

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH

2 REVIEW BOARD

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

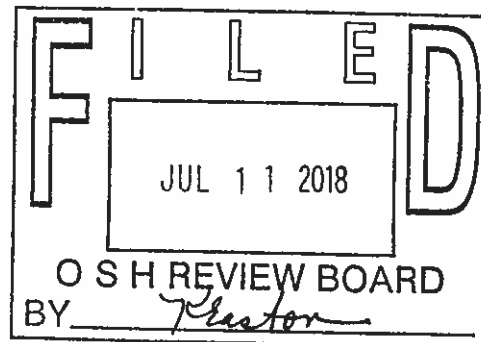
Docket No. LV 17-1900

Complainant,

9 vs.

10 XTREME MANUFACTURING,

Respondent.



11
12 DECISION

13 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
14 **HEALTH REVIEW BOARD** at a hearing commenced on the 14th day of March
15 2018, in furtherance of notice duly provided according to law, MS. SALLI
16 ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**
17 **Administrative Officer of the Occupational Safety and Health**
18 **Administration, Division of Industrial Relations (OSHA)**; and MR. TIM
19 ROWE, ESQ., appearing on behalf of Respondent, **Xtreme Manufacturing.**

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

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

25 Citation 1, Item 1, charged a violation of NRS 618.375(1) commonly
26 known as the General Duty Clause, which provides in pertinent part:

27 Duties of employers. Every employer shall furnish
28 employment and a place of employment which are free
from recognized hazards that are causing or are
likely to cause death or serious physical harm to

1 his or her employees.

2 The complainant alleged that:

3 On March 9, 2017, there were steel storage racks
4 that were not anchored to the ground. The employer
5 did not furnish a place of employment free from
6 recognized hazards that are causing or are likely
7 to cause death or serious physical harm to his or
8 her employees when the employees accessed the
9 approximate 20 steel storage racks daily in order
10 to access boxes, pallets and parts using a
11 forklift. This exposed employees to crushing
12 injuries like broken bones, paralysis, or death
13 should the rack system get hit by the forklift and
14 cause the shelves and parts to strike the
15 employees. 1. There was one steel storage rack
16 located in the south central part of the shop. 2.
17 There were approximately nineteen steel storage
18 racks located on the outside of the shop against
19 the north side of the wall on the north side of the
20 property.

21 Reference ANSI MH 16.1 Specification for Design
22 Testing, and Utilization of Industrial Steel
23 Storage Racks. Section 1.4.7 Column Based Plates
24 and Anchors. The bottom of all columns shall be
25 furnished with column base plates, as specified in
26 Section 7.2. All rack columns shall be anchored to
27 the floor with anchor bolts capable of resisting
28 the forces caused by the horizontal and vertical
loads on the rack.

ONE FEASIBLE MEANS OF ABATEMENT WOULD BE TO FOLLOW
ANSI MH 16.1 PARAGRAPH 1.4.7 (ANCHORING DOWN RACK).

XTREME MANUFACTURING, LLC, WAS PREVIOUSLY CITED FOR
A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH
STANDARD OR ITS EQUIVALENT STANDARD, NRS
618.375(1), ANSI MH 16.1 SECTION 1.4.7, WHICH WAS
CONTAINED IN OSHA INSPECTION NUMBER 1101628,
CITATION NUMBER 1, ITEM NUMBER 1, AND WAS AFFIRMED
AS A FINAL ORDER ON AUGUST 26, 2016.

23 The citation was classified as "Repeat Serious." The proposed
24 penalty for the alleged violation is in the amount of \$8,000.00.

25 Citation 2, Item 1, charged a violation of 29 CFR 1910.1200(f)(6),
26 which provides in pertinent part:

27 Workplace labeling. Except as provided in
28 paragraphs (f)(7) and (f)(8) of this section, the
employer shall ensure that each container of
hazardous chemicals in the workplace is labeled,

1 tagged or marked with either: the information
2 specified under paragraphs (f)(1)(i) through (v) of
3 this section for labels on shipped containers; or,
4 product identifier and words, pictures, symbols, or
5 combination thereof, which provide at least general
6 information regarding the hazards of the chemicals,
7 and which, in conjunction with the other
8 information immediately available to employees
9 under the hazard communication program, will
10 provide employees with the specific information
11 regarding the physical and health hazard of the
12 hazardous chemical.

13 The complainant alleged that:

14 On March 9, 2017, at the Xtreme Manufacturing LLC's
15 shop, there were two hazardous chemical containers
16 in the workplace, which were not labeled, tagged or
17 marked. The containers did not have the
18 information specified under paragraphs (f)(1)(i)
19 through (v) of the section for labels on shipped
20 containers or product identifier and words,
21 pictures, symbols or combination thereof, which
22 provide at least general information regarding the
23 hazards of the chemicals. The Wilkins Anti-
24 fog/Anti-Static Lens Cleaner was used to clean the
25 lenses and face shields of the equipment being used
26 at the shop.

27 The violation was classified as "Other than Serious." No penalty
28 was proposed.

The parties stipulated to the admission of evidence identified as
complainant's Exhibits 1 through 3 and respondent's Exhibits A, B, C.
Counsel further stipulated that respondent no longer contests Citation
2, Item 1, and the notice of contest withdrawn.

FACTS

A referral inspection was conducted on March 9, 2017 by NVOSHA
based upon various complaints which were found to be invalid except for
the two which ultimately became the basis of Citation 1, Item 1, and
Citation 2, Item 1 as referenced.

The essential facts providing the basis for Citation 1, Item 1 are
undisputed. Respondent employees were operating a forklift inside and

1 outside a warehouse facility work site in Henderson, Nevada. The
2 forklift was utilized daily to access boxes, pallets and parts located
3 on steel storage racks. The inside rack was approximately nine feet
4 eight inches (9' 8") high; the outside racks ranged from 10'3" to 10'4"
5 in height. The shelving racks were not anchored or bolted to the
6 concrete floor. The inspector reported hazard exposure to the employees
7 due to the potential of a forklift striking the unsecured storage
8 shelving racks causing a tip or collapse, resulting in probable serious
9 injury or death to employees in the work area. The CSHO recommended a
10 citation for violation of NRS 618.375(1) commonly known as the **General**
11 **Duty Clause**.

12 The inspector also found the respondent employer had been
13 previously cited six months prior for the same violative conduct. A
14 citation was issued by OSHA inspection number 1101628, Citation 1, Item
15 1, and affirmed as a Final Order on August 26, 2016. The citation
16 resulted in confirmation of the violation through a settlement agreement
17 for abatement of the hazard exposure by anchoring the metal shelving
18 racks to the floor.

19 The inspector reported that after the settlement and abatement, the
20 respondent moved the shelving to the present location in the facility
21 due to the need for power company access to electrical equipment below
22 the flooring. When the shelving was moved it was not again bolted to
23 the floor in compliance with the settlement agreement.

24 Based upon the undisputed facts, the inspector recommended
25 citation for the violation classification as both **Serious** and **Repeat**.
26 The NVOSHES complaint alleged the respondent violated **NRS 618.375**
27 **commonly known as the general duty clause**. The citation was based upon
28 the current inspection for lack of bolting to the floor, and violation

1 of the previous settlement agreement which required abatement of the
2 admitted hazardous conditions.

3 The respondent defense was based on a legal issue for failure to
4 meet the burden of proof of a **recognized hazard** by preponderant
5 evidence. Respondent contends there was no evidence of **employee**
6 **exposure** to a "**recognized hazard**" which is a required proof element
7 under the general duty clause, therefore no violation of NRS 618.375 can
8 be lawfully confirmed.

9 Respondent offered evidence and testimony that NVOSHES presented
10 no proof of a **recognized hazard**, and relied primarily on an ANSI
11 standard (American National Standards Institute) which is an industry
12 consensus guidance recommendation, but not a legal basis for issuance
13 of a citation.

14 Respondent presented documentary and testimonial evidence from a
15 professional engineer that no **recognized hazard** existed at the subject
16 worksite. There is no codified **specific standard** under CFR (Code of
17 Federal Regulations) requiring anchoring of shelving racks to the floor;
18 and the ANSI guidance relied upon by NVOSHA applied to **only** metal
19 shelving racks at a **6 to 1 ratio or greater** that presented the risk of
20 tipping. Professional engineer, Mr. David Glabe, provided an opinion
21 report and testimony that the shelving racks on the premises did not
22 reach more than a 2.6 to 1 ratio therefore not within the ANSI guidance
23 even should it be considered applicable.

24 The NVOSHA CSHO Eric Aros who conducted the inspection is no longer
25 employed by the Division and therefore the principal witness testimony
26 was provided through NVOSHES supervisor, Mr. Jamal Sayegh. Documentary
27 exhibits were stipulated in evidence by both parties at complainants
28 Exhibits 1-3 and respondent Exhibits A, B, C.

1 Citation 2, Item 1 was subject of a stipulation by counsel for
2 withdrawal from contest. Accordingly no defense was provided and the
3 citation deemed admitted.

4 Complainant counsel waived opening statement other than to
5 represent the essence of the matter before the Board to involve steel
6 racking and anchoring shelving material to the ground.

7 Respondent counsel provided a brief opening statement identifying
8 the respondent's position denying the alleged violation of the general
9 duty clause. Counsel asserted the citation is based upon a particular
10 ANSI standard that applies to commercial steel racking. He referenced
11 the respondent defense to be the ANSI standard relied upon in the case
12 is not applicable and can't be used as a rule of law because it is
13 essentially just a guideline. Counsel asserted that when the Board
14 analyzes the engineering principles behind steel racking and the purpose
15 of anchors, it quickly becomes apparent that there was no hazard created
16 from the subject racks.

