arville Street in Las Vegas, Nevada. CSHO Magtoto referenced  
9 his opening conference summary and narrative report in evidence at  
10 Exhibit 1, pages 29 through 33. He identified the project general  
11 contractor **in control** of the site as Core Construction Services of  
12 Nevada, Inc. and found seven (7) subcontractors also performing work at  
13 the job location. Based upon the number of employers and employees on  
14 the job site, CSHO Magtoto conducted the inspection under the OSHA  
15 **"Multi-Employer Citation Policy"**.

16 During the **"walk around"** inspection CSHO Magtoto observed six  
17 employees working near and around **floor holes without fall protection**.  
18 He determined two employees of the respondent, Jetstream Construction,  
19 Inc., were installing drywall near four floor level hole openings. CSHO  
20 Magtoto referenced his report in evidence at Exhibit 1, page 4,  
21 identified photographic exhibits, and testified particularly as to the  
22 hazard exposures depicted in photos at pages 98 through 119. He  
23 observed the photographed holes, which varied in size, to have been made  
24 as "roof curbs" for heating and ventilation systems that MMC Contractors  
25 West, Inc., another subcontractor, was preparing to install. The hole  
26 openings and roof curbs were covered with thin plastic sheeting marked  
27 with the words "hole" and "danger". He testified from his observations  
28 and the photographs that the holes were not covered with plywood or

1 other materials capable of supporting without failure at least twice the  
2 weight of an employee, equipment, or materials that may come in contact  
3 with the cover at any one time. He determined the conditions were in  
4 violation of applicable OSHA standards because respondent employees were  
5 exposed to fall hazards of 14 feet to the level below.

6 Mr. Magtoto referenced his investigative report in evidence at  
7 Exhibit 1, page 30, and testified general contractor job superintendent,  
8 Mr. Larry Taylor, confirmed the height of the roof holes to the surface  
9 below as fourteen (14) feet. He further reported through Mr. Taylor  
10 that subcontractor MMC Contractors West was in the process of moving  
11 plywood to cover the holes from building four (4) to the subject area  
12 one (1) when the inspection was conducted. The procedure was that after  
13 vent ductings were punched, curbs were installed and covered with  
14 plywood. Superintendent Taylor advised that subcontractor MMC  
15 Contractors West, Inc. was **responsible** for the holes. Mr. Taylor and  
16 Scott Free, Safety Manager for MMC Contractors West, Inc. reported that  
17 ". . . once they cut the hole, they own it . . ." MMC Contractors West  
18 did not do what they were supposed to do in area 1." CSHO Magtoto  
19 reported that MMC Contractors West would be recommended for a citation  
20 as a **creating and correcting employer**. He testified ". . . Jetstream  
21 Construction, Inc., the respondent herein, as well as Western Singly  
22 Ply, LLC would be cited as **exposing (employees) (sic) employers. . . .**"

23 CSHO Magtoto continued his testimony with regard to Citation 1,  
24 Item 2, referencing 29 CFR 1926.501(b)(14). He observed two employees  
25 of respondent performing drywall work near wall openings. He identified  
26 the photographic evidence at Exhibit 1, page 111, depicting employees  
27 of Jetstream engaged in work around an opening. The height of the wall  
28 at the opening was measured at 32 inches high, and 6 feet 8 inches wide.

1 He referenced Exhibit 1, page 31 in evidence and testified ". . . the  
2 existing guardrails that were initially installed by the general  
3 contractor were removed probably to facilitate installation of  
4 drywall. . . . The employees were exposed to possible fall hazards . . .  
5 depicted in photos. . . . The top of the top rail of guardrail was not  
6 42" (+ or - 3") above the walking/working level." Mr. Magtoto reported  
7 general contractor superintendent Taylor confirmed the employees likely  
8 removed the top rails and did not re-install them after they finished  
9 hanging the drywall. CSHO Magtoto testified the respondent herein is  
10 a drywall contractor; and based upon investigative information does not  
11 engage in either cutting openings, covering them, nor related type work  
12 outside of the drywall field.

13 Mr. Magtoto referenced interview statements at Exhibit 1, pages 36  
14 through 50.

15 He testified that respondent foreman Mr. Hugo Navarrete reported  
16 he told the respondent employees to "watch for the edges" on the roof.  
17 He further testified foreman Navarrete was on the roof at the time the  
18 employees were working although not depicted in any of the photographs.

19 Respondent employee Mr. Armando Ocon reported at Exhibit 1, page  
20 37 in his written statement that foreman Navarrete had directed him to  
21 perform drywall work on the roof. Employee Luis Escobedo reported in  
22 Exhibit 1, page 38 that ". . .they thought the wall was high enough to  
23 protect them . . ."

24 CSHO Magtoto continued his testimony with regard to Citation 2,  
25 Item 1. He observed an energized relocatable power tap (RPT) being used  
26 to charge batteries at building four (4) near the second story hallway.  
27 There were four (4) battery chargers owned by another contractor plugged  
28 into the RPT at the time of the inspection. He reported foreman

1 Navarrete acknowledged that one of his employees brought the power strip  
2 to the job site; but he (Navarrete) was not aware of it until discovery  
3 during the inspection. Employee Edwin Baide admitted at Exhibit 1, page  
4 40 in his witness statement to bringing his own power strip to the job  
5 site; and reported ". . . I don't think my company knows . . ."

6 CSHO Magtoto concluded his investigation and informed respondent  
7 he would recommend Jetstream be cited under the OSHA **multi-employer**  
8 **worksite policy** as an **exposing employer**, while the general contractor  
9 Core Construction cited as **controlling employer** and MMC the **creating**  
10 **employer**.

11 On cross-examination, CSHO Magtoto testified he did not conduct any  
12 tests to determine whether the plastic covers could carry an employee's  
13 weight. He observed the plastic material to be non-compliant with the  
14 specific standard requirements, and confirmed same through general  
15 contractor superintendent Taylor. He testified superintendent Taylor  
16 informed him ". . . whoever opens the hole is responsible . . ." CSHO  
17 Magtoto testified that Jetstream is merely a drywall contractor and not  
18 responsible for **controlling, creating, covering,** or otherwise  
19 barricading the hole openings.

20 Complainant presented witness testimony from Mr. Nicholas LaFranz,  
21 identified as a Nevada OSHEs CSHO supervisor. He testified as to the  
22 Exhibit 1 inspection worksheet and confirmed the OSHA violative  
23 conditions found at the worksite referenced in Citation 1, Items 1 and  
24 2. He also testified specifically on proof elements of **employer**  
25 **knowledge, plain view, hazard exposure** and **serious** classifications. Mr.  
26 LaFranz testified with regard to the NVOSHA **multi-employer worksite**  
27 citation policy. He reviewed and explained the employer categories for  
28 citation as **creating, controlling, exposing and correcting.** He

1 testified on the analysis and designation for penalty assessments; and  
2 explained the injuries that could reasonably be incurred by employees  
3 from a fall through the floor and wall openings.

4 Mr. LaFranz further testified as to Citation 2, Item 1 involving  
5 respondent employee use of an unlisted certified relocatable power tap  
6 RPT for battery charging. He described the injuries that could  
7 reasonably be expected to occur and testified not likely to result in  
8 death or serious injury, but rather minimal employee injuries. He  
9 explained the rationale and OSHA policy in for citing the employer for  
10 an "**other than serious**" violation. He testified on the evidentiary  
11 proof element of **employer knowledge** at Citation 2, Item 1. He  
12 referenced the labeled restriction and OSHA enforcement guidance that  
13 a reasonably prudent employer must be aware of the **certified listing**  
14 capabilities of any power cord for safe use, rather than mere reliance  
15 on a label. He testified the employer is required under OSHA general  
16 industry standards to assure equipment utilized by employees at  
17 worksites is fully compliant with the applicable safety standards.

18 Respondent presented witness testimony from Mr. Hugo Navarrete,  
19 identified as the respondent foreman at the job site on the day of the  
20 inspection. Mr. Navarrete testified as to the company safety policy  
21 including his having provided fall protection and safety meetings to the  
22 respondent employees. He identified and explained the meeting topics  
23 relating to fall protection and equipment utilization. Mr. Navarrete  
24 testified that contrary to the testimony of CSHO Magtoto, he was not on  
25 the subject roof at all on the day of the OSHA inspection. He testified  
26 that when he directed employees to work at the roof height levels, he  
27 assumed the employees would be wearing the appropriate fall protection  
28 under the company safety policy. He further testified that he assumed

1 the roof was safe for drywall, based upon instructions he received, that  
2 ". . . everything is covered up . . . ." He also testified "Jetstream  
3 is not authorized to cover holes or any other employer's work . . . ."  
4 Mr. Navarrete testified ". . . did not know Edwin (employee Baide) was  
5 using his own RPT on the job site or that it was not certified as safe  
6 . . . ."

