NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY,

Complainant,

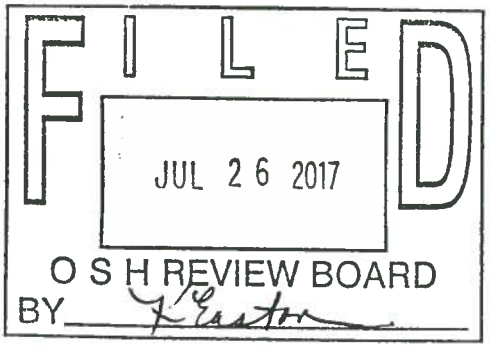
vs.

GILMORE CONSTRUCTION, LLC,

Respondent.

_____/

Docket No. LV 17-1862



DECISION

This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at hearings on the 14th day of December 2016, and the 15th day of June 2017, in furtherance of notices duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel appeared on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations** (OSHA); and MR. CHRIS McCULLOUGH, ESQ. appeared on behalf of Respondent, **Gilmore Construction, LLC.** The **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

The complaint filed by the OSHA sets forth allegations of violation

of Nevada Revised Statutes as referenced in Exhibit "A", attached thereto.

Citation 1, Item 1, charges a violation of 29 CFR 1926.501(b)(13) which provides:

> "Residential Construction." Each employee engaged in residential construction activities 6 feet (1.8M) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exceptions: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

29 CFR 1926.502(k):

> "Fall protection plan." This option is available **only** to employees engaged in leading edge work, precast concrete erection work, or **residential construction work** (See 1926.501(b)(2), (b)(12), and (b)(13)) who can demonstrate that it is infeasible or it creates a greater hazard to use conventional fall protection equipment. The fall protection plan must conform to the following provisions. (Emphasis added)
>
> Note: there is a **presumption** that it is **feasible** and will not create a greater hazard to **implement at least one of the above-listed fall protection systems.** Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems. (Emphasis added)

Citation 1, Item 1, charges **in the alternative**, a violation of 29 CFR 1926.502(d)(16)(iii), which provides:

> Personal fall arrest systems, when stopping a fall, shall: Be rigged such that an employee can neither free fall more than 6 feet (1.8 m), nor contact any lower level.
>
> NVOSHA alleged three employees of Gilmore Construction, LLC were not protected from fall hazards at the multi-family residential

construction project located at 3140 St. Rose Pkwy, Henderson, NV 89183. The employees were working from the top plate of the wood framed wall installing prefabricated trusses on building 6 of the project. The employees were using personal fall arrest systems consisting of harnesses, self-retracting lifeline, and anchor straps. The Werner Autocoil 2, model R210030, self-retracting lifelines were anchored to the top plate of the wall beneath the employees. The top plate was approximately 9 feet above the lower level. The estimated free fall distance was approximately 7 feet. The Werner Autocoil 2, self-retracting lifeline is designed to be anchored above the user. The total estimated fall distance when using the Werner Autocoil 2, self-retracting lifeline is 12 ½ feet from the bottom of the self-retracting lifeline. The injuries the employees could sustain from a fall of 9 feet to the level below are fractures, contusions, and concussions.

GILMORE CONSTRUCTION, LLC WAS PREVIOUSLY CITED FOR A VIOLATION OF A SUBSTANTIALLY SIMILAR OCCUPATIONAL SAFETY AND HEALTH STANDARD, 29 CFR 1926.501(B)(13), WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER 1072250, CITATION NUMBER 1, ITEM NUMBER 1 AND WAS AFFIRMED AS A FINAL ORDER ON OCTOBER 6, 2015.

and

GILMORE CONSTRUCTION, LLC WAS PREVIOUSLY CITED FOR A VIOLATION OF A SUBSTANTIALLY SIMILAR OCCUPATIONAL SAFETY AND HEALTH STANDARD, 29 CFR 1926.501(B)(1), WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER 316004597, CITATION NUMBER 1, ITEM NUMBER 1 AND WAS AFFIRMED AS A FINAL ORDER ON OCTOBER 4, 2012.

and

GILMORE CONSTRUCTION, LLC WAS PREVIOUSLY CITED FOR A VIOLATION OF A SUBSTANTIALLY SIMILAR OCCUPATIONAL SAFETY AND HEALTH STANDARD, 29 CFR 1926.501(B)(13), WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER 314891771, CITATION NUMBER 1, ITEM NUMBER 1 AND WAS AFFIRMED AS A FINAL ORDER ON OCTOBER 25, 2011.