17 DISCUSSION

18 Counsel for the Chief Administrative Officer presented testimony
19 and documentary evidence with regard to the alleged violations. Mr.
20 Jamal Sayegh identified himself as a Certified Safety and Health Officer
21 (CSHO) and currently a compliance supervisor. The inspection was
22 conducted by a former CSHO no longer employed with Nevada OSHA, Mr. Eric
23 Aros. Mr. Sayegh testified he was the reviewing supervisor at the time
24 of the inspection and the principal qualified witness to testify on the
25 violations.

26 Mr. Sayegh identified and referenced complainant Exhibits 1 through
27 3, specific reportings and photographic evidence during the course of
28 his testimony. Noting Citation 1, Item 1, the general duty clause

1 violation, Mr. Sayegh identified the inspection narrative, report,
2 violation work sheets and photographs. He referenced CSHO Aros notes
3 from the narrative describing the work site conditions, particularly
4 observations during the "walkaround" portion. Mr. Sayegh referenced
5 Exhibit 1, page 12 of the narrative report reflecting the observations
6 of CSHO Aros. The report provided:

7 ". . . I observed multiple steel storage racks that
8 were not anchored to the ground beneath them.
9 Items had been placed on the racks and removed from
10 the racks utilizing a forklift. There were three
11 sets of steel storage racks on the outside of the
12 shop on the north wall of the north side of the
13 facility. All three sets of racks were three racks
14 high. From west to east, the first set of racks
15 was six racks wide. The next set of racks was nine
16 racks wide. The last set of racks was four racks
17 wide. Mr. Fisher showed me where the steel storage
18 racks were previous anchored. The approximate
19 height from the ground to the top of the top rack
20 ranged from 10.3 to 10.4 feet.

21 According to Mr. Fisher, the steel storage racks
22 had not been anchored for approximately three
23 weeks. He said that the location where the storage
24 racks were before was underneath power lines and
25 that the power company asked them to move the
26 location of the storage racks to keep them away
27 from the power lines. Mr. Fisher said that they
28 were previously anchored when they were underneath
of the power lines.

There was a single storage rack inside of the shop
that was not anchored either. Mr. Fisher said that
there was no need to anchor that rack because of
the height, which he said was approximately ten
feet tall. He said that anything over twelve feet
needs to be anchored. He said that it had been
moved one and a half to two weeks ago. The
approximate height of the single rack inside the
shop was 9.8 feet (as measured from the ground to
the top of the top rack).

Brandon Main, President of Xtreme Manufacturing,
LLC told me that they were waiting on permits from
the City of Henderson before they anchored the
racks at the new location that they had been moved
to.

Mr. Lewis told me that the steel storage rack in
the shop had been moved to that location about one

1 and a half to two weeks ago. He said that the
2 original location of the steel storage rack was
3 about fifteen feet away from its present location
4 and it was not anchored at its previous location.
5 He said that he had put the boxes of wire on the
6 middle shelf with the forklift. He said it took
7 him about a minute to complete. He said that each
8 box weighed about 30 lbs. for a total of 1,000 lbs.
9 He said that he directs work and that he can give
10 verbal discipline and Eric will be the one who
11 writes up the employees.

12 Mr. Brown said that he accesses the racks a couple
13 of times per week and that he thinks that the steel
14 storage racks have been there one or two months.
15 He said that he will get pallets, parts and steel
16 from the racks. He continued on saying that it may
17 take a few minutes to access the racks."

18 Mr. Sayegh further testified as to the hazardous conditions,
19 employee exposure, and the potential for serious injury or death which
20 could result in the workplace through operation of forklifts moving
21 materials on or from the metal racks not anchored to the ground.

22 Mr. Sayegh further testified as to the previous violation admitted
23 by respondent and referenced Exhibit 2 to establish the prior violation
24 upon which the **repeat** classification was based and enhancement of the
25 proposed penalty under established NVOSHA enforcement policies. He
26 identified the racks through the pictorial exhibits at Exhibit 1,
27 including 62A and 63A. He identified photographic Exhibit 1, page 66 to
28 confirm the racks were not anchored, explaining there were no bolts in
the rack holes in the concrete floor. He further testified as to
pictorial Exhibit 1, pages 68, 69 and 70, regarding different angles and
at page 77 reported measurement of the height showing approximately
10'4". Mr. Sayegh testified under direct examination that the racks,
the rack height, and material storage were in "**plain view**" demonstrating
that the shelves were not anchored to the floor.

On continuing examination Mr. Sayegh testified as to Exhibit 2,

1 page 97, identifying a copy of the settlement agreement for the previous
2 violation for lack of anchoring storage racks subject of prior citation
3 and admission of same becoming a final order on August 26, 2016. Mr.
4 Sayegh testified the work sheet confirmed the previous citation was
5 issued six months previous and testified it established a "heightened
6 awareness" for the violative conditions to support employer knowledge.

7 Mr. Sayegh testified with regard to Exhibit 2, page 124 referencing
8 the American National Standards Institute (ANSI) at 1.4.7, page 127, to
9 **recognize** the hazardous conditions at the workplace due to a failure of
10 anchoring the racking material to the ground. He explained the ANSI
11 standard is a "consensus standard" developed by the industry for
12 reference and guidance for recognition of hazards differentiating same
13 from those codified by congress in the CFR references as to specific
14 controlling standards.

15 Mr. Sayegh explained the allegations of the citation in the
16 complaint and identified ANSI MH 16.1 Paragraph 1.4.7 as referenced.
17 He noted the reference of ANSI MH 16.1 specification for design testing
18 and utilization of industrial steel racks. Section 1.4.7, column face
19 plates and anchors, and requiring the bottom of all columns shall be
20 furnished with column base plates as specified in section 7.2. He
21 further noted by reference to the exhibits that all the rack columns
22 shall be anchored to the floor with anchor bolts capable of resisting
23 the forces caused by the horizontal and vertical loads on the rack.

24 Respondent counsel conducted cross-examination. Mr. Sayegh
25 testified he did not have a professional engineering degree nor ever
26 studied forces or loads for designing storage racks. Further having
27 read the ANSI standard on storage racks and the data contained in the
28 referenced ANSI standard, he admitted ANSI is only guidance for

1 reference, particularly under general duty clause violations.

2 Counsel for respondent presented witness testimony from Mr. David
3 Glabe who identified himself as a consulting engineer and qualified
4 expert witness in construction engineering, training and OSHA design.
5 He testified that he writes ANSI standards for scaffolding and explained
6 that storage rack loads for engineering are very similar applications.
7 He identified his report prepared at Exhibit A in evidence. He
8 testified there was no hazard present under the work site conditions and
9 referenced his report at Exhibit A. He testified the ANSI standard
10 referenced in the report from Glabe Consulting Services at Exhibit A,
11 pages 1 through 7. He identified page 2 noting his opinions providing
12 "Opinion #1. The lack of storage rack/ground anchors did not create a
13 hazard that was likely to cause death or serious physical harm to
14 employees." He referenced his second opinion that respondent complied
15 with the applicable OSHA and ANSI storage rack regulations and
16 standards. Mr. Glabe testified the ANSI standard only recommends
17 anchorage to the floor if there is a ratio of 6 to 1. He further
18 testified that storage height to depth ratio at the respondent work site
19 is approximately only 2.6, so the ANSI standard requirement for
20 anchoring is not applicable therefore there is no recognized hazard.
21 He testified the racks were ". . . stable therefore no hazard based upon
22 the calculations and there were no other calculations, information or
23 showing of hazardous conditions to the employees under the general duty
24 cause." He concluded that there is "no hazard therefore no violation
25 . . ."

26 On direct, redirect and cross-examination Mr. Glabe testified
27 ". . . anchoring racks is a good idea, but has nothing to do with
28 remaining standing up if hit by a forklift so there is no engineering

1 basis to support the existence of a 'hazard' under the general duty
2 clause." He referenced page 44 of the ANSI exhibit identified as
3 respondent's Exhibit C. Mr. Glabe further testified that the racking
4 was ". . . safer without anchors because if hit . . . it would tend to
5 move the racks out of the way and lessen the impact . . ."

6
7 On cross-examination, Mr. Glabe responded to counsel questions
8 including the definition of ANSI. He testified it's a society made up
9 of various trades with safety background which works to develop
10 **consensus standards** for industry guidance.

11 Respondent presented witness testimony from Mr. Ron Rogers who
12 identified himself as the safety manager for the respondent. He
13 testified the previous violation referenced in the complaint to
14 establish a repeat violation required less expense and time than to
15 contest. On redirect he testified the only reason the company agreed
16 to re-anchor, and did in fact do same, was to satisfy OSHA.

17 On cross-examination Mr. Rogers testified that the current
18 violation is not a correct application of ANSI nor was the previous
19 citation. He is aware that Federal OSHA enforces rack anchoring the
20 same as NVOSHA does. He further testified the action under the previous
21 agreement reflected abatement by anchoring but then the racks were moved
22 because NV Energy required access to the underground power and the
23 racking was accordingly not re-anchored after being moved.

24 On closing of the presentation of documentary evidence and witness
25 testimony, both counsel provided closing arguments.

