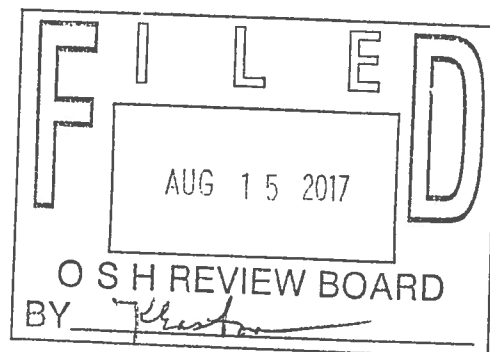


1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3
4

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 (8th
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

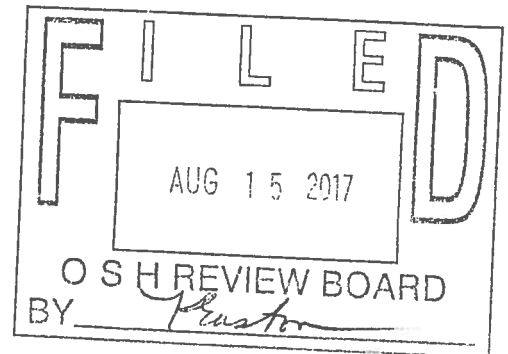
Docket No. LV 17-1902

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