The violation was classified as "Repeat-Serious." The proposed penalty for the alleged violation is in the amount of TWENTY-SEVEN THOUSAND DOLLARS ($27,000.00).

Citation 2, Item 1, charges a violation of 29 CFR 1910.1200(g)(8), which provides:

> The employer shall maintain in the workplace copies of the required safety data sheets for each hazardous chemical, and shall ensure that they are **readily accessible** during each work shift to employees when they are in the their work area(s). (Electronic access and other alternatives to maintaining paper copies of the safety data sheets are permitted as long as no barriers to immediate employee access in each workplace are created by such options.) (Emphasis added)
>
> NVOSHA alleged the Safety Data Sheet was not made readily accessible for three employees of Gilmore Construction, LLC, at the multi-family residential construction project located at 3140 St. Rose Pkwy, Henderson, NV 89183. Employees use Title Bond Subfloor Adhesive on the project and the Safety Data Sheet was not included in the employer-provided Safety Data Sheet binders.

The violation was classified as "Other." There was no proposed penalty for Citation 2, Item 1.

Complainant and respondent stipulated to the admission of documentary evidence at complainant's Exhibits 1, 2, 3 and 4; and respondent's Exhibits 1-A through 14.

Complainant presented testimony and documentary evidence with regard to the alleged violations through Mr. Jeffrey Snell, Compliance Safety and Health Officer (CSHO). He testified as to his investigation, findings and the citation issued to the respondent employer.

On or about March 15, 2016 CSHO Jeffrey Snell conducted a comprehensive site inspection at a multi-employer worksite located a 3140 St. Rose Pkwy, Henderson, NV. He described the work activities underway at the time of the inspection and noted safety issues relating to the respondent employer Gilmore Construction, LLC (Gilmore) which lead to recommendation for issuance of the citations referenced. Mr. Snell referenced his report and findings at Exhibit 1 and testified accordingly. In the Gilmore storage container he discovered cases of Tite Bond Sub Floor Adhesive. The employer onsite safety data sheet

binders did not contain the safety data information for the adhesive as required under OSHA standards. He reported at Exhibit 1, pages 15-17 that he was informed the binders were recently updated but the employer unable to produce an electronic copy of the safety data sheet at the time of the inspection. The employer hazard communication program was reviewed. CSHO Snell determined a violative condition existed based upon the Safety Data Sheet (SDS) not made readily accessible for three employees of Gilmore Construction at the subject job site. He recommended the issuance of Citation 2, Item 1 for a violation of 29 CFR 1910.1200(g)(8).

In continued testimony CSHO Snell referenced complainant Exhibit 1, page 17 report and photographs in evidence at pages 64-67. He testified that on the second level of building 6 respondent employees were engaged in the work of installing trusses. He testified from his narrative report findings that respondent employees were working while standing on the top plate of a 9 foot high framing structure. The employees were using a personal fall arrest system consisting of a harness, retractable lanyard and anchor straps. The anchor strap was wrapped around a top plate the employees were working from and the body of the retractable hung below the top plate. The approximate total free fall distance was initially determined to be 8 feet and the fall of the level below the employees 9 feet.

Mr. Snell testified as to the employee interview statements at Exhibit 1, pages 21 through 26. He further testified on his interviews with employer representatives and his findings from the violation worksheets at Exhibit 1, pages 27 through 35. The employee interviews of Messrs. Gonzalez, Vasquez and Tadao were translated from Spanish to English and hand written by associate CSHO Aldo Lizzaraga; then later

transcribed and included in the exhibit report.

CSHO Snell testified the photographic exhibits at Exhibit 1, pages 64 to 77 particularly depicted a respondent employee working while using a retractable lifeline device. He described the retracting lifeline as a Werner Autocoil 2 model R210030 which he observed anchored beneath the employees at "foot level." He testified from his interviews, observations and photographs that he determined employee exposure due to the measured distance of a fall from the working platform of approximately 9 feet and a free fall distance of approximately 7 feet. He determined the Werner Autocoil (yoyo) device would not protect the employee from the hazard exposure and potential serious injuries due to a fall of 9 feet to the level below. He described the potential injuries to consist of fractures, contusions, and concussions.

CSHO Snell testified he determined from his investigative findings that Mr. Guitarez, the respondent superintendent, as well as company managing partner/co-owner Larry Gilmore, Jr. were aware of the distances and the potential hazards resulting from use of the yoyo retractable device when tied off at foot level.

Mr. Snell testified email exchanges with representatives of the Werner product manufacturer confirmed his determination that the retractable Werner Autocoil is not recommended for use when tied off at foot level.