26 Complainant asserted there is a great deal of disinformation being
27 presented before the Board. She argued that Citation 1, Item 1 is a
28 Repeat/Serious violation of the General Duty Clause based upon the
respondent's failure to provide safe employment free of recognized

1 hazards as required by NRS. Counsel asserted the industry consensus
2 shows that ANSI considers the condition unsafe if racks are not
3 anchored; but NVOSHA is not "citing ANSI" as a basis of violation, only
4 the guidance developed for the facts presented. Counsel argued that six
5 months ago respondent was cited for the same hazard, so the employer was
6 well aware of NVOSHA position to establish knowledge of the violative
7 conditions. She argued based upon the testimony of Mr. Rogers the
8 Federal OSHA cites the same for rack anchoring as to does NVOSHA.

9 Counsel further argued that while she does not challenge the expert
10 qualifications of Mr. Glabe as an engineer, he had never seen the job
11 site and therefore cannot make a blanket statement that the job site did
12 not depict a violative safety condition from the employee hazards as
13 cited. Counsel concluded that there was a violation of NRS, that
14 exposure was admitted as well as employer knowledge established.
15 Counsel asserted the only issue is whether there is a hazard. Counsel
16 concluded by arguing that OSHA had its burden of proof and that the
17 Repeat/Serious violation subject of Citation 1, Item 1 should be
18 confirmed.

19 Respondent counsel presented closing argument by asserting there
20 was simply no hazard and without such a showing there could be no
21 violation. Counsel argued that no one from OSHA explained "what the
22 hazard is . . ." Counsel read the citation allegations from the
23 complaint and argued there was no evidence that a forklift running into
24 shelving would result in objects striking and injuring employees.
25 Counsel asserted the worksite conditions do not depict a "recognized
26 hazard by the industry . . . despite the ANSI standard because it (the
27 standard) does not apply. Counsel asserted that yes ANSI is a consensus
28 but OSHA requires legal proof to show a violation not just non-

1 compliance with an ANSI standard.

2 In considering the testimony, exhibits, and arguments of counsel,
3 the Board is required to review the evidence and established legal
4 elements to prove violations under Occupational Safety & Health Law to
5 confirm a violation by a preponderance of evidence.

6 APPLICABLE LAW

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

10 All facts forming the basis of a complaint must be
11 proved by a preponderance of the evidence. See
12 *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD
13 ¶16,958 (1973).

14 In citing an employer under the **General Duty**
15 **Clause**, it is specifically necessary to demonstrate
16 the existence of a **recognized hazard** as mandated by
17 the statute; whereas citing an employer under a
18 **specific standard** relies upon a recognition element
19 based upon codification by Congress and adoption of
20 certain recognition hazards for particular
21 industries. To establish a violation of the
22 General Duty Clause, the **complainant must do more**
23 **than show the mere presence of a hazard.** The
24 General Duty Clause, ". . . obligates employers to
25 **rid their workplaces of recognized hazards . . .**"
26 *Whitney Aircraft v. Secretary of Labor*, 649 F.2d
27 96, 100 (2nd Cir. 1981). (emphasis added)

28 "The elements of a **general duty clause** violation
identified by the first court of appeals to
interpret Section 5(a)(1) have been adopted by both
the Federal Review Commission and the Courts. In
National Realty and Construction Co., Inc. v.
OSHRC, 489 F.2d 1257 (D.C. Cir. 1973), the court
listed three elements that OSHA must prove to
establish a general duty violation; the Review
Commission extrapolated a fourth element from the
court's reasoning: (1) a **condition or activity in**
the workplace presents a hazard to an employee; (2)
the condition or activity is **recognized as a**
hazard; (3) the hazard is causing or is **likely to**
cause death or serious physical harm; and (4) a
feasible means exists to eliminate or materially
reduce the hazard. The four-part test continues to
be followed by the courts and the Review
Commission. E.g., *Wiley Organics Inc. v. OSHRC*,
124 F.3d 201, 17 OSH Cases 2125 (6th Cir. 1997);

1 Beverly Enters., Inc., 19 OSH Cases 1161, 1168
2 (Rev. Comm'n 2000); Kokosing Constr. Co., 17 OSH
3 Cases 1869, 1872 (Rev. Comm'n 1996). The National
4 Realty, decision itself continues to be routinely
5 cited as a landmark decision. See, e.g., Kelly
6 Springfield Tire Co. v. Donovan, 729 F.2d 317, 321,
7 11 OSH Cases 1889 (5th Cir. 1984); Ensign-Bickford
8 Co. v. OSHRC, 717 F.2d 1419, 11 OSH Cases 1657
9 (D.C. Cir. 1983); St. Joe Minerals Corp. v. OSHRC,
10 647 F.2d 840, 845 n.8, 9 OSH Cases 1946 (8th Cir.
11 1981); Pratt & Whitney Aircraft Div. v. Secretary
12 of Labor, 649 F.2d 96, 9 OSH Cases 1554 (2d Cir.
13 1981); R.L. Sanders Roofing Co. v. OSHRC, 620 F.2d
14 97, 8 OSH Cases 1559 (5th Cir. 1980); Magma Copper
15 Co. v. Marshall, 608 F.2d 373, 7 OSH Cases 1893 (9th
16 Cir. 1979); Bethlehem Steel Corp. v. OSHRC, 607
17 F.2d 871, 7 OSH Cases 1802 (3d Cir. 1979).
18 Rabinowitz Occupational Safety and Health Law,
19 2008, 2nd Ed., page 91. (emphasis added)

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

27 NRS 618.375(1) commonly known as the General Duty Clause provides
28 in pertinent part:

29 ". . . Every employer shall:

30 1. Furnish employment and a place of employment
31 which are **free from recognized hazards that are**
32 **causing or are likely to cause death or serious**
33 **physical harm to his employees . . .**" (emphasis
34 added)

35 A respondent may rebut allegations by showing:

- 36 1. The standard was inapplicable to the situation
37 at issue;
- 38 2. The situation was in compliance; or lack of
39 access to a hazard. See, *Anning-Johnson Co.*,
40 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

41 NRS 618.625 provides in pertinent part:

42 ". . . a **serious violation** exists in a place of
43 employment if there is a **substantial probability**
44 **that death or serious physical harm could result**
45 **from a condition** which exists, or from one or more

1 practices, means, methods, operations or processes
2 which have been adopted or are in use in that place
3 of employment unless the employer did not and could
4 not, with the exercise of reasonable diligence,
5 know of the presence of the violation."

6 A "**repeat**" violation is established if based upon a prior violation
7 of the same standard, a different standard, or general duty clause, if
8 the present and prior violation is substantially similar.

9 A violation is considered a repeat violation:

10 If, at the time of the alleged repeat violation,
11 there was a Commission final order against the
12 employer for a substantially similar violation.
13 *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (no. 16183,
14 1979). A prima facie case of substantial
15 similarity is established by a showing that the
16 prior and present violations were for failure to
17 comply with the same standard. *Superior Electric
18 Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597,
19 1996). *Robert B. Reich, Secretary of Labor, United
20 States Department of Labor v. D.M. Sabia Company
21 and Occupational Safety and Health Review
22 Committee*, 90 F.3d 854 (1996); *Caterpillar, Inc. v.
23 Alexis M. Herman, Secretary of Labor, and
24 Occupational Safety and Health Administration,
25 Respondents and United Auto Workers, Local 974,
26 Intervenors*, 154 F.3d 400 (1998).

27 A repeated violation may be found based on a prior
28 violation of the same standard, a different
standard, or the **general duty clause**, but the
present and prior violations must be substantially
similar. *Caterpillar, Inc.*, 18 OSH Cases 1005,
1006 (Rev. Comm'n 1997), *aff's*, 154 F.3d 400, 18
OSH Cases 1481 (7th Cir. 1998); *GEM Indus., Inc.*, 17
OSH Cases 1861, 1866 (Rev. Comm'n 1996). OSHA may
generally establish its prima facie case of
substantial similarity by showing that the prior
and present violations are of the same standard.
The employer may rebut that showing by establishing
that the violations were substantially different.
Where the citations involve different standards,
OSHA must present "sufficient evidence" to
establish the substantial similarity of the
violations. A similar showing must be made if the
citations involve the same standard but the
standard is broadly worded. Repeated violations
are not limited to factually identical occurrences.
Provided that the hazards are similar, minor
differences in the way machines work or in the size
and shape of excavations will usually not lead to

1 a finding of dissimilarity. In general, the key
2 factor is whether the two violations resulted in
3 substantially similar hazards. It is not necessary,
4 however, that the seriousness of the hazard
5 involved in the two violations be the same.
6 Rabinowitz, Occupational Safety and Health Law, 2nd
7 Ed. 2008 at pp. 230-231. (emphasis added)

8 The Board in reviewing the facts, documentation, testimony and
9 other evidence must measure same against the established applicable law
10 developed under the Occupational Safety & Health Act.