7 On cross-examination Mr. Navarrete testified as to the Citation 1,  
8 Item 2, wall opening citation. He did not evaluate the roof for any  
9 hazards in existence prior to sending employees to perform work there.  
10 When asked why he warned the employees about being careful at the edges,  
11 Mr. Navarrete responded he did so just as a safety precaution. "They  
12 were supposed to be wearing fall protection." Mr. Navarrete admitted  
13 he knew there were hole openings on the roof, but believed they were  
14 covered.

15 On redirect examination, Mr. Navarrete testified he observed metal  
16 cross members under the plastic covers when he viewed a floor opening  
17 from below as depicted in photographic Exhibit 1, page 101.

18 At the conclusion of presentation of testimony and documentary  
19 evidence, counsel conducted closing arguments.

20 Plaintiff asserted the first two violations charged at items 1 and  
21 2 of Citation 1 were established by the evidence. The fall protection  
22 hazards were observed, photographed, undisputed, and confirmed in the  
23 work areas of respondent employees. There was no evidence the plastic  
24 covering was compliant with the applicable OSHA standard to support a  
25 man's weight if a fall occurred. There was no evidence presented that  
26 the hole openings were properly covered in accordance with the standard.  
27 General contractor superintendent Taylor reported the responsible  
28 contractor MMC failed to properly cover hole openings with plywood. The

1 testimony and reports showed MMC did not have a forklift available on  
2 the inspection day to transport plywood covers for required  
3 installation. Counsel argued that all three employers identified by  
4 CSHO Magtoto were equally cited in their respective roles under multi-  
5 employer worksite policy as creating, controlling and, in the instance  
6 of respondent, an exposing employer. There was no evidence to establish  
7 the respondent or foreman personally checked the roof for safety  
8 requirements before sending employees to work on the roof. **Employer**  
9 **knowledge** can be imputed through the foreman. ". . . The floor and wall  
10 holes were subject of a warning by the foreman to the employee and in  
11 **plain view** for anyone inspecting the work area from the roof, or from  
12 the side as to the wall openings . . . ."

13 At Citation 2, Item 1, counsel asserted defensive argument that the  
14 employer was not aware of the RPT brought to the job by an employee is  
15 not enough to avoid a "plain site" violation. The respondent employer  
16 had a duty to assure all hazard exposures were protected. Employee  
17 Baide reported the employer ". . . doesn't always provide equipment  
18 . . . ."

19 Counsel concluded by arguing there was insufficient evidence to  
20 support an employee misconduct defense to rebut the prima facie case of  
21 violation. No proof to support the recognized defense of employee  
22 misconduct was offered including "adequate communication, meaningful  
23 enforcement and specific training." Without the established elements  
24 based upon preponderant evidence, the law does not recognize the  
25 affirmative defense of employee conduct to satisfy the respondent burden  
26 of proof.

27 Respondent provided closing argument. Counsel asserted Exhibit A,  
28 pages 1 through 18 admitted in evidence contained all the recognized

1 requirements to support the employee misconduct defense. Counsel argued  
2 the exhibits were subject of stipulation and provided documentary proof  
3 of training meetings, including tail gate talks, attendance records of  
4 involved employees; requirements for daily visual inspection of safety  
5 equipment as provided in the employee training packet and related safety  
6 policies. Counsel asserted the evidence supports a defense of employee  
7 misconduct.

8 Counsel argued employees of the respondent are drywall workers and  
9 not responsible for the job of covering the openings nor trained to test  
10 floor covers or to provide markings on the covers alerting employees to  
11 the existence of floor holes. Counsel argued at Citation 2, Item 1,  
12 there was no direct evidence of employer knowledge of the RPT brought  
13 to the site by an employee; and no legal basis to support imputation for  
14 violation.

15 In reviewing the testimony, documents and exhibits including  
16 arguments of counsel, the Board is required to weigh the competent  
17 evidence under required elements to establish violations under  
18 occupational safety and health law based upon the statutory burden of  
19 proof.

20 In all proceedings commenced by the filing of a  
21 notice of contest, the **burden of proof rests with**  
22 **the Administrator.** (See NAC 618.788(1). (emphasis  
added)

23 All facts forming the basis of a complaint must be  
24 proved by a **preponderance** of the evidence. See  
*Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD  
¶16,958 (1973). (emphasis added)

25 **Preponderance** of the evidence means evidence that  
26 enables a trier of fact to determine that the  
27 existence of the contested fact is more probable  
28 than the nonexistence of the contested fact. NRS  
233B, Sec. 2. *Nassiri v. Chiropractic Physicians'*  
*Board of Nevada*, 130 Nev. Adv. Op. No. 27, 327 P.3d  
487 (2014) (emphasis added)



1 A "serious" violation is established in accordance with NRS  
2 618.625(2) which provides in pertinent part:

3 . . . a **serious violation** exists in a place of  
4 employment if there is a substantial probability  
5 that death or serious physical harm could result  
6 from a condition which exists or from one or more  
7 practices, means, methods, operations or processes  
8 which have been adopted or are in use at that place  
9 of employment **unless the employer did not and could  
10 not, with the exercise of reasonable diligence,  
11 know the presence of the violation.** (emphasis added)

12 An "other than serious" violation is defined as:

13 If a **direct or immediate relationship does exist**  
14 **but** there is still **no probability of death or**  
15 **serious physical injury**, then an "other-than-  
16 **serious"** designation is appropriate. *Pilgrim's*  
17 *Pride Corp.*, 18 O.S.H. Cases 1791 (1999). (emphasis  
18 added)

19 To establish a **prima facie case**, the Secretary  
20 (Chief Administrative Officer) must prove the  
21 existence of a violation, the exposure of  
22 employees, the reasonableness of the abatement  
23 period, and the appropriateness of the penalty.  
24 *Bechtel Corporation*, 2 OSHC 1336, 1974-1975 OSHD  
25 ¶18,906 (1974); *Crescent Wharf & Warehouse Co.*, 1  
26 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).  
27 (emphasis added)

28 To **prove a violation** of a standard, the Secretary  
must establish (1) the applicability of the  
standard, (2) the existence of noncomplying  
**conditions**, (3) employee exposure or access, and  
(4) that the **employer knew or with the exercise of**  
**reasonable diligence could have known of the**  
**violative condition**. See *Belger Cartage Service,*  
*Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);  
*Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC  
1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
(No. 76-1408, 1979); *American Wrecking Corp. v.*  
*Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.  
2003). (emphasis added)

A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;
2. The situation was in compliance; or lack of access to a hazard. See *Anning-Johnson Co.*,

1 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

2 3. Proof by a preponderance of substantial  
3 evidence of a recognized defense.

4 OSHA's **multi-employer citation policy** describes  
5 four classes of employers that may be cited:  
6 **exposing, creating, correcting, and controlling.**  
7 A "controlling" employer is an employer that could  
8 reasonably be expected to prevent or detect and  
9 abate the violative condition by reason of its  
10 control over the worksite or its supervisory  
11 capacity. The reasonable efforts that a controlling  
12 employer must make to prevent or detect and abate  
13 violative conditions depend on multiple factors,  
14 including the degree of its supervisory capacity,  
15 its constructive or actual knowledge of, or  
16 expertise with respect to, the violative condition,  
17 the cause of the violation, the visibility of the  
18 violation and length of time it persisted, and what  
19 the controlling employer knows about a  
20 subcontractor's safety programs. It does not  
21 depend on whether the controlling employer has the  
22 manpower or expertise to abate the hazard itself.  
23 *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998);  
24 *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 6  
25 OSH Cases 1077 (8<sup>th</sup> Cir. 1977). See *Blount Int'l*  
26 *Ltd.*, 15 OSH Cases at 1899-1900; *Sasser Elec. &*  
27 *Mfg. Co.*, 11 OSH Cases 2133 (Rev. Comm'n 1984);  
28 *Grossman Steel & Aluminum Corp.*, 4 OSH Cases 1185  
(Rev. Comm'n 1976) *Marshall v. Knutson*, 566 F.2d at  
601. *McDevitt Street Bovis*, 19 OSH Cases 1108 (Rev.  
Comm'n 2000); *David Weekley Homes*, 19 OSH Cases at  
1119-20; *Centex-Rooney*, 16 OSH Cases at 2130. *R.P.*  
*Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 18 OSH  
Cases 1551 (6<sup>th</sup> Cir. 1998). *Blount Int'l Ltd.*, 15  
OSH Cases 1897 (Rev. Comm'n 1992) (citing *Red*  
*Lobster Inns of Am., Inc.*, 8 OSH Cases 1762 (Rev.  
Comm'n 1980)). *IBP Inc.*, 144 F.3d at 867, 18 OSH  
Cases 1353. *United States v. MYR Grp. Inc.*, 361  
F.3d 364, 20 OSH Cases 1614 (7<sup>th</sup> Cir. 2004); *cf.*  
*Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1,  
16 OSH Cases 131 (1<sup>st</sup> Cir., 1993) (same holding  
based on 29 CFR §1910.12). See, e.g. *Summit*  
*Contractors Inc.*, 20 OSH Cases 1118 (Rev. Comm'n J.  
2002), *Homes by Bill Simms, Inc.*, 18 OSH Cases 2158  
(Rev. Comm'n J. 2000). Occupational Safety and  
Health Law, 3<sup>rd</sup> Ed., Dale & Schudtz. (emphasis  
added)