On cross-examination, Mr. Snell testified on his interpretation of the safety reasons for locating the tie-off point of the lanyard. His primary focus was centered on the height of the fall to be arrested for determining the relationship of the tie-off point. Mr. Snell performed measurements and considered the manufacturer's information to determine the effective length of the recoil line to protect against a potential

fall from the work platform. He testified there were alternate measures of protection other than use of devices tied off at working foot levels which he determined would not protect the employee from serious injury or harm in the event of a fall. He testified the lanyards were wrapped around framing material then connected to the harness and the retractable line, however the distance of a fall would still be approximately 9 feet. He testified on the company fall protection policy and noted at respondent Exhibit 10, page 64, that employees were allowed to tie off on trusses. He noted this was permissible, however the subject citation was for the length of the lanyard in consideration of the fall height before contact to the floor. "It all depends on if the set up will stop . . . contact with the ground . . ."

Mr. Snell testified that Exhibit 1, page 30, at paragraph 20(e) confirms the top of the plate of the wood deck was 9 foot 1 inch above the ground based upon his interviews with by Mr. Gutierrez, the respondent superintendent. CSHO Snell estimated the fall distance by reference to his report at Exhibit 1, page 30, paragraph 20(e) which provided:

> "The length of the self-retractable lifeline, the amount of lifeline extended out of the casing to the users harness attachment point, and the length of the anchor used would need to be added to the free fall distance to calculate the total fall distance. An estimate of this added length could range from 3 feet to 6 feet depending on the user's working position, kneeling or standing. Added to Werner's free fall calculation, the user's free fall could range from 5 feet to 9 feet before the self-retracing lifeline would engage and start to decelerate the user's fall."

Mr. Snell referenced photographs at Exhibit 1, pages 64A and 66 and responded to questions with regard to the calculations he made as opposed to those identified by the respondent. He testified the

respondent's position was that the yoyo device would "brake" the fall, but he believed the employee would still strike the area below.

On cross-examination counsel challenged CSHO Snell on his measurements and asserted they were incorrect and opposed to those provided and subject of testimony by the respondent representatives. On further cross-examination CSHO Snell testified with regard to compliance considerations based upon **infeasibility, greater hazard,** and **alternate means** of compliance as opposed to use of the Werner yoyo device. He testified the requirements to demonstrate infeasibility and greater hazard are specifically provided for in the standard and require more evidence on the part of an employer beyond simply concluding existent worksite conditions permitted safer use of the retractable device.

Respondent presented witness testimony at the continued hearing from Mr. Larry Gilmore, Jr. He denied statements by CSHO Snell attributed to him at Exhibit 1, page 30. Mr. Gilmore testified there was an apparent misunderstanding by the CSHO after a brief discussion on the retractable device when he was describing various alternate means of protection, notably a potential "pole" tie-off point; and use of ladders or options he believed would have been ineffective and/or create a greater hazard than use of the Werner retractable device. He testified the nature of the particular framing work being performed at the time of inspection was such that the yoyo device would work best and prevent employees from hitting the lower area far more assuredly that the various options raised and discussed. He testified the CSHO's measurements at page 30 were not correct nor accurate. Mr. Gilmore testified that 2 feet is the actual distance for the Werner device to effectuate a reasonable level of protection for an employee equipped

with same. He admitted the manufacturer's instructions did not recommend use of the retractable tied off at foot level; but he (Gilmore) believed it was effective, conducted his own testing, and understood it was permitted under OSHA standards during certain configurations of work efforts. Mr. Gilmore testified the device protected the employees from a fall injury while working in the particular configuration of the framing. He further testified there was no actual exposure to the fall hazard depicted in the photographs, observed by CSHO Snell, nor supported by his calculations.

At the conclusion of evidence and testimony counsel presented closing arguments.

Complainant asserted the facts of violation have been established from the testimony and photographs at Exhibit 1 as well as the admitted incorrect use of the Werner yoyo under the circumstances and measurements calculated by CSHO Snell. Counsel asserted the burden of proof was met as to the required elements; and there was no showing or proof of the affirmative defenses for "greater hazard" or "infeasibility" as recognized under occupational safety and health law. Counsel argued there was no challenge to respondent's overall site safety or its work plan, just one single operation subject of the fall citation. ". . . This was a case where the manufacturer and OSHES believed that an employee simply cannot anchor the safety line below the employee (foot level) if the line is not designed to prevent the employee from hitting the lower level below. . . ." Counsel argued that in this specific case there was no evidence by the defense that the employee would not hit the lower deck because of the way the yoyo was set up (anchored). It's obvious the potential hazard is depicted from the photographs in evidence and the unquestioned use contrary to the

manufacturer's instructions.