11 ANALYSIS

12 The issue before the Review Board for analysis and decision is
13 whether the burden of proof was met to establish a violation of NRS
14 618.275(1) (the General Duty Clause). The respondent asserts the core
15 element for proof was not met due to a failure to establish the
16 existence of a "recognized hazard" as mandated by the statute.
17 Complainant references the ANSI standard as requiring anchorage of
18 shelving racks to the floor whereas respondent asserts that guidance is
19 only applicable if the ratio in the guidance were met. The respondent
20 evidence is the racks at the work site were at a ratio of not more than
21 2.6, whereas the ANSI does not set guidance for bolting to the ground
22 until there is a 6 to 1 ratio. However complainant contends that while
23 ANSI is guidance for the requirement of anchoring racks for safety it
24 does not negate, as a basis for general duty compliance, elimination of
25 a plainly recognized hazard. The shelving without attachment to the
26 ground is subject of tipping with forklifts operating in the work place
27 areas occupied by employees. Respondent contends the referenced ANSI
28 cannot be cited for a violation alone whereas complainant asserts that
the safety guidance can be utilized and the courts have accepted that
position.

The burden of proof to establish a violation under occupational

1 safety and health law requires different elements of proof to establish
2 a general duty clause violation from a specific standard. The violation
3 at Citation 1, Item 1, referenced a serious **repeat** violation of NRS
4 618.375(1), the General Duty Clause. The respondent **admitted the**
5 **previous safety violation for the same violation at the same work site,**
6 **and agreed to abate the admitted recognized hazard.** Complainant met the
7 burden of proof and satisfied the elements to establish and confirm a
8 violation by a preponderance of evidence.

9 The photographic exhibits in evidence depict a plainly unsafe
10 **hazardous** condition at Citation 1, Item 1.

11 Loaded steel shelving in the employee work area is regularly in
12 potential contact with forklift loading activity inside and outside the
13 facility. The evidence was unrebutted the shelving was not secured to
14 the floor. The previous admission of violation **for whatever reason,** is
15 evidence the respondent recognized the hazard and agreed to abate it.
16 Now the respondent claims it should not be held to the compliance it
17 accepted and agreed to because the settlement agreement was based solely
18 on economic reasons. The recognition of such an obvious hazard,
19 previously admitted by respondent cannot be disregarded in the subject
20 work place condition and should be **recognized** by a reasonably prudent
21 employer.

22 The legal duty of respondent is not to protect against unknown,
23 unforeseen or extreme events, but rather **recognized hazards** as defined
24 by or developed under applicable occupational safety and health law.

25 To satisfy the burden of proof for an alleged general duty clause
26 violation under established Occupational Safety and Health Law, the
27 division must show **by a preponderance of evidence** that there existed a
28 **"recognized hazard"** of which the **employer had knowledge** (actual or

1 constructive) in order to **foresee** and, thus, **prevent** injury or harm to
2 its employees by utilizing **feasible** measures that would reduce the
3 likelihood of injury.

4 The evidence demonstrates by a preponderance of evidence that the
5 un rebutted testimony of the employer operations presented a **clear and**
6 **obvious potential hazard** to employees which is reasonably foreseeable and
7 requires protection to keep the work place safe from such hazard.
8 Further, it is reasonable to infer from the evidence that an unsecured
9 steel shelf coming in potential contact with a forklift constitutes an
10 **obvious** hazard.

11 The courts have long recognized that an **obvious or**
12 **glaring nature of a hazard** may itself suffice to
13 provide the basis for a finding of **recognition** in
14 the **context of a "recognized hazard", a required**
15 **proof element under the general duty clause.** See,
16 *Kelly Springfield Tire Co. V. Donovan*, 729 F.2d
17 317, 321, 11 OSH Cases 1889 (5th Cir. 1984).

18 Citations may also be vacated if the employer proves a lack of
19 "feasibility".

20 A citation may be vacated if the employer proves
21 that: (1) **the means of compliance prescribed by the**
22 **applicable standard would have been infeasible**
23 **under the circumstances** in that either (a) its
24 implementation would have been technologically or
25 economically infeasible or (b) necessary work
26 operations would have been technologically or
27 economically infeasible after its implementation;
28 **and (2) either (a) an alternative method of**
29 **protection was used** or (b) there was no feasible
30 alternative means of protection. *Beaver Plant*
31 *Operations Inc.*, 18 OSHC 1972, 1977 (Rev. Comm'n
32 1999), rev'd on another ground, 223 F.3d 25, 19
33 OSHC 1053 (1st Cir. 2000); *Gregory & Cook, Inc.*, 17
34 OSHC 1189, 1190 (Rev. Comm'n 1995); *Siebel Modern*
35 *Mfg. & Welding Corp.*, 15 OSHC 1218, 1228 (1991);
36 *Mosser Constr. Co.*, 15 OSHC 1408, 1416 (Rev. Comm'n
37 1991); *Dun-Par Engineered Form Co.*, 12 OSHC 1949
38 (1986), rev'd on another ground, 843 F.2d 1135, 13
39 OSHC 1652 (8th Cir. 1988). (emphasis added)

40 The Board finds the cited general duty clause referenced to be

1 **applicable** to the facts in evidence. There was no competent evidence or
2 showing of any lack of feasibility.

3 The violation was appropriately classified as **serious**.

4 NRS 618.625 provides in pertinent part:

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

14 Further the violation was appropriately classified as **repeat** based
15 upon the undisputed prior violation in evidence.

16 As to the arguments as to a lack of "hazard recognition," the Board
17 notes previous case law which has confirmed that a standard published
18 by the American National Standards Institute (ANSI) and guidelines
19 published accordingly, are compelling evidence of **industry recognition**.
20 See *Kokosing Construction Co.*, 17 OSH Cases 1869, 1873 (Rev. Comm'n
21 1996) *Reich v. Arcadian Corp.*, 110 F.3d 1192, 17 OSH Cases 1929 (5th
22 Cir. 1997). Here NVOSHA did not cite ANSI itself for a violation, but
23 rather guidance relating to the identification of **recognized hazards** in
24 the workplace.

25 DECISION

26 The Boards finds as a matter of fact and law, that a violation did
27 occur as to Citation 1, Item 1, NRS 618.375(1). The violation was proved
28 by a preponderance of evidence in satisfaction of the recognized proof
elements of violation under occupational safety and health law. The
violation was appropriately classified and proven as "Repeat/Serious"
based upon the prior violation and evidence. The proposed penalty was
appropriate in the amount of EIGHT THOUSAND DOLLARS (\$8,000.00).

1 The violation at Citation 2, Item 1, classified as "Other-than-
2 Serious" referencing 29 CFR 1910.1200(f)(6) was not subject of contest
3 at the time of hearing. Counsel stipulated at the commencement of the
4 hearing that the notice of contest as to Citation 2, Item 1 was
5 withdrawn.

6 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
7 **REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as
8 to Citation 1, Item 1, NRS 618.375(1). The classification of the
9 violation as "Repeat/Serious" and the proposed penalty in the total sum
10 of EIGHT THOUSAND DOLLARS (\$8,000.00) is approved and confirmed.

11 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
12 **REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as
13 to Citation 2, Item 1, 29 CFR 1926.1200(f)(6). The classification of
14 "Other-than-Serious" and no penalty proposed was confirmed.

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

25 DATED: This 29th day of June 2018.

26 NEVADA OCCUPATIONAL SAFETY AND HEALTH
27 REVIEW BOARD

28 By Steve Ingersoll
STEVE INGERSOLL, 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,

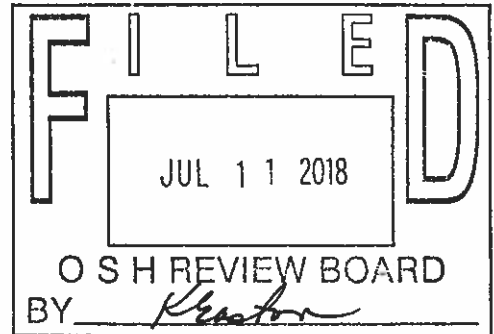
Docket No. LV 17-1900

Complainant,

vs.

12 XTREME MANUFACTURING, LLC,

Respondent.



14
15 CERTIFICATE OF MAILING

16 Pursuant to NRCP 5(b)(2)(B), I certify that on July 11, 2018 I
17 deposited for mailing, certified mail/return receipt requested, at
18 Carson City, Nevada, a true copy of the **DECISION** addressed to:

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

21 Timothy E. Rowe, Esq.
22 McDonald Carano Wilson LLP
P. O. Box 2670
Reno NV 89505

23 DATED: July 11, 2018

24
25
KAREN A. EASTON

26
27 RECEIVED
28 JUL 12 2018
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 OF THE
8 DIVISION OF INDUSTRIAL RELATIONS
9 OF THE DEPARTMENT OF BUSINESS AND
10 INDUSTRY,

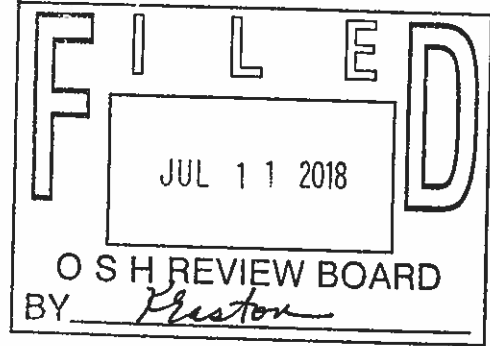
Docket No. LV 18-1912

Complainant,

vs.