26 In construction industry cases, several courts  
27 have, to one degree or another, held that general  
28 contractors or certain higher level subcontractors  
may in some circumstances be cited under Section  
5(a)(2) **even if the exposed employees are not**

1 **theirs.** *Secretary of Labor v. Trinity Indus.*, 504  
2 F.3d 297 (3d Cir. 2007); *Universal Constr. Co. v.*  
3 *OSHRC*, 182 F.3d 726, 728-31, 18 OSH Cases 1769 (10<sup>th</sup>  
4 Cir. 1999); *United States v. Pitt-Des Moines Inc.*,  
5 168 F.3d 976, 18 OSH Cases 1609 (7<sup>th</sup> Cir. 1999);  
6 *R.P. Carbone Const., Co. v. OSHRC*, 166 F.3d 815, 18  
7 OSH Cases 1551 (6<sup>th</sup> Cir. 1998); *New England Tel. &*  
8 *Tel. Co. v. Secretary of Labor*, 589 F.2d 81, 81-82  
9 (1<sup>st</sup> Cit. 1978); *Equip. Leasing Inc. v. Secretary of*  
10 *Labor*, 577 F.2d 534, 6 OSH Cases 1699 (9<sup>th</sup> Cir.  
11 1978); *Marshall v. Knutson Constr. Co.*, 566 F.3d  
12 596, 6 OSH Cases 1077 (8<sup>th</sup> Cir. 1977); *Brennan v.*  
13 *OSHRC (Underhill Constr. Corp.)*, 513 F.3d 1032,  
14 1038, 2 OSH Cases 1641 (2d Cir. 1975).  
15 Occupational Safety and Health Law, 3<sup>rd</sup> Ed., Dale &  
16 Schudtz. (emphasis added)

17 The elements of proof to establish violation of the cited standard  
18 at Citation 1, Item 1 were met by a preponderance of evidence. It was  
19 unrefuted the standard was **applicable** to the facts in evidence.  
20 Respondent employees were working without fall protection near floor  
21 holes/openings and subject to unprotected fall hazard. There was no  
22 evidence or rebuttal to support claims the holes were properly covered  
23 by use of plastic material to meet the specific requirements of the  
24 cited standard. **Non-complying conditions** were established from the  
25 photographic evidence and the unrebutted testimony of CSHO Magtoto. Mr.  
26 Navarrete was the job site foreman and **admitted responsible supervisory**  
27 **employee** of the respondent employer. He conducted no inspection of the  
28 roof prior to instructing employees to perform work in the area which  
in **plain view** depicted floor openings unprotected as specifically  
required by the cited standard. **Employer knowledge** was established  
through the testimony of CSHO Magtoto and foreman Navarrete. The  
foreman knew or should have known with the exercise of reasonable  
diligence that before sending employees to work in the subject area  
there should have been a review or determination for their general  
safety and particularly compliance with the fall protection standards.

1 Under principles well recognized in occupational safety and health law,  
2 supervisory knowledge is imputed to the respondent employer.

3 The primary defensive position asserted by respondent was that  
4 covering of openings was the responsibility of other contractors; and  
5 respondent had no knowledge that its employees would be exposed to  
6 noncompliant or uncovered floor openings. However the respondent  
7 employer is charged with knowledge of the site conditions where its  
8 employees were assigned work such that, **with the exercise of reasonable**  
9 **diligence, a reasonably prudent employer** would have known of the  
10 violative conditions. Further, the violative conditions were in **plain**  
11 **view.**

12 In general, the actual or constructive **knowledge of**  
13 **a supervisory employee will be imputed to the**  
14 **employer**, and thus constitute a prima facie showing  
15 of employer knowledge. Where supervisory knowledge  
16 can be imputed, OSHA need not also show that there  
17 were deficiencies in the employer's safety program.  
18 *Halmar Corp.*, 18 OSH Cases 1014, 1016-17 (Rev.  
Comm'n 1997), *aff'd on other grounds*, 18 OSH Cases  
1359 (2d Cir. 1998). *But see L.R. Willson & Sons*  
*Inc. v. OSHRC*, 134 F.3d 1235, 1240-41, 18 OSH Cases  
1129 (4<sup>th</sup> Cir. 1998), and cases cited therein at  
footnote 31. Occupational Safety and Health Law, 2<sup>nd</sup>  
Ed., Rabinowitz at page 87. (emphasis added)

19 ". . . (A) **supervisor's knowledge** of deviations  
20 from standards . . . is properly **imputed to the**  
21 **respondent employer.** . . ." *Division of Occupational*  
22 *Safety and Health vs. Pabco Gypsum*, 105 Nev. 371,  
23 775 P.2d 701 (1989). (emphasis added) Nevada  
24 Supreme Court decision in case no. 67270 issued  
25 January 14, 2016 identified as Terra Contracting,  
Inc., Appellate, vs. Chief Administrative Officer  
of the Occupational Safety and Health  
Administration, Division of Industrial Relations of  
the Department of Business and State of Nevada,  
Respondent

26 Actual knowledge is not required for a finding of  
27 a serious violation. **Foreseeability and**  
28 **preventability** render a violation serious provided  
that a **reasonably prudent employer**, i.e., one who  
is safety conscious and possesses the technical  
expertise normally expected in the industry

1 concerned, would know of the danger. *Candler-*  
2 *Rusche, Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723  
3 (1976), appeal filed, No. 76-1645 (D.C. Cir. July  
4 16, 1976); *Rockwell International*, 2 OSHC 1710,  
5 1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d  
6 1283 (6<sup>th</sup> Cir. 1976); *Mountain States Telephone &*  
7 *Telegraph Co.*, 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365  
8 (1973). (emphasis added)

9 **Employee exposure** was established directly by preponderant evidence  
10 of and also through **access** to the hazardous conditions as depicted in  
11 the photographic exhibits and unrebutted testimony of CSHO Magtoto. The  
12 witness testimony, interview reports and site conditions confirmed proof  
13 for the element of **actual employee exposure**.

14 Under Occupational Safety and Health Law, there  
15 need be **no showing of actual employee exposure in**  
16 **favor of a rule of access** based upon reasonable  
17 predictability - (1) the zone of danger to be  
18 determined by the hazard; (2) access to mean that  
19 employees either while in the course of assigned  
20 duties, personal comfort activities on the job, or  
21 while in the normal course of ingress-egress will  
22 be, are, or have been in the zone of danger; and  
23 (3) the employer knew or could have known of its  
24 employees' presence so it could have warned the  
25 employees or prevented them from entering the zone  
26 of danger. *Gilles & Cotting, Inc.*, 3 OSHC 2002,  
27 1975-1976 OSHD ¶ 20,448 (1976); *Cornell & Company,*  
28 *Inc.*, 5 OSHC 1736, 1977-1978 OSHD ¶ 22,095 (1977);  
*Brennan v. OSAHRC and Alesea Lumber Co.*, 511 F.2d  
1139 (9<sup>th</sup> Cir. 1975); *General Electric Company v.*  
*OSAHRC and Usery*, 540 F.2d 67, 69 (2d Cir. 1976).

29 The OSHA safety compliance requirements on a **multi-employer**  
30 **worksite** for all employees is the responsibility of four categories of  
31 employers. Employers are classified as **controlling, creating,**  
32 **correcting** or **exposing**. In the subject case, the evidence is unrefuted  
33 that the employees of respondent were **exposed** and accordingly the  
34 respondent was properly classified and cited as an **exposing employer**.

35 The Citation 1, Item 1 standard is clear to require a specific duty  
36 for compliance by an employer to protect its employees. Absent

1 ambiguity, a statute's **plain meaning** controls, and no further analysis  
2 is permitted.

3 *State Farm Mut. Auto. Ins. Co. v. Commissioner of*  
4 *Ins.*, 114 Nev. 535, 540, 958 P.2d 733, 736 (1998).  
5 Only where a statute's language is ambiguous, must  
6 a court look to legislative history and rules of  
7 statutory interpretation to determine its meaning.  
8 *Leven v. Frey*, 123 Nev. 399, 404, 168 P.3d 712, 716  
(2007). A statute's language is ambiguous when it  
is capable of more than one reasonable  
interpretation. *Id.* Internal conflict can also  
render a statute ambiguous.

9 Based upon the facts and applicable law the Citation 1, Item 1  
10 violation and classification of **serious** must be confirmed.

11 NRS 618.625 provides in pertinent part:

12 ". . . a serious violation exists in a place of  
13 employment if there is a **substantial probability**  
14 **that death or serious physical harm could result**  
15 **from a condition** which exists, or from one or more  
16 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."