11 BMC WEST, LLC, dba
12 SELECTBUILD NEVADA, INC.,

Respondent,



13
14 DECISION

15 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
16 **HEALTH REVIEW BOARD** at a hearing commenced on the 14th day of March
17 2018, in furtherance of notice duly provided according to law, MS.
18 SALLI ORTIZ, ESQ., counsel appearing on behalf of the Complainant,
19 **Chief Administrative Officer of the Occupational Safety and Health**
20 **Administration, Division of Industrial Relations (OSHA)**; and MR. RICK
21 ROSKELLEY, ESQ., appearing on behalf of Respondent, **BMC West, LLC, dba**
22 **Selectbuild Nevada, Inc., the NEVADA OCCUPATIONAL SAFETY AND HEALTH**
23 **REVIEW BOARD** finds as follows:

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

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

1 Citation 1, Item 2, charges a violation of 29 CFR 1926.452(c)(4),
2 which provides:

3 29 CFR 1926.452(c)(4). Where uplift can occur
4 which would displace scaffold end frames or
5 panels, the frames or panels shall be locked
6 together vertically by pins or equivalent means.

7 NVOSHA alleged:

8 On the southeast side of the Rockpointe jobsite,
9 located at 10197 West Reno Avenue, #36, Las
10 Vegas, NV 89148, employees were applying stucco
11 to a new residence while working from a three-
12 tiered fabricated frame scaffold that were (sic)
13 not fully joined together vertically by pins or
14 equivalent means. On the day of the inspection,
15 wind gusts were approximately 31 mph contributing
16 to potential uplift. The employees were exposed
17 to a fall hazard of approximately 7 to 15 feet to
18 the ground below, which could result in broken
19 bones and up to death.

20 The violation is classified "Serious." The penalty proposed in
21 the amount of FOUR THOUSAND FOUR HUNDRED DOLLARS (\$4,400.00).

22 Complainant and respondent stipulated to the admission of
23 documentary evidence identified as complainant Exhibits 1 and 2; and
24 respondent Exhibits identified as Tabs 1 through 11.

25 Both counsel waived opening statements.

26 FACTS

27 A referral inspection was conducted on or about February 23, 2017
28 by NVOSHA which resulted in the issuance of Citation 1, Item 2 as
29 referenced.

30 The essential facts providing the basis for the citation were
31 undisputed. Two respondent employees were observed working from a
32 three-tiered fabricated frame scaffold while applying stucco to a
33 newly constructed residential home. The CSHO observed and
34 photographed a lack of **locking pins** on scaffolding as depicted in
35 photographic Exhibit 1, page 65, 72A, 73A, 74, 75 and 76. There were

1 no other trades on the site.

2 It was further undisputed that the referenced citation requires
3 scaffold end frames or panels be locked together vertically by pins
4 or equivalent means **only** where uplift can occur which would displace
5 scaffold end frames or panels.

6 The CSHO determined there were wind gusts on the property of
7 approximately 31 mph that contributed to a potential for uplift which
8 required the use of **locking pins**. There were no other conditions
9 referenced, alleged, or cited to cause potential uplift.

10 The respondent contends the cited standard does not specify wind
11 or any other particular conditions which require a mandatory duty for
12 an employer to "pin scaffolding." The sole criteria under the cited
13 standard is that vertical pins or equivalent means shall be utilized
14 **when an uplift can occur to cause displacement**. The respondent
15 position is that neither wind nor any other conditions existed at the
16 site to require pinning or any other equivalent means to protect
17 employees because there was no potential of uplift. The respondent
18 identified witnesses to testify in support of the position including
19 the project safety manager and a scaffolding expert engineer.

20 The issue presented to the Review Board on this appeal is to
21 determine whether there was preponderant evidence of wind or other
22 contributing factors to require protection under the cited standard
23 against a cause for uplift and potential displacement of the
24 scaffolding. The cited standard 29 CFR 1926.452(c)(4) **does not**
25 **specify** conditions for pinning, including winds. NVOSHA enforcement
26 relegates scaffold pinning to a determination by the employer or
27 through a qualified **competent person** as defined under occupational
28 safety and health law.

1 DISCUSSION

2 Counsel for the Chief Administrative Officer presented witness
3 testimony and documentary evidence with regard to the alleged
4 violations. Certified Safety and Health Officer (CSHO) Mr. Mark
5 Nester, who conducted the inspection and reporting, is no longer
6 employed by NVOSHES. Mr. Jamal Sayegh was identified as the OSHES
7 supervisor who originally reviewed the evidence, citation process and
8 now the responsible complainant witness to testify in support of the
9 violation. He described his experience and background, including
10 between 200 and 300 investigations; and one and one-half years as
11 supervisor, overseeing between 150 and 200 cases. Mr. Sayegh
12 identified complainant's Exhibits 1 and 2, stipulated in evidence and
13 referenced the specific reportings and photographs during the course
14 of his testimony.

15 At Citation 1, Item 2, Mr. Sayegh testified with specific
16 reference to the inspection narrative report, violation worksheets and
17 photographs. He referenced the CSHO narrative report at Exhibit 1,
18 pages 15-17 and testified as to the inspection and findings. (Tr.
19 page 23) At Exhibit 1, page 16 the CSHO reported finding a lack of
20 scaffold **locking pins** "in some spots." The respondent foreman of
21 scaffolding reported the company does not use pins everywhere (because
22 of no uplift) but they do have locking pins in some spots. The CSHO
23 report confirmed there were "no other trades on the site nor were
24 there any employees working below the scaffold crew." Exhibit 1, page
25 16.

26 Mr. Sayegh testified from Exhibit 1, page 28 identified as the
27 violation worksheet for Citation 1, Item 2, 29 CFR 1926.452(c)(4).
28 He described the basis for the classification of **Serious** and the

1 potential serious injuries or death that could result due to a fall
2 from the scaffolding height. He confirmed **employer knowledge** through
3 the supervisory personnel, specifically Mr. Ziul Bayardo, the company
4 safety manager, who referenced there were no pins because there was
5 "no uplift". (Exhibit 1, page 21) Mr. Sayegh referenced the interview
6 statement at Exhibit 1, page 22 by foreman Mr. Marco Cruces,
7 identified as a "**competent person**" in scaffold erection under
8 occupational safety and health law. In support of the complainant
9 burden of proof for employer knowledge, Mr. Sayegh testified from
10 Exhibit 1, referencing pages 30-31. He noted at page 30, paragraph
11 3, the foreman of scaffolding, Mr. Cruces, reported he was a **competent**
12 **person** and checked everything and determined "we don't use pins
13 everywhere - no uplift." Mr. Sayegh further confirmed at page 30 that
14 the employer had actual and constructive knowledge based on the
15 investigation interviews reflecting that foreman Mr. Mario Gomez, was
16 working from the scaffolding where pins were not present; and as a
17 supervisory employee foreman, has the authority to correct problems.

18 Mr. Sayegh testified the primary cause of the citation for uplift
19 was based upon the inspector reporting 30 mph winds on the day of the
20 inspection. Mr. Sayegh explained severity, probability and gravity
21 factor to support the citation in accordance with the OSHES operations
22 manual.

23 On cross-examination Mr. Sayegh testified there was no citation
24 or allegation for anything other than wind to potentially cause uplift
25 and displacement of the scaffolding. The CSHO did not report
26 equipment operations near the scaffolding. He confirmed the only
27 issue is wind sufficient to displace scaffolding without pins. He
28 testified not all of the scaffolding was missing locking pins; and the

1 citation based only on the scaffolds observed and photographed by the
2 CSHO. Mr. Sayegh explained the need of a force strong enough to lift
3 the scaffolding out of position, referencing a dictionary definition
4 for "displacement." He testified "stacking pins" were in place. He
5 further testified that locking pins are not used everywhere, but only
6 as required if conditions for uplift are found at the site.

7 Mr. Sayegh testified as to the "Safety Standards for Scaffolding
8 in the Construction Industry" referencing respondent Tab 11, page 293,
9 sections 3 and 4 regarding the use of locking pins. He testified that
10 stacking pins are always required but not at issue because none were
11 found to be missing in this case. He identified and testified as to
12 Tab 11, page 240, as a final OSHA guidance rule. He reviewed Tab 11,
13 page 267 from the OSHA guidance and testified it provides
14 ". . .locking pins are only required where uplift forces are strong
15 enough to displace the scaffolding . . . such as hoist use . . ." On
16 questioning he responded that there is no reference to any guidance,
17 rules or standards for wind as a cause for uplift and displacement.
18 Tr. pages 40-41.

19 Counsel referenced Tab 11, page 258 as a different OSHA standard
20 directing no work on scaffolds during storms or high winds unless a
21 competent person determines its safe. Mr. Sayegh testified he agreed
22 there is no problem for employee work on scaffold during wind as such,
23 just needs competent person to okay. Tr. page 42.

24 On continued questioning as to evidence of wind, Mr. Sayegh
25 responded to a question whether the evidence of wind speed was from
26 an airport location approximately 15 miles from the construction site.
27 Mr. Sayegh testified "correct." In referencing the graph at Exhibit
28 1, page 37 Mr. Sayegh agreed it only shows wind at 20 mph. Mr. Sayegh

1 responded to a question from counsel that - there's no evidence of
2 anything close to 31 mph at the job site. Mr. Sayegh testified he
3 agreed.

4 Counsel referenced pictorial evidence at respondent's Tab 2 of
5 the job site on the day of the inspection. He noted flags depicted
6 around the subject work site property appeared to be standing still
7 and asked whether - it looks as if there was no wind whatsoever. Mr.
8 Sayegh responded "correct."

9 Counsel referenced Tab 2, pages 113 and 114, as photographs
10 depicting maybe only a slight breeze, but the flags flat so there
11 could be no potential for wind uplift. He asked: there are no flags
12 standing so the CSHO had no showing of winds capable of displacement?
13 Mr. Sayegh responded that "There is wind, that's all I can tell you
14 by looking at the flag." When asked the question "OSHA provides no
15 guidance on wind gust speed for uplift, does it?" Mr. Sayegh
16 testified "no."