17 There was a preponderance of evidence in the record for potential  
18 serious injury or death to result from a fall through the floor openings  
19 to the level below. The evidence supports the classification of the  
20 violation as serious.

21 Respondent raised and asserted the recognized defense of  
22 **unpreventable employee misconduct**. However there was insufficient  
23 preponderant evidence to satisfy the respondent burden to proof of all  
24 the required elements for the defense under occupational safety and  
25 health law. To establish the affirmative defense of "unpreventable  
26 employee misconduct," the employer must prove four elements: (1)  
27 established work rules designated to prevent the violation, (2) adequate  
28 communication of those rules to the employees, (3) **steps taken to**

1 **discover any violations of those rules, and (4) effective enforcement**  
2 of those rules after discovering violations. *Marson Corp.*, 10 BNA OSHC  
3 1660 (No. 78-3491, 1982); see *Pabco Gypsum*, 105 Nev. at 373, 775 P.2d  
4 at 703, *Terra, supra*.

5 The burden of proof rests with OSHA under Nevada law (NAC  
6 618.798(1)); but after establishing same, the burden shifts to the  
7 respondent to prove any recognized defenses. See *Jensen Construction*  
8 *Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10  
9 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

10 Respondent Exhibit A, although documentary in nature and not  
11 subject to witness testimony did establish an acceptable company safety  
12 plan and work rules upon which the respondent is entitled to rely in  
13 **asserting** the defense of employee misconduct. However the defense  
14 requires satisfaction of all elements of proof. There was insufficient  
15 evidence to prove the required elements for **steps taken to discover**  
16 **violations of the rules and effective enforcement of those rules.**  
17 Despite working in the subject roof area for approximately **two days**  
18 where hole openings were either uncovered or improperly covered with  
19 plastic in plain view; the respondent foreman did not inspect the site  
20 conditions before sending employees to work, nor assure the employees  
21 were utilizing the appropriate safety equipment. Foreman Navarrete  
22 testified he observed the noncompliant plastic covers yet took no action  
23 to enforce the fall hazard protection standards. Over a two day work  
24 period a reasonably prudent employer supervisor would have readily  
25 gained knowledge of the existent violative conditions on the roof that  
26 required fall protection assurance. Accordingly, the recognized defense  
27 of employee misconduct, while raised, was not supported by preponderant  
28 evidence to negate the findings and prima facie evidence of violation.

1           The Board finds the respondent employer had a statutory duty to  
2 comply with the OSHA safety standards as an "**exposing employer**" even if  
3 it did not create or control the hazard. *Southern Pan Services vs. U.S.*  
4 *Department of Labor*, U.S. Court of Appeals, 11<sup>th</sup> Cir. No. 16-13417,  
5 Decided: April 11, 2017.

6           In reviewing Citation 1, Item 2, the Board finds insufficient  
7 preponderant evidence of a violation under OSHES statutory burden of  
8 proof. The necessary proof element of **employer knowledge** was not  
9 established. The facts, testimony and documentary reports demonstrate  
10 the **wall** openings presented different worksite conditions from the **floor**  
11 hole openings at Citation 1, Item 1. The evidence at Exhibit 1, page  
12 112 depicted a side view of the building wall openings with guard  
13 railings installed. The photo was taken the evening prior to the  
14 inspection and date stamped 12/07/2016. The interview statements of  
15 employees Luis and Humberto Escobar and supporting evidence demonstrated  
16 they arrived at the work area on 12/08/2016 at 6:00 a.m. and began  
17 installing drywall at 8:00 a.m. A photo of the two employees at Exhibit  
18 1, page 111, depicted them installing a guard railing during the  
19 inspection. There was no photo of foreman Navarrete at the location  
20 taken by CSHO Magtoto. Mr. Navarrete testified he did not inspect the  
21 roof area prior to the employee work; nor was he even on the roof  
22 despite Mr. Magtoto's reported recollection. The subject employees were  
23 trained and the company safety policy in place for fall hazard  
24 protection based upon documentary evidence at respondent Exhibit A,  
25 pages 1-18. There was no evidence of **actual employer knowledge** of the  
26 alleged brief violative conditions, **nor can that proof requirement be**  
27 **imputed** under the facts in evidence. The employer and foreman could  
28 reasonably rely on the photograph at page 112 to assume the guard



1 railing shown would remain in place until the brief drywall work was  
2 completed the following morning.

3 The Board need not reach a determination on the employee misconduct  
4 defense under the facts in evidence. There is no finding of **employer**  
5 **knowledge** of violative conditions, and therefore no basis to shift the  
6 burden of proof to respondent to establish the employee misconduct  
7 defense. The Board finds no evidentiary bases to reasonably support the  
8 required proof element of employer **foreseeability**, either directly or by  
9 imputation through the supervising foreman.

10 The Board would be required to extrapolate a violation under the  
11 strict burden of proof by imputing employer knowledge to strained  
12 factual circumstances. This would require reliance upon speculation  
13 **estimates, assumptions, and/or inferences** as to what might or could  
14 occur in a series of events. However, it is incumbent upon the  
15 **complainant to meet the burden of proof by preponderant evidence to**  
16 **establish a violation.**

17 . . . The **Secretary's obligation** to demonstrate the  
18 alleged violation by **a preponderance of the**  
19 **reliable evidence** of record **requires more than**  
20 **estimates, assumptions and inferences** . . . [t]he  
21 Secretary's reliance on mere conjecture is  
22 insufficient to prove a violation . . . [findings  
23 must be based on] 'the kind of evidence on which  
24 responsible persons are accustomed to rely in  
25 serious affairs.' *William B. Hopke Co., Inc.*, 1982  
26 OSAHRC LEXIS 302 \*15, 10 BNA OSHC 1479 (No. 81-206,  
19820 (ALJ) (citations omitted). (Emphasis added)

23 When the Secretary has introduced evidence showing  
24 the existence of a hazard in the workplace, the  
25 employer may, of course, defend by showing that it  
26 has taken **all necessary precautions to prevent the**  
**occurrence of the violation.** *Western Mass. Elec.*  
*Co.*, 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981).  
(Emphasis added)

27 The Board cannot engage in speculation to extrapolate a violation  
28 by imputing employer knowledge to the respondent based on a condition

1 that not reasonably noticeable to a foreman supervisor when viewing the  
2 outside barricaded condition in the photo taken on December 7 at page  
3 112A. It is reasonable to rely on trained experienced employees to  
4 perform work safely and in accordance with an established safety  
5 training plan. The facts, testimony, photographs and reports taken as  
6 a whole confirmed the wall openings presented a different worksite  
7 condition distinguished from the floor hole openings which occurred in  
8 **plain view**. The wall opening condition and the brief work effort near  
9 the wall opening does not provide sufficient preponderant evidence upon  
10 which to base or impute employer knowledge to find a violation.

11 An employer cannot in all circumstances be held to  
12 the **strict standard of being an absolute guarantor**  
13 **or insurer that his employees will observe all the**  
14 **Secretary's standards at all times.** (emphasis  
15 added) An isolated brief violation of a standard  
16 by an employee which is unknown to the employer and  
17 is contrary to both the employer's instructions and  
18 a company work rule which the employer has  
19 uniformly enforced does not necessarily constitute  
20 a violation of [the specific duty clause] by the  
21 employer. *Id.*, 1 O.S.H.C. at 1046. (emphasis  
22 added)

18 *National Realty and Construction Co., Inc. v.*  
19 *OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973), is the  
20 fountainhead case repeatedly cited to relieve  
21 employers of responsibility for the allegedly  
22 disobedient and negligent act of employees which  
23 violate specific standards promulgated under the  
24 Act, and sets forth the principal which has been  
25 confirmed in an extensive line of OSHC cases and  
26 reconfirmed in *Secretary of Labor v. A. Hansen*  
27 *Masonry*, 19 O.S.H.C. 1041, 1042 (2000).

23 ". . . employers are not liable under the Act for  
24 an individual **single act of an employee which an**  
25 **employer cannot prevent."** *Id.*, 3 O.S.H.C. at 1982.  
26 The OSHRC has repeatedly held that "employers,  
27 however, have an affirmative duty to protect  
28 against preventable hazards and preventable  
29 hazardous conduct by employees. *Id.* See also,  
30 *Brock v. L.E. Meyers Co.*, 818 F.2d 1270 (6<sup>th</sup> Cir.),  
31 *cert. denied* 484 U.S. 989 (1987). (emphasis added)

32 . . . the mere occurrence of a safety violation

1 does not establish ineffective enforcement,  
2 *Secretary of Labor v. Raytheon Constructors Inc.*,  
3 19 O.S.H.C. 1311, 1314 (2000).