17 On further recross-examination, Mr. Sayegh was asked when the
18 scaffolding is tied to the building, it gives it more strength against
19 collapse; to which he testified "yes."

20 Mr. Sayegh confirmed there was no employer contest as to Citation
21 1, Item 1.

22 Respondent offered witness testimony from Mr. Kent Barber who
23 identified himself as a Nevada licensed structural engineer. He
24 referenced Tab 9, his CV and qualification as an engineer expert for
25 scaffolding. Mr. Barber testified there was a lack for potential
26 uplift when planks are not tied to the scaffold structure unless
27 speeds reach 64 mph. Tr. pages 73-74. He further testified there were
28 no wind tests provided at the site by NVOSHA; rather only a weather

1 station cell phone reference for winds nearby. He testified from his
2 investigation that the maximum wind on the day of the inspection was
3 18 miles per hour, with maximum gusts of approximately 13 mph. He
4 testified there was no evidence, nor could he find any report of winds
5 at the job site on the day of the inspection to create a potential for
6 uplift, or cause potential displacement of the scaffolding.

7 On cross-examination Mr. Barber testified the wind direction was
8 not relevant.

9 Respondent offered witness testimony from Mr. Ziul Bayardo who
10 identified himself as the safety manager for respondent. He explained
11 his background, experience and qualifications for the position. Tr.
12 pages 79-80. Mr. Bayardo testified on respondent employee training
13 for scaffolding work and hazard recognition. He further testified the
14 respondent position is that scaffolding must be pinned whenever
15 employees use a hoist. The company has never had a previous citation
16 for scaffolding violation, despite 16-17 years of operations. The job
17 site was approximately 14 and one-half miles from the CSHO reported
18 wind location on February 23, 2017. Mr. Bayardo testified he
19 performed an inspection on the scaffolding on the same day as the CSHO
20 investigation. He testified on the subject day there was no problem
21 wind at the job site. Mr. Bayardo testified that based on his
22 experience of 15-17 years in the industry, locking pins are only
23 needed if there's a possibility of uplift and in his opinion it would
24 have to exceed 20 mph, or be caused by other equipment contacting the
25 scaffolding. He further responded to questions that if the wind was
26 substantial on that date, the CSHO would have directed the employees
27 come down from the scaffolding. Tr. pages 89-90.

28 On continued direct examination, Mr. Bayardo testified the

1 pictorial exhibits depicted the flags around the project showed no
2 evidence of wind.

3 Respondent offered witness testimony from Mr. Luke Griffis who
4 identified himself as a licensed Nevada professional engineer expert
5 in scaffolding. He testified as to respondent Tab 11, page 293, and
6 explained locking pins or equivalent means are only required to
7 prevent uplift. He further testified the standard does not list
8 specific conditions or requirements for the use of locking pins; and
9 that OSHA relies on the opinion of a qualified **competent person**
10 trained to identify anything that might cause or contribute to an
11 uplift. He further testified that OSHA does not require locking pins
12 on all scaffolds. He responded to a question as to ". . . would it
13 be physically possible for a wind gust of 31 miles per hour to create
14 an uplift in this scaffolding? Mr. Griffis answered "no." Tr. pages
15 105-106.

16 APPLICABLE LAW

17 The Board is required to review the evidence and recognized legal
18 elements to prove violations under established occupational safety and
19 health law.

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

22 NAC 618.788 (NRS 618.295) In all proceedings
23 commenced by the filing of a notice of contest,
the burden of proof rests with the Chief.

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

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

1 the contested fact.

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

16 A respondent may rebut allegations by showing:

- 17 1. The standard was inapplicable to the
18 situation at issue;
- 19 2. The situation was in compliance; or lack of
20 access to a hazard. See, *Anning-Johnson Co.*,
21 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).
22 (emphasis added)

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
28 more practices, means, methods, operations or
processes which have been adopted or are in use
in that place of employment **unless the employer**
did not and could not, with the exercise of
reasonable diligence, know of the presence of the
violation." (emphasis added)

29 A "**competent person**" is defined as "one who is
30 capable of identifying existing and predictable
31 hazards in the surroundings or working conditions
32 which are unsanitary, hazardous, or dangerous to
33 employees, and who has authorization to take
34 prompt corrective measures to eliminate them" [29
CFR 1926.32(f)].

35 The **burden of proof** to confirm a violation rests with OSHA under
36 Nevada law (NAC 618.788(1)); but after establishing same, **the burden**
37 **shifts to the respondent to prove any recognized defenses**. See *Jensen*
38 *Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶ 23,664 (1979). Accord,

1 Marson Corp., 10 OHSHC 2128, 1980 OSHC 1045 ¶ 24,174 (1980).

2 The Board in reviewing the facts, documentation, testimony and
3 other evidence must measure same against the established applicable
4 law developed under the Occupational Safety & Health Act.

5 ANALYSIS

6 At Citation 1, Item 2, referencing 29 CFR 1926.452(c)(4), the
7 Board finds the complainant did not meet the required burden of proof
8 under occupational safety and health law to establish a violation.
9 The undisputed photographic and factual evidence reflected the
10 respondent did not equip some of its scaffolding with **locking pins** on
11 the day of the inspection. The further undisputed evidence is that
12 the standard does not provide specific criteria or conditions as to
13 when locking pins are required. The testimony and evidence from both
14 complainant and respondent witnesses support the employer position
15 that requirement for utilizing locking pins is left to determination
16 made only when conditions reflect a potential for "uplift and
17 displacement." The causes for providing locking pins or other
18 equipment protection to the scaffolding are subject of decision by
19 qualified individuals recognized as **competent persons** under
20 occupational safety and health law. Here the evidence and testimony
21 clearly established that some of the recognized conditions considered
22 for requiring the use of locking pins on scaffolding include, but are
23 not limited to, using a hoist to lift materials to the scaffold,
24 relying on a forklift to operate near the scaffolding to lift
25 materials to the operating platform when employees are working, and
26 various other conditions. The preponderant evidence and testimony
27 reflect consideration of wind as a potential factor for uplift, would
28 be limited to only extremely high velocities. The citation and

1 allegation reflect there was only one condition upon which the
2 citation was based, namely a wind determined by the CSHO to be at
3 approximately 31 mph. However there was no **competent evidence that**
4 **any wind existed at the job site on the day of the inspection.** The
5 CSHO relied upon a telephone "app" for weather reporting at an airport
6 facility approximately 15 miles from the job site. The undisputed
7 pictorial evidence provided by respondent at Tab 2, demonstrates
8 several advertisement flags on poles at the project were flat or limp
9 to support respondent witness testimony that there was no wind at the
10 job site on the day of the inspection.

11 Professional engineer expert witness Griffis testified the
12 standard does not specifically require uplift protection from winds
13 nor does it require locking pins utilized on all scaffolding. The
14 company safety representative testified there was no wind issue at the
15 job site on the day of inspection. The existent company safety policy
16 is for employees not to work from scaffolding if winds reached even
17 approximately 20 mph. Respondent simply did not use locking pins on
18 the scaffolding because there were no wind or other conditions
19 presented. The complainant did not offer competent evidence of any
20 wind velocity nor at the 31 mph alleged in the citation. The
21 unconfirmed cell phone weather report was neither competent,
22 compelling, nor preponderant upon which this Board could rely to
23 support a violation. Further, the CSHO wind report was not credible
24 given the complainant's own photographs at Exhibit 1, pages 69 and 69A
25 showing flags hanging down.

26 Notably, in this case, the construction site was not classified
27 as a **multi-employer work site**. With such classification, the Review
28 Board has recognized competent evidence of additional potential causes

1 for uplift. These include, but not limited to, equipment operated by
2 other employer employees in proximity to the scaffolding. Such multi-
3 employer/employee conduct could potentially result in a strike to the
4 scaffold and cause uplift. Depending upon the work site facts and
5 conditions, multi-employer/employee presence on a work site could
6 warrant required use of locking pins. Here there was **no multi-
7 employer/employee evidence to require utilization of locking pins.**

8 Without preponderant evidence to prove each required element for
9 the burden of proof, notably the existence of non-complying
10 conditions, and employee exposure or access to hazardous conditions,
11 there can be no violation.

12 The Board concludes, based upon the evidence as a matter of fact
13 and law, the cited violation at Citation 1, Item 2 must be dismissed
14 based upon a failure of preponderant evidence to meet the statutory
15 burden of proof to establish the cited violation. Further, the
16 preponderant evidence offered by respondent confirmed the work site
17 was in compliance.

18 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
19 **REVIEW BOARD** that no violation of Nevada Revised Statutes did occur
20 as to Citation 1, Item 2, 29 CFR 1926.452(d)(4), and the proposed
21 classification and penalty denied.

22 The Board directs counsel for the **Respondent**, Chief
23 Administrative Officer of the Occupational Safety and Health
24 Administration, to submit proposed Findings of Fact and Conclusions
25 of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and
26 serve copies on opposing counsel within twenty (20) days from date of
27 decision. After five (5) days time for filing any objection, the
28 final Findings of Fact and Conclusions of Law shall be submitted to

1 the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD by prevailing
2 counsel. Service of the Findings of Fact and Conclusions of Law
3 signed by the Chairman of the NEVADA OCCUPATIONAL SAFETY AND HEALTH
4 REVIEW BOARD shall constitute the Final Order of the BOARD.