4 At Citation 2, Item 1, the Board finds a lack of preponderant  
5 evidence to establish a violation for the cited electrical equipment  
6 standard at 29 CFR 1926.403(b)(ii). It was undisputed that employee  
7 Baide brought his own RPT to the worksite. He admitted the employer had  
8 no knowledge of the RPT. While the employer is expected to have  
9 knowledge of **its worksite equipment** through foremen and supervisors, the  
10 facts in evidence demonstrated a **lack of reasonable foreseeability** to  
11 establish employer knowledge directly or vicariously through imputation.  
12 The location where the equipment batteries were being charged was not  
13 in the direct work area. Additionally, the potential exposure time by  
14 respondent employees in the area was not substantial.

15 Based upon facts, evidence and testimony, it is the decision of the  
16 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of  
17 Nevada Revised Statutes did occur at Citation 1, Item 1 29 CFR  
18 1926.501(b)(4)(i), the Serious classification and proposed penalty in  
19 the amount of \$800.00 are confirmed.

20 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**  
21 **HEALTH REVIEW BOARD** that no violation did occur as to Nevada Revised  
22 Statutes at Citation 1, Item 2, 29 CFR 1926.501(b)(14). The Serious  
23 classification (zero proposed penalty) is denied.

24 It is the additional decision of the **NEVADA OCCUPATIONAL SAFETY AND**  
25 **HEALTH REVIEW BOARD** that no violation did occur as to Nevada Revised  
26 Statutes at Citation 2, Item 1, 29 CFR 1926.403(b)(2), the Other than  
27 Serious classification and proposed penalty are denied.

28 The Board directs counsel for the **respondent** to submit proposed  
Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**

1 SAFETY AND HEALTH REVIEW BOARD and serve copies on opposing counsel  
2 within twenty (20) days from date of decision. After five (5) days time  
3 for filing any objection, the final Findings of Fact and Conclusions of  
4 Law shall be submitted to the NEVADA OCCUPATIONAL SAFETY AND HEALTH  
5 REVIEW BOARD by prevailing counsel. Service of the Findings of Fact and  
6 Conclusions of Law signed by the Chairman of the NEVADA OCCUPATIONAL  
7 SAFETY AND HEALTH REVIEW BOARD shall constitute the Final Order of the  
8 BOARD.

9 DATED: This 29th day of August 2017.

10 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
11 REVIEW BOARD

12 By /s/  
13 JAMES BARNES, CHAIRMAN

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3  
4  
5

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

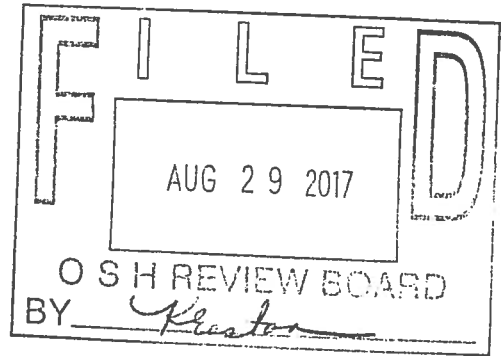
Docket No. LV 17-1889

Complainant,

vs.

JETSTREAM CONSTRUCTION, INC.,

Respondent.



14  
15 CERTIFICATE OF MAILING

16 Pursuant to NRCP 5(b)(2)(B), I certify that I am an employee of  
17 SCARPELLO & HUSS, LTD., and that on August 29, 2017 I deposited for  
18 mailing, certified mail/return receipt requested, at Carson City,  
19 Nevada, a true copy of the **DECISION** addressed to:

20 Salli Ortiz, Esq.  
21 Division of Industrial Relations  
22 400 W. King Street, #201  
23 Carson City NV 89703

24 Troy McKnight  
25 Region 9 Safety Compliance  
26 150 N. Durango, Suite 100  
27 Las Vegas NV 89145

28 DATED: August 29, 2017

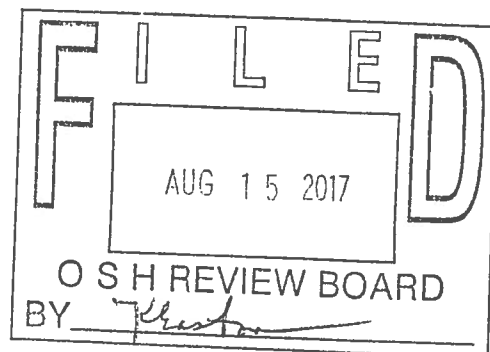
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CARSON CITY OFFICE

*Karen A Easton*  
KAREN A. EASTON

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3  
4

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

Docket No. LV 17-1902



Complainant,

vs.

11 HARBER CO., INC. dba MOUNTAIN CASCADE  
12 OF NEVADA,

Respondent.  
13 \_\_\_\_\_/

14 **DECISION**

15 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
16 **REVIEW BOARD** at a hearing commenced July 12, 2017, in furtherance of  
17 notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel  
18 appearing on behalf of the Complainant, **Chief Administrative Officer of**  
19 **the Occupational Safety and Health Administration, Division of**  
20 **Industrial Relations** (OSHA). MR. ROBERT PETERSON, ESQ., appearing on  
21 behalf of Respondent, Harber Co., Inc. dba Mountain Cascade of Nevada.

22 Jurisdiction in this matter has been conferred in accordance with  
23 Chapter 618 of the Nevada Revised Statutes.

24 The complaint filed by the OSHA sets forth allegations of violation  
25 of Nevada Revised Statutes as referenced in Exhibit "A", attached  
26 thereto.

27 Citation 1, Item 1, charges a violation of NRS 618.987(2), which  
28 provides:

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1 NRS 618.987 Requirements to present employer with  
2 completion card.

3 2. If a supervisory employee on a construction  
4 site fails to present his or her employer with a  
5 current and valid completion card for an OSHA-30  
6 course not later than 15 days after being hired,  
7 the employer shall suspend or terminate his or her  
8 employment.

9 Complainant alleged:

10 Harber Company, Inc. dba Mountain Cascade of Nevada  
11 did not suspend or terminate supervisory employees  
12 for failing to present them an OSHA 30 card within  
13 15 days of being hired. The employees were  
14 supervising the installation of a replacement sewer  
15 line in a trench located to the north of the  
16 intersection of South Durango Drive and West Agate  
17 Avenue, Las Vegas, NV 89113, on March 10, 2017.  
18 One employee was the superintendent who had worked  
19 for the company since 2015 in a different state,  
20 but had started working in Nevada on February 13,  
21 2017. The other employee was the foreman who had  
22 worked for the company since 2011.

23 HARBER COMPANY, INC. DBA MOUNTAIN CASCADE OF NEVADA  
24 WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS  
25 OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS  
26 EQUIVALENT STANDARD, NEVADA REVISED STATUTES  
27 618.983(2), WHICH WAS CONTAINED IN OSHA INSPECTION  
28 NUMBER 316510247, CITATION NUMBER 1, ITEM NUMBER 3,  
AND WAS AFFIRMED AS A FINAL ORDER ON JANUARY 4,  
2013, WITH RESPECT TO A WORKPLACE LOCATED AT 1515  
NATIONAL GUARD WAY, RENO, NV 89502.

19 The citation was classified as "Repeat/Other." The proposed  
20 penalty for the alleged violation is in the amount of ONE THOUSAND  
21 DOLLARS (\$1,000.00).

22 Citation 2, Item 1, charges a violation of 29 CFR 1926.652(a)(1),  
23 which provides in pertinent part:

24 Each employee in an excavation shall be protected  
25 from cave-ins by an adequate protective system  
26 designed in accordance with paragraph (b) or (c) of  
27 this section except when: 1926.652(a)(1)(i)  
28 Excavations are made entirely in stable rock; or  
1926.652(a)(1)(ii) Excavations are less than 5 feet  
(1.52 m) in depth and examination of the ground by  
a competent person provides no indication of a  
potential cave-in.

1 Citation 1, Item 1, charges in the alternative, a violation of 29  
2 CFR 1926.652(b)(2), which provides in pertinent part:

3 Design of sloping, and benching systems. The  
4 slopes and configurations of sloping and benching  
5 systems shall be selected and constructed by the  
6 employer or his designee and shall be in accordance  
7 with the requirements of paragraph (b)(1); or, in  
8 the alternative, paragraph (b)(2); or in the  
9 alternative, paragraph (b)(3); or in the  
10 alternative paragraph (b)(4), as follows:  
11 Determination of slopes and configurations using  
12 appendices A and B. Maximum allowable slopes, and  
13 allowable configurations for sloping and benching  
14 systems, shall be determined in accordance with the  
15 conditions and requirements set forth in appendices  
16 A and B to this subpart.

17 Complainant alleged:

18 "The trench located to the north of the  
19 intersection of South Durango Drive and West Agate  
20 Avenue, Las Vegas, NV 89113, had a sloped  
21 protective system that was not constructed in  
22 accordance with Appendix B of 92 CFR 1926 subpart  
23 P. Two employees of Harber Company, Inc., dba  
24 Mountain Cascade of Nevada were working in the  
25 trench installing a 24-inch sewer line. The  
26 approximate depth of the trench was 9 feet where  
27 the sewer line had not been placed, and 6 feet  
28 where the sewer line was placed. The trench was  
approximately 13 feet in width at the top and 3.5  
feet in width at bottom. The employer classified  
the slope as type B which requires a slope of 1:1.

At the 9-foot depth, this trench would need to be  
a minimum of 18 feet in width at the top (not  
including the bottom width) to meet the 1:1 slope.  
Accounting for the bottom width requires that this  
trench have a top width of 21.5 feet to produce a  
slope of 1:1.

At the 6-foot depth, this trench would need to be  
a minimum of 12 feet in width at the top (not  
including the bottom width) to meet the 1:1 slope.  
Accounting for the bottom width requires that this  
trench have a top width of 15.5 feet to produce a  
slop of 1:1.

At both depths the slope was too steep to meet a  
1:1 ratio. The slope at the 9-foot depth was  
approximately 0.53:1. The slope at the 6-foot depth  
was approximately 0.79:1. (For every foot in depth,  
less than a foot in width was provided.)



1 Based on observations and interviews, the trench's  
2 soil type was more consistent with Type C which  
requires a slope of 1.5:1.

3 At the 9-foot depth, this trench's overall width  
4 would have to be 30.5 feet. At the 6-foot depth,  
5 this trench's overall width would have to be 21.5  
6 feet.

7 For Type B or Type C soil, the slope of this trench  
8 was too steep to meet the requirements of the  
9 standard, exposing the employees to possible  
10 serious injuries up to and including death from  
11 cave-in hazards.

12 The violation was classified as "Serious." The proposed penalty  
13 for the alleged violation is in the amount of ONE THOUSAND TWO HUNDRED  
14 DOLLARS (\$1,200.00).

15 Counsel for the complainant and respondent stipulated to the  
16 admission of evidence at complainant's Exhibits 1 through 3 and  
17 respondents Exhibit A.

18 Counsel for the parties further stipulated to the withdrawal of  
19 contest as to Citation 1, Item 1.

20 Counsel presented witness testimony and documentary evidence  
21 through Certified Safety and Health Officer (CSHO) Mr. Jeff Snell. Mr.  
22 Snell testified he conducted a "referral inspection" at the respondent  
23 construction site located in Las Vegas, Nevada at South Durango Drive  
24 and West Agate Avenue. He identified Mr. Angel Valdovinos as foreman  
25 of Harber Company, Inc., dba Mountain Cascade of Nevada, the respondent  
26 herein. Mr. Snell conducted an opening conference with foreman  
27 Valdovinos and the company general superintendent Mr. Tim Soucie. CSHO  
28 Snell referenced his inspection report stipulated in evidence at Exhibit  
1, pages 12 through 14 and the inspection narrative, pages 15 to 17. He  
testified as to his findings during the inspection.

During the "walk around," CSHO Snell observed two employees working

1 in a trench. He reported one employee was using a compactor the other  
2 holding an underground utility marking tape out of the way. There was  
3 no shoring in the trench, but he observed the trench to be sloped. The  
4 north end of the trench where the employees were working was 6 feet  
5 deep. The 24 inch diameter sewer line had already been laid in that  
6 area. The trench was 9 feet deep at the bottom of the sewer line. The  
7 width of the trench at the top was approximately 13 feet. The trench  
8 crossed over an existing culvert. The area soil had been previously dug  
9 up to install the culvert, the sewer line being replaced, 2 natural gas  
10 lines, and a water main. The trench slope was ". . . too steep, and did  
11 not meet the ratio for type B soil of 1:1."

12 CSHO Snell reported at Exhibit 1, page 16 the respondent general  
13 superintendent Tim Soucie, informed him he was using hydraulic shoring  
14 in the trench until reaching the area above the culvert. He testified  
15 Mr. Soucie advised they were:

16 ". . .sloping . . . because of the culvert and  
17 adjacent wash . . . the shoring would not hold up  
18 due to the fill above the culvert being type 2, so  
19 they had to slope the trench . . . (they) could not  
20 go any wider with the trench due to a high pressure  
natural gas line to the east of the trench and the  
road, the water main, and another gas line to west  
of the trench . . ."

21 During employee interviews Mr. Snell was informed the respondent  
22 was using shoring up until the day before the inspection. They stopped  
23 utilizing the shoring because the soils were so loose and falling around  
24 the shoring. Mr. Snell testified and reported that the OSHA excavation  
25 definitions could also apply to the trench as a "confined space,"  
26 however there were vertical standards covering excavations and therefore  
27 determined 29 CFR 1926.652 applicable.

28 CSHO Snell identified the photographs at Exhibit 1 in evidence, and

1 testified picture 44 demonstrated the trench he measured ranged from 9  
2 feet to 6 feet in depth. He referenced photographic Exhibit 1, page 116  
3 depicting a confirmed respondent employee standing on the trench floor.  
4 He testified photographs at Exhibit 1, pages 117 and 118 depicted him  
5 taking measurements of the trench, the latter at the shallower end. At  
6 Exhibit 1, page 123 he identified the photograph as demonstrating a  
7 measurement of the top width of the trench. He testified it was "just  
8 shy" of 13 feet and referenced photographic Exhibit 1, page 125 to  
9 support his findings.

10 On cross-examination Mr. Snell testified the employer classified  
11 the soil as "Type 2, Class B soil." Mr. Snell later confirmed from  
12 calculations that a slope of 1:1 was required. He explained the  
13 standard prevents classifying "previously disturbed" soil to any better  
14 consistency than "B." Based upon the employer's classification of that  
15 Type B soil, the depth of work observed and the measurements taken, Mr.  
16 Snell recommended a citation for violation of 29 CFR 1926.652(a)(1).  
17 He cited the violative conditions in the alternative. CSHO Snell  
18 explained the purpose for the alternative citation of 29 CFR  
19 1926.652(b)(2) was to provide data for correction options including  
20 "sloping" configurations and the employer determinations permitted under  
21 the standard through the appendices at A and B. He testified the  
22 citations included options for compliance. He referenced Exhibit 1  
23 commencing at page 55 as recognized supporting references for  
24 compliance.

25 CSHO Snell testified he utilized the employers equipment to take  
26 the measurements as he did not have a tape with him at the site. He  
27 confirmed his width measurements at the top of the trench, and testified  
28 he did not actually measure the bottom width. He utilized the top width

1 measurement and referenced the employer data and his observations to  
2 establish the bottom width for sloping protection requirements. Mr.  
3 Snell further testified he was not informed by the employer, who allowed  
4 use of its measuring rods, of any defect or damage to the equipment.  
5 Mr. Snell testified he personally observed the employee working in the  
6 trench he measured at over five (5) feet deep without cave-in protection  
7 in violation of the cited standard. He confirmed his reportings,  
8 including the interview statements at Exhibit 1, pages 19 through 20 and  
9 particularly the violation worksheets at pages 21 through 68.

10 Complainant presented witness testimony from compliance NVOSHES  
11 supervisor, Mr. Nicholas LaFronz. He identified Exhibit 1, page 36 as  
12 the violation worksheet and testified on the citation charging  
13 allegations in the alternative. He testified "both (standards) apply  
14 . . . but that 29 CFR 1926.652(a)(1) alone would give an appearance the  
15 employer had nothing in place . . . However they in fact did have  
16 equipment at the site, so . . . believed 1926.652(b)(2) more clearly  
17 ". . . covered what they did and showed why not enough . . ." for  
18 compliance. He explained both standards referenced excavation  
19 protection from cave-ins and adequate protective systems for an  
20 undisputed depth of over five (5) feet and Type B soil; however, the  
21 options permitted in 29 CFR 1926.652(b)(2) provided direction and  
22 explanation on the design, details for sloping protection.

23 Mr. LaFronz reviewed the CSHO findings and the worksheet  
24 information on the elements required to prove a violation by NVOSHA  
25 particularly at Exhibit 1, pages 36 through 40. He testified **employee**  
26 **exposure** was established based upon the personal observations of the  
27 CSHO and photographs in evidence. The citation was **applicable** to the  
28 **violative condition** observed by Mr. Snell which reflected no shoring or

1 required sloping ratio in the trench area measured at well over five (5)  
2 feet deep.