5 DATED: This 29 day of June 2018.

6 NEVADA OCCUPATIONAL SAFETY AND HEALTH
7 REVIEW BOARD

8 By: 
9 STEVE INGERSOLL, CHAIRMAN

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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,

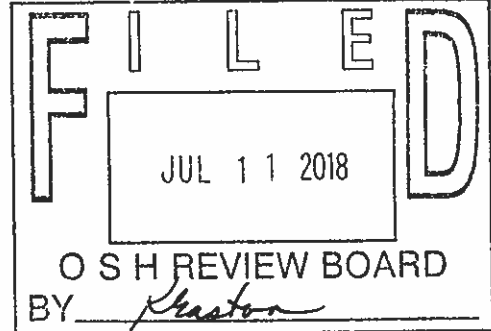
Docket No. LV 18-1912

Complainant,

vs.

10 BMC WEST, LLC, dba SELECTBUILD
11 NEVADA, INC.,

Respondent. /



12
13 CERTIFICATE OF MAILING

14 Pursuant to NRCP 5(b), I certify that on July 11, 2018, I
15 deposited for mailing, certified mail/return receipt requested, at
16 Carson City, Nevada, a true copy of the **DECISION** addressed to:

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

20 Rick Roskelley, Esq.
21 Littler Mendelson
22 3960 Howard Hughes Parkway, Suite 300
23 Las Vegas NV 89169-5937

DATED: July 11, 2018

Karen A. Easton

24 KAREN A. EASTON

25
26
27
28
RECEIVED
JUL 12 2018
DIR LEGAL
CARSON CITY OFFICE

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,

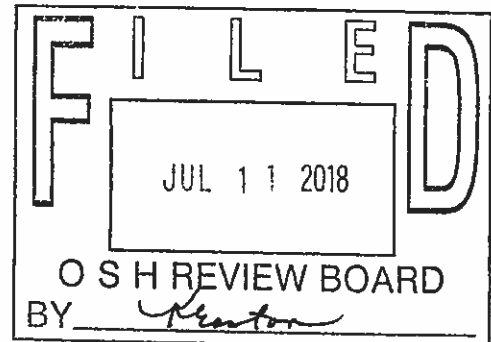
Complainant,

vs.

12 RESTORATION AND RECOVERY, LLC,

Respondent.
13 _____/

Docket No. LV 17-1906



14 FINAL ORDER

15 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
16 **HEALTH REVIEW BOARD** at a hearing commenced on the 15th day of March
17 2018, in furtherance of notice duly provided according to law, MS. SALLI
18 ORTIZ, 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)**. There was no
21 appearance by the respondent or counsel, nor any information provided
22 requesting a continuance of the proceeding. The **NEVADA OCCUPATIONAL**
23 **SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

26 The complaint filed by the OSHA sets forth allegations of violation
27 of Nevada Revised Statutes as referenced in Exhibit "A", attached
28 thereto. References made to the complaint for each of the specific

1 citations and allegations of violation.

2 On the June 28, 2017 the respondent filed a response to the
3 complaint opposing the findings of violations and assessment of
4 penalties.

5 The Citation 1, Items 1 through 8 classified each of the Code of
6 Federal Regulations (CFR) violations as **Serious**. The proposed penalty
7 for the serious violations is in the amount of NINE THOUSAND SIX HUNDRED
8 DOLLARS (\$9,600.00). Citation 2, Item 1 charged a violation of Code of
9 Federal Regulations (CFR) and classified of the violation as **Regulatory**
10 with a proposed penalty in the amount of THREE HUNDRED DOLLARS
11 (\$300.00).

12 Based upon the non-appearance of the respondent party, counsel
13 moved for judgment by default. The Board entered an order granting
14 default subject to presentation of evidence and testimony to confirm the
15 violations through a Final Order. Complainant submitted documentary
16 evidence identified as Exhibits 1 and 2, comprising pages 1 through 108.
17 At the conclusion of the presentation of evidence and testimony,
18 complainant moved for a order granting summary judgment.

19 DISCUSSION

20 Complainant presented witness testimony from Certified Safety and
21 Health Officer Industrial Hygienist 3 (CSHO-IH3) Mr. Jody Gascon. The
22 witness testified to having conducted the NVOSHA inspection based upon
23 a referral from the Clark County Health Department of Air Quality,
24 reporting asbestos materials in a dumpster on the premises. CSHO Gascon
25 testified he spoke to the owner identified as Ms. Marivelle Nunez and
26 identified the narrative report in evidence at Exhibit 1, pages 9-10.
27 He testified Ms. Nunez reported that she and others had removed the
28 ceiling tile and related materials from the office during a remodeling;

1 and deposited the materials in a Republic Services dumpster outside the
2 building. Ms. Nunez admitted having no training for the recognition
3 and/or removal of asbestos materials. CSHO Gascon obtained samples for
4 testing and photographs of the premises as referenced in Exhibit 1,
5 pages 99-100, depicting the office building site and materials. He
6 described the materials as pieces of flooring and ceiling tiles with
7 **mastic** and joint compound which appeared to contain asbestos. He
8 testified the reported results of an asbestos survey identified
9 chrysotile asbestos between two and five percent. (Exhibit 1, page 9)

10 Mr. Gascon testified the respondent employees were not informed of
11 the presence of asbestos prior to starting work; and the employees
12 admitted to not having proper training to conduct asbestos removal.
13 CSHO Gascon advised the employer of his findings and recommended
14 issuance of the citations for the violations as referenced in the
15 complaint.

16 Counsel presented witness testimony from Mr. John Hutchison. Mr.
17 Hutchison identified himself as the supervisor at NVOSHES and described
18 his background and qualifications. He further explained the reportings
19 at Exhibits 1 and 2 in evidence; and testified with reference to the
20 documentation. He explained the need for training to protect employees
21 involved with, or performing work relating to, asbestos materials, and
22 the statutory requirements referenced in 29 CFR 1926.1101 and various
23 subsections identified specifically in the citations at Exhibit 1, pages
24 49-66.

25 Mr. Hutchison testified on the basis for the classification of
26 **Serious**, the expected detriment to safety and health for any employees
27 contacting same, insufficient protection or training, and the penalty
28 calculations under the NVOSHES enforcement manual.

1 Mr. Hutchison testified as to Citation 2, Item 1, the **regulatory**
2 classified violation referencing NRS 618.790. He confirmed the employer
3 was engaged in a project where aggressive methods were used to remove
4 drywall, joint compound, texture material, plaster, ceiling tiles and
5 floor tiles. The materials contained between two and five percent
6 chrysotile asbestos. He confirmed the employer does not hold an
7 asbestos abatement contractor's license with the state of Nevada to
8 engage in the project for control of asbestos.

9 Mr. Hutchison testified the respondent management explained they
10 understood a building inspection was done by the city before their
11 purchase which included an asbestos survey. Mr. Hutchison testified he
12 approved the CSHO findings and authorized the issuance of the citations
13 against the respondent as referenced in the exhibits and evidentiary
14 reportings.

15 Board members questioned the witness with regard to the status of
16 the employees working and subsequent determinations of toxicity levels
17 of the asbestos material. Mr. Hutchison testified Ms. Nunez is the
18 owner of her own LLC and she was actually performing the work on the
19 building with the assistance of family members. There were no employees
20 of a contractor or independent employer performing work on the premises.
21 Additional questions from Board members reflected the company, although
22 named "Restoration" was not engaged in construction work; but rather a
23 drug rehabilitation and psychiatric type facility. He further testified
24 the employer had no knowledge of the asbestos requirements or toxic
25 aspects relating to asbestos.

26 At the conclusion of presentation of evidence and testimony,
27 counsel provided closing argument. Counsel asserted the company bought
28 the building presumably to expand their business and set about making

1 what they thought were cosmetic changes. However they began taking down
2 walls and disturbing the ceiling, as well as the tile and the floor.
3 There was no clear indication of knowledge regarding asbestos by Ms.
4 Nunez. Counsel asserted the response filed by the respondent did not
5 provide evidentiary opposition, but objected to the penalty and
6 expressed her lack of any knowledge or intent for wrong doing. Counsel
7 argued the evidence, photographs and statements of Ms. Nunez were
8 sufficient for finding the violations. She argued there was no rebuttal
9 evidence submitted, neither in the contest letter nor answer; and a
10 prima facie case of violation established.

11 Complainant moved for an order of summary judgment.

12 APPLICABLE LAW

13 The Board is required to review the evidence and recognized legal
14 elements to prove violations under established occupational safety and
15 health law.

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

18 NAC 618.788 (NRS 618.295) In all proceedings
19 commenced by the filing of a notice of contest, the
burden of proof rests with the Chief.

20 All facts forming the basis of a complaint must be
21 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD
22 ¶16,958 (1973).

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

26 To prove a violation of a standard, the Secretary
27 must establish (1) the applicability of the
standard, (2) the existence of noncomplying
28 conditions, (3) employee exposure or access, and
(4) that the **employer knew or with the exercise of
reasonable diligence could have known of the**

1 **violative condition.** See *Belger Cartage Service,*
2 *Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
3 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
4 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC
5 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
6 (No. 76-1408, 1979); *American Wrecking Corp. v.*
7 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
8 2003). (emphasis added)

9 A respondent may rebut allegations by showing:

- 10 1. The standard was inapplicable to the situation
11 at issue;
- 12 2. The situation was in compliance; or lack of
13 access to a hazard. See, *Anning-Johnson Co.*,
14 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).
15 (emphasis added)

16 NRS 618.625 provides in pertinent part:

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

27 Federal Rule of Civil Procedure 56 governs and
28 allows for summary judgment where the pleadings,
discovery and any affidavits offered demonstrate
there is **no genuine issue of material fact and law**
and that the moving party is entitled to judgment
as a matter of law. 29 C.F.R. §220061 (regarding
submission of a case without hearing) ("Motions for
summary judgment are covered by Federal Rule of
Civil Procedure 56.") see *United States Steel*
Corp., 9 OSH Cases 1527 (Rev. Comm'n 1981).
(emphasis added)

In reviewing the documentary and testimonial evidence under the
statutory burden of proof for violations of the cited standards, the
Board finds, as a matter of fact and law, no sufficient preponderance
of evidence to warrant confirmation of the violations charged in the
citations referenced in the complaint.

There is no preponderant evidence for the proof requirement of

1 **employer knowledge.** There was no evidence the employer knew, or with
2 the exercise of reasonable diligence could have known, of the violative
3 conditions. Mr. Hutchison testified candidly and fairly with regard to
4 the facts presented and the lack employer knowledge. Similarly counsel
5 identified the employer knowledge element to be "weak". Without proof
6 by a preponderance of each of the four critical elements to find a
7 violation, there can be no final order confirming violations.

8 The Board finds no **employee exposure** within the intended
9 jurisdictional scope of the Nevada Occupational Safety and Health Act.

10 Here the owner was not an employer engaged in the construction,
11 asbestos, or property renovation business. The respondent operates a
12 rehab facility. She and her partner/assistant, together with family
13 members, were merely attempting remodel of the office premises. There
14 were no employees engaged by an employer to perform construction work
15 or regulated asbestos removal requiring training or licensure. The
16 spirit and intent of the Occupational Safety and Health Act is to assure
17 safe working conditions for employees of employers engaged in regulated
18 work tasks. The facts presented here depict a property owner and
19 friends pitching in together to effectuate a remodel. Accordingly,
20 there were no **employees exposed** to hazardous conditions as contemplated
21 under the jurisdiction and scope for employer/employee relationships
22 governed by the Act. At best, it appears the only employee on the
23 premises was an office assistant, not employed for demolition or
24 remediation requiring training for asbestos materials nor knowledgeable
25 in the safety requirements for same. Similarly the respondent owner was
26 merely doing her own remodel work. The other individuals involved
27 appeared to be assistive family members. NRS requires **employees of an**
28 **employer** subject of exposure to codified or recognized **hazards** for which

1 there is **employer knowledge** of the conditions requiring safety
2 protection and training.

3 Notably, the respondent written opposition reflected an expenditure
4 of substantial funds at Exhibit 1, pages 83-84, to later determine and
5 confirm the lack of any actual harmful conditions of asbestos and
6 included various methods to address, remove or deal with same. Specific
7 reference is made to the statements provided at Exhibit 1, pages 83-98:

8 ". . . It is never our intent to do any harm in
9 contrary we want to improve the lives of the
10 residents of Las Vegas, Nevada. I would also like
11 to take a moment to mention we also met with Jody
12 Gascon of the State of Nevada, Department of
13 Business and Industry, Division of Industrial
14 Relations, Occupational Safety and Health
15 Administration and complied with all of his
16 request. I also requested Chris and Sara keep him
17 and Kevin in the loop as to what was going on. We
18 thank him, Kevin, Chris and Sara for walking us
19 through this process that we were totally
20 unfamiliar with as this is our first commercial
21 purchase. This process has been very stressful and
22 intimidating and we are grateful this problem was
23 identified by Kevin and rectified by Chris and
24 Sara's offices."

25 The evidence presented by complainant included a report of the
26 testing results for the materials removed. It demonstrated the asbestos
27 found was at a "**non-actionable level**."

28 Fairness, good faith, and a reasonable application of occupational
safety and health law requires the case be dismissed.

The Board concludes, based upon the evidence, as a matter of fact
and law, the cited violations at Citation 1, Items 1 through 8 and
Citation 1, Item 2, be and they hereby are dismissed. The complainant
motion for summary judgment is denied. The Board grants judgment for
the respondent.

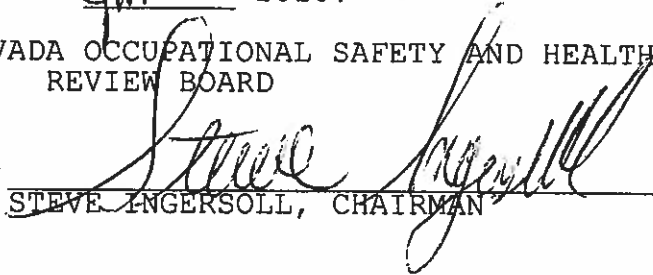
///

///

1 This Order shall be deemed a Final Order of the **NEVADA OCCUPATIONAL**
2 **SAFETY & HEALTH REVIEW BOARD** and inclusive of Findings of Fact and
3 Conclusions of Law.

4 DATED: This 28 day of June 2018.

5 NEVADA OCCUPATIONAL SAFETY AND HEALTH
6 REVIEW BOARD

7 By: 
8 STEVE INGERSOLL, 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

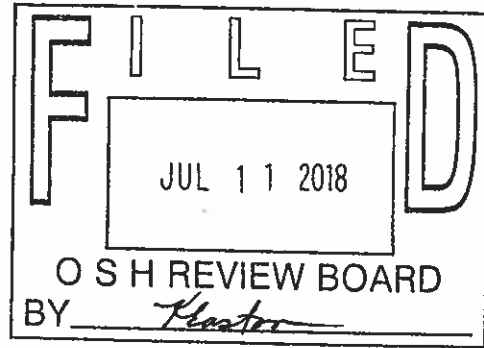
Docket No. LV 17-1906

Complainant,

vs.

10 RESTORATION AND RECOVERY, LLC,

11 Respondent.
12



13 CERTIFICATE OF MAILING

14 Pursuant to NRCP 5(b)(2)(b), I certify that on July 11, 2018 I
15 deposited for mailing, certified mail/return receipt requested, at
16 Carson City, Nevada, a true copy of the **FINAL ORDER** addressed to:

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

20 Marivelle Nunez, LMFT
21 Restoration and Recovery, LLC
22 807/811 S. Decatur Blvd.
23 Las Vegas NV 89107

DATED: July 11, 2018

24 
25 _____
26 KAREN A. EASTON

27 RECEIVED
28 JUL 12 2018
DIR LEGAL
CARSON CITY OFFICE

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,

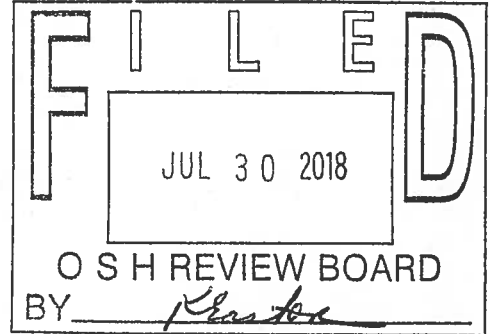
Docket No. LV 17-1906

Complainant,

vs.

10 RESTORATION AND RECOVERY, LLC,

Respondent.
_____ /



13 ERRATA

14 ON THE 11th day of July 2018 the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD (BOARD)** entered a Final Order in the subject
16 captioned matter. The Final Order contained errors as to the following:

17 At page 2, line 20, the **Certified** Safety and Health Officer should
18 read **Compliance** Safety and Health Officer (CSHO).

19 Page 8, line 24, should read ". . . **Citation 2, Item 1.** . . ."

20 The Final Order is amended and corrected through this *Errata*. In
21 all other respects the Final Order entered by the BOARD is confirmed.

22 DATED this 30th day of July 2018.

23 NEVADA OCCUPATIONAL SAFETY AND
24 HEALTH REVIEW BOARD

25 By: /s/
26 STEVE INGERSOLL, 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

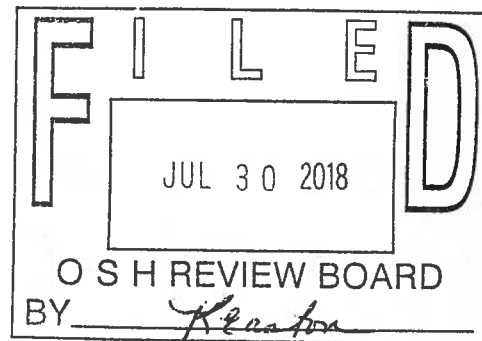
Docket No. LV 17-1906

Complainant,

vs.

10 RESTORATION AND RECOVERY, LLC,

Respondent.
11 _____/




12
13 CERTIFICATE OF MAILING

14 Pursuant to NRCP 5(b)(2)(b), I certify that on July 30, 2018 I
15 deposited for mailing, certified mail/return receipt requested, at
16 Carson City, Nevada, a true copy of the **ERRATA** addressed to:

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

20 Marivelle Nunez, LMFT
21 Restoration and Recovery, LLC
22 807/811 S. Decatur Blvd.
23 Las Vegas NV 89107

DATED: July 30, 2018

24
25
26
27
28

KAREN A. EASTON

RECEIVED
JUL 31 2018
DIR LEGAL
CARSON CITY OFFICE