3 Mr. LaFronz testified that Exhibit 1, page 39 established **employer**  
4 **knowledge**, based upon employer general superintendent Mr. Tim Soucie's  
5 presence at the worksite and his reports in evidence. Mr. Soucie  
6 admitted the soil was "too loose" in the area for the shoring to "stand  
7 up" which caused him to switch to sloping. He testified and referenced  
8 at Exhibit 1, page 39, that Mr. Soucie informed they could not go any  
9 wider with the trench because of the high pressure gas line to the east  
10 and a water main and gas line to the west. He noted Exhibit 1, pages  
11 46 through 49 confirmed Mr. Soucie completed and signed four (4)  
12 consecutively dated inspection "box" forms for "Type B soil" and  
13 "sloping required of 1:1." Mr. Soucie also completed on the same four  
14 (4) forms, and reported to Mr. Snell the trench's dimensions listed as  
15 ". . . 8 feet deep, top width 14 feet and bottom width 42 inches . . ."  
16 Mr. LaFronz testified " . . . it was agreed the soil was Type B, and the  
17 excavation dimensions were admitted so the trench should have been  
18 sloped 1:1; but that's not what the CSHO found during the inspection  
19 . . . ." Mr. LaFronz testified, the report at Exhibit 1, page 40  
20 provides ". . . To meet a 1:1 ratio using these dimensions, the **minimum**  
21 **top width** should have been approximately 19.5 feet . . . ." The  
22 measurements taken and confirmed by Mr. Snell, the admitted reports  
23 completed by Mr. Soucie, and the photographic exhibits both placed the  
24 top width at approximately thirteen (13) feet to fourteen (14) feet.

25 Mr. LaFronz further testified to support the classification of  
26 serious, the proposed penalty and referenced the Exhibit 1 worksheets.

27 Respondent presented witness testimony from Mr. Tim Soucie. He  
28 identified himself as the general superintendent for the respondent on

1 the day of the inspection. Mr. Soucie testified he stopped using  
2 shoring at the particular location because a high pressure gas line and  
3 water main were in the way as reported by the CSHO. He testified the  
4 equipment utilized by the CSHO to measure the top width was not reliable  
5 because "rods" are often broken at the bottom or otherwise damaged. He  
6 further testified the CSHO had no idea how wide the bottom of the trench  
7 was. Mr. Soucie testified it was ". . . about 48 inches . . ." He  
8 testified the company used a "penatrometer" which measures sensitivity  
9 strength of the soil. He testified he was cited for a violation under  
10 two sections of 29 CFR 1910.652 as both (a) (1) and (b) (2) and questioned  
11 how that could be done.

12 On cross-examination Mr. Soucie testified he never mentioned the  
13 potential defective condition of the measuring equipment to CSHO Snell  
14 at the time of the inspection. He further testified the measuring rod  
15 was "not accurate" when he let the CSHO use it; and further testified  
16 he doesn't rely on the use of ". . . rods because they bend or are  
17 broken; just not very accurate . . . but not way off . . ."

18 Mr. Soucie identified complainant's photograph at Exhibit 1, page  
19 41A as depicting the measuring rod utilized. He testified the slope in  
20 the trench was ". . . 1:1 . . . despite what the CSHO found . . ." Mr.  
21 Soucie agreed the soil was Type B and the appropriate slope ratio  
22 required under the standard was indeed 1:1. He testified that he  
23 disagreed with the CSHO inspection findings.

24 At the conclusion of the respondent's case, the Board requested  
25 additional testimony from Mr. LaFronz on the trench excavation  
26 measurement calculations. Mr. LaFronz testified that respondent's own  
27 Exhibits A-1 and A-4 admitted the bottom width of the trench was 42  
28 inches and the top width 14 feet. He explained that the mathematical

1 calculations clearly demonstrate, based on respondent's own numbers, the  
2 minimum top width should have been 19.5 feet.

3 At the conclusion of evidence and testimony, the parties presented  
4 closing arguments.

5 Complainant argued the photographs in evidence showing the  
6 measurements made by the CSHO using the respondent's own equipment,  
7 measuring rods not a tape, confirmed a violation of the standard cited  
8 for failure to provide cave-in protection to employees working in the  
9 trench excavation over five (5) feet deep. It was undisputed that  
10 shoring was not in place. There was no dispute the soil was Type B, nor  
11 depth over five (5) feet as confirmed and included at respondent's  
12 Exhibit A in evidence. The CSHO utilized the employer Type B  
13 classification and measured the sloping using the undisputed reference  
14 requirement of a 1:1 ratio. ". . . (S)o if all agree on the soil type  
15 and the 1:1 ratio and reference the respondent's own Exhibit A-4  
16 calculations, the evidence clearly establishes the respondent didn't  
17 meet the ratio if you run the numbers . . ."

18 Counsel referenced Exhibit 1, page 62 stipulated in evidence and  
19 asserted it depicted the sloping requirements based upon the  
20 measurements listed in the respondent exhibits and agreed upon by the  
21 parties. It clearly ". . . shows the lack of compliance . . ."  
22 Counsel further argued the CSHO didn't measure the bottom and accepted  
23 the respondent measurement data for the 1:1 ratio requirement. No  
24 additional bottom measurement was needed under the facts in evidence to  
25 establish the excavation was not properly sloped to achieve the required  
26 protection under the standards. Counsel argued that the burden of proof  
27 was met.

28 Respondent presented closing argument. Counsel asserted the burden

1 of proof had not been met due to the lack of accurate measuring to  
2 determine the sloping ratio to be non-compliant. Counsel further argued  
3 the citation should be dismissed because it was charged in the  
4 **alternative** which lacked the **particular** allegations required by OSHA to  
5 establish a violation. Counsel asserted the applicable law requires a  
6 specific standard be charged to satisfy OSHA particularity requirements  
7 in the recognized enforcement process. He argued the citation for  
8 violation at Citation 2, Item 1 should be dismissed.

9 In reviewing the testimony, documents and exhibits including  
10 arguments of counsel, the Board must analyze the competent evidence  
11 under the burden of proof to establish violations under occupational  
12 safety and health law.

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

15 All facts forming the basis of a complaint must be  
16 proved by a preponderance of the evidence. See  
*Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD  
17 ¶16,958 (1973).

18 Preponderance of the evidence means evidence that  
19 enables a trier of fact to determine that the  
existence of the contested fact is more probable  
20 than the nonexistence of the contested fact. NRS  
*233B, Sec. 2. Nassiri v. Chiropractic Physicians'*  
21 *Board of Nevada*, 130 Nev. Adv. Op. No. 27, 327 P.3d  
487 (2014)

22 A "serious" violation is established in accordance with NRS  
23 618.625(2) which provides in pertinent part:

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



1 To establish a prima facie case, the Secretary  
2 (Chief Administrative Officer) must prove the  
3 existence of a violation, the exposure of  
4 employees, the reasonableness of the abatement  
5 period, and the appropriateness of the penalty.  
6 *Bechtel Corporation*, 2 OSHC 1336, 1974-1975 OSHD  
7 ¶18,906 (1974); *Crescent Wharf & Warehouse Co.*, 1  
8 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).  
9 (emphasis added)

6 To prove a violation of a standard, the Secretary  
7 must establish (1) the **applicability** of the  
8 standard, (2) the existence of **noncomplying**  
9 **conditions**, (3) **employee exposure or access**, and  
10 (4) that the **employer knew or with the exercise of**  
11 **reasonable diligence** could have known of the  
12 violative condition. See *Belger Cartage Service,*  
13 *Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
14 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);  
15 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC  
16 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
17 (No. 76-1408, 1979); *American Wrecking Corp. v.*  
18 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.  
19 2003). (emphasis added)

14 A respondent may rebut allegations by showing:

- 15 1. The standard was inapplicable to the situation  
16 at issue;
- 17 2. **The situation was in compliance**; or lack of  
18 access to a hazard. See *Anning-Johnson Co.*,  
19 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).
- 20 3. **Proof by a preponderance of substantial**  
21 **evidence of a recognized defense.**

20 The cited standards charged in the alternative **specifically**  
21 **described the violative conditions** requiring cave-in protection for  
22 respondent employees working in the trench installation; **and** the  
23 **permitted protective** systems options that could be elected by the  
24 employer to effectuate compliance. The **applicable** governing standards  
25 were appropriately cited in the alternative at 29 CFR 1926.652(a)(1) and  
26 29 CFR 1926.652(b)(2).

27 Proof of the **violative conditions** element was clearly established  
28 from the preponderant evidence of the jobsite conditions. It was

1 unrefuted the employees were **working** in a trench **excavation over five**  
2 **(5) feet** deep without shoring. The 1:1 slope was undisputed as the  
3 correct design **ratio** to protect the recognized **employee exposure** for  
4 cave-in protection. **Employer knowledge** was established based upon the  
5 admitted presence of the respondent superintendent and foreman at the  
6 jobsite. There was no evidence to the contrary. There was no dispute  
7 the trench was **unshored**, the soil classification Type B, and the ratio  
8 of the slope required at 1:1.

9 A prima facie case of violation was established by a preponderance  
10 of evidence.

11 There were two factual issues disputed for the finding of  
12 violation. The first is whether the slope ratio was actually 1:1 based  
13 upon the complainant calculations from evidence in the record.  
14 Respondent offered **no competent evidence of measurement in rebuttal**. The  
15 measurements taken by the CSHO in the presence of the respondent  
16 supervisory employees, and depicted in the pictorial evidence, confirmed  
17 a violation of the sloping requirements for protection of the employees  
18 working in the trench. The **respondent's own data** and measuring  
19 equipment were utilized to establish the violative conditions. See  
20 respondent's Exhibits A-1 through A-6. Inaccuracy of the measuring rod  
21 was not asserted at the time of inspection, nor subject of any competent  
22 evidence. Respondent presented no evidence of measurements other than  
23 those reported at it's A-1 through A-6 exhibits.

24 The evidence established violation of 29 CFR 1926.652(a)(1).  
25 Preponderant evidentiary proof required under recognized occupational  
26 safety and health law confirmed the existence of **violative conditions,**  
27 **applicability** of the proven cited standard, **exposure of employees,**  
28 **employer knowledge and appropriateness of the penalty.**

1 The calculations to determine the violation did not rest solely  
2 upon a need for a field measurement of the bottom of the trench.  
3 Reference to Exhibit A, page 40, paragraph 23, addresses the central  
4 issue which is then resolved at Exhibit 1, page 62, and the photograph  
5 at page 125. The competent and credible explanation of Mr. LaFronz in  
6 his testimony supported the basis for calculating the slope ratio.  
7 **Further, the respondent's own records at A-1 and A-6** established the  
8 listed dimensions of the trench. Using those dimensions admitted by  
9 respondent, the minimum top width should have been approximately 19.5  
10 feet. However it was unrefuted that the top width was either "just shy"  
11 of 13 feet, or 14 feet as listed by the respondent. To meet a 1:1  
12 ratio, the minimum top width would have to be **19.5 feet** as opposed to  
13 the respondent admitted evidence at "**14 feet.**"

14 The measuring rod depicted in the photographs demonstrated the  
15 violative condition of the trench in **plain view**. To accept respondent  
16 arguments of compliance defies **plain view, plain meaning**, and the facts  
17 in evidence. The testimony and documentary evidence in the record are  
18 confirmed through the mathematical calculations and support findings of  
19 violation.

20 The standards cited were clear and unambiguous. Absent ambiguity  
21 a statute's **plain meaning** controls and no further analysis is permitted.  
22 *State Farm Mut. Auto. Ins. Co. v. Commissioner of Ins.*, 114 Nev. 535,  
23 540, 958 P.2d 733, 736 (1998). *Leven v. Frey*, 123 Nev. 399, 404, 168  
24 P.3d 712, 716 (2007).

25 Once the complainant establishes a prima facie case of violation,  
26 under occupational safety and health law the burden of proof shifts to  
27 the respondent.

28 The **respondent** records in evidence at Exhibit A-1 through A-6

1 listed the bottom width of the trench at 42" and the top width at 14".  
2 The simple mathematics demonstrate the slope was insufficient to meet  
3 the agreed required 1:1 slope ratio. It was undisputed the soil was  
4 Type B and required a 1:1 slope ratio for compliance. Respondent  
5 offered no proof to rebut the prima facie case of violation. To the  
6 contrary, respondent admitted the depth, bottom width, top width, soil  
7 type, and slope requirements which were utilized by NVOSHES to complete  
8 the mathematical calculations to prove a violation under the applicable  
9 OSHA standards. The undisputed factual conditions governed the sloping  
10 ratio. The preponderant evidence demonstrated the top width would have  
11 had to be far greater to satisfy the cited standards and protect  
12 employees working in a trench at a depth more than 5 feet. The  
13 excavation conditions required protection from either shoring or under  
14 the mathematically determined sloping ratio. The difference of a top  
15 width between approximately 14 feet and 19.5 feet to meet the 1:1 slope  
16 ratio was not even close to even give respondent the "benefit of doubt."

17 The second defensive issue is based upon arguments that **alternative**  
18 pleading of a citation is unlawful and lacks **particularity** under fair  
19 enforcement procedures.

20 Section 9(a) requires that the citation "describe  
21 with particularity the **nature of the violation**" and  
22 that it refer to the provision of the Act,  
23 **standard**, regulation, or order alleged to have been  
24 violated. The **purpose of the requirement** is to  
25 **apprise the employer** of the **alleged violation** so  
26 that **corrective action** can be taken and **so that the**  
27 **employer can decide whether to contest.** An  
28 **insufficiently particular citation may not be**  
**vacated unless it adversely affected the employer's**  
**ability to defend.** *Del Monte Cor.*, 4 OSH cases  
2035 (Rev. Comm'n 1977). *Ringland-Johnson, Inc. V.*  
*Dunlop*, 551 F.2d 1117, 1118, 5 OSH Cases 1137 (8<sup>th</sup>  
Cir. 1977); *Brabham-Parker Lumber Co.*, 11 OSH Cases  
1201, 1202 (Rev. Comm'n 1983); *Louisiana-Pacific*  
*Corp.*, 5 OSH Cases 1994 (1977).

1           The **lack of particularity** defense may be raised in OSHA cases. An  
2 employer may challenge the citation itself claiming that it is not  
3 specific enough to give the employer **fair notice of a violation** in order  
4 to defend. Here the facts and testimony in evidence demonstrate the  
5 employer was given ample notice of **the violation** and the **corrective**  
6 **action required** such that it could prepare an adequate defense and made  
7 aware of evidentiary and related requirements. The employer was cited  
8 in the alternative for the violative conditions. The citations included  
9 the particular information required and compliance options. Compliance  
10 was easily achievable by simply widening the top width of the trench to  
11 permit the actual sloping required to result in a 1:1 ratio.

12                     The federal review commission has vacated citations  
13 because they lack sufficient particularity . . .  
14 explaining that due process requires an employer  
15 have **knowledge of specific violations**. Without  
16 particularity the employer **could not prepare an**  
**adequate defense nor be aware of evidentiary**  
**standards**. *L.E. Meyers Co.*, 3 O.S.H.S.C. 1026 (1975)  
*Id.* 3 O.S.H.C. at 1027.

17           Here there was no question the employer was placed on full notice  
18 as to the **nature** of the violation. ". . . (A)n insufficiently  
19 particular citation may **not** be vacated unless it **adversely** affected an  
20 employer's ability to defend . . ." (*Louisiana-Pacific Corp.*, supra at  
21 page 15.) There was no competent evidence, documentation, or persuasive  
22 argument of **any adversity or inability to defend**. The cited standard at  
23 29 CFR 1926.652(a)(1) described with particularity the nature of the  
24 trench violation; and in the alternative 29 CFR 1926.652(b)(2), the  
25 methodology and options for correction to satisfy OSHA cave-in  
26 protection without use of shoring.

27           Based upon the testimony, photographic exhibits and documentation  
28 in evidence, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND**

1 **HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did  
2 occur as to Citation 1, Item 1, NRS 618.987(2), the "Repeat-Other"  
3 classification confirmed, and the penalty in the amount of ONE THOUSAND  
4 DOLLARS (\$1,000.00) confirmed.

5 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**  
6 **HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did  
7 occur as to Citation 2, Item 1, 29 CFR 1926.652(a)(1) the Serious  
8 classification confirmed, and the proposed penalty in the amount of ONE  
9 THOUSAND TWO HUNDRED DOLLARS (\$1,200.00) approved.

10 The Board directs counsel for the **complainant** to submit proposed  
11 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**  
12 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel  
13 within twenty (20) days from date of decision. After five (5) days time  
14 for filing any objection, the final Findings of Fact and Conclusions of  
15 Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
16 **REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and  
17 Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL**  
18 **SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the  
19 **BOARD.**

20 DATED: This 15th day of August 2017.

21 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
22 REVIEW BOARD

23 By            /s/  
24 JAMES BARNES, CHAIRMAN

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3

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

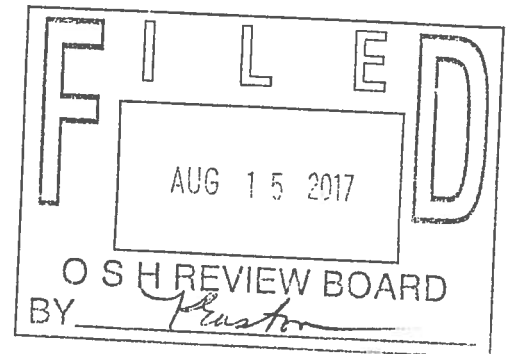
Docket No. LV 17-1902

Complainant,

vs.

10 HARBER COMPANY, INC., dba  
11 MOUNTAIN CASCADE OF NEVADA,

Respondent.



12 \_\_\_\_\_/  
13 CERTIFICATE OF MAILING

14 Pursuant to NRCPC 5(b)(2)(B), I certify that I am an employee of  
15 SCARPELLO & HUSS, LTD., and that on August 15, 2017 I deposited for  
16 mailing, certified mail/return receipt requested, at Carson City,  
17 Nevada, a true copy of the **FINAL ORDER** addressed to:

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

22 Robert D. Peterson, Esq.  
23 3300 Sunset Blvd., Suite 110  
24 Rocklin, CA 95677

25 DATED: August 15, 2017

26   
27 KAREN A. EASTON  
28

RECEIVED  
AUG 17 2017  
DIR LEGAL  
CARSON CITY OFFICE