Counsel further argued the violation at Citation 2, Item 1 was clear and the facts undisputed. The wrong SDS was at the job site. This was a simple "paper" violation classified as "other" and without penalty.

Respondent argued the anchor point is the controlling factor and it must be located such that an employee can safely perform work and not come into contact with floor below if an accident occurs. There was no **employee exposure** to injury while working attached to the recoil device. He asserted **employer knowledge** was not proven based upon the testimony of CSHO Snell. Mr. Snell's testimonial recollections of his discussions with Mr. Gilmore at the jobsite during inspection were not credible. There was no proof that Mr. Gilmore had knowledge that an employee would strike the floor below during a fall while using the Werner device. Mr. Gilmore explained in his testimony what would actually happen if a recognized "pole system" were used in conjunction with the device. Counsel argued the accurate measurements and analysis under the facts in evidence demonstrate there was no burden of proof to show the yoyo would not function to arrest a fall as used. Counsel argued the CSHO's determinations were simply not accurate by referencing a 12 foot 6 inch distance at Exhibit 1 and during his testimony to be the bottom point of the self-retractable lifeline to the lower level. "He utilized the wrong calculations . . . the math was incorrect . . ." The top plate was 9 foot 1 inch on which the employees were standing and the CSHO admitted the employee would have stopped his fall by 1-2 inches above the floor surface based upon the facts in evidence. There was simply no evidence to prove the subject employee depicted in the photograph using the Werner recoil system was working in violation of the standard.

There was actually 2 more feet of protected distance before reaching the floor level under a correct analysis of the measurements and calculations. Therefore the burden of proof for a violation was not met which is incumbent upon the complainant.

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

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. (See NAC 618.788(1).
>
> All facts forming the basis of a complaint must be proved by a preponderance of the evidence. See *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).
>
> NRS 233B(2) "Preponderance of evidence" means evidence that enables a trier of fact to determine that the existence of the contested fact is more probable than the nonexistence of the contested fact.
>
> NAC 618.788 (NRS 618.295) In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Chief.
>
> To prove a violation of a standard, the Secretary must establish (1) the applicability of the standard, (2) the **existence of noncomplying conditions**, (3) **employee exposure** or access, and (4) that the **employer knew** or **with the exercise of reasonable diligence could have known** of the violative condition. See *Belger Cartage Service, Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003). (emphasis added)

A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;

2. **The situation was in compliance; or lack of access to a hazard.** See, *Anning-Johnson Co.*,

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

NRS 618.625 provides in pertinent part:

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

NRS 618.635 provides in pertinent part:

> Any employer who willfully or repeatedly violates any requirements of this chapter, any standard, rule, regulation or order promulgated or prescribed pursuant to this chapter, may be assessed an administrative fine of not more than $70,000 for each violation, but not less than $5,000 for each willful violation. (emphasis added)

The Board finds no preponderant evidence under the complainant's burden of proof to support findings of violations as charged at Citation 1, Item 1, nor Citation 2, Item 1. It is undisputed the employer provided a Werner Autocoil self-retracting lifeline safety device for use by its employees at the subject worksite. A core factual analysis to determine a violation at Citation 1, Item 1 centers upon an effective fall protection use of the device when anchored at the "foot level" of employees working at approximately 9 foot 1 inch about the ground level. While OSHES premised its case of violative conduct on permitting the tie-off point at the working platform foot level, this Board does not interpret the applicable law to prevent that type of tie-off configuration **under certain circumstances and particularly those here in evidence.**

The Board takes administrative notice of the United States

Department of Labor Federal OSHA Interpretation letter applicable to the issue of permissibility to anchor a fall arrest system at employee foot level. (Federal OSHA Interpretation Letter dated September 21, 2007 referencing Standard 1926.502(d)(16); 1926.502(d)(16)(iii).) The Board finds, in conformance with the Federal Interpretation Letter advisory and rationale:

> "OSHA requirements **do not specifically prohibit an employer from anchoring a lanyard at or near an employees's feet.** Instead, OSHA standards require that a personal fall arrest system be rigged such that an employee cannot free fall more than 6 feet, **or contact any lower level...**" (Emphasis added)

Accordingly, the fact of an anchor point at foot level is not preponderant evidence, *per se*, of a **violative condition**; nor is a manufacturer recommendation against such use. The focus of Board analysis is not merely the anchor point, but rather the distance of a potential fall from that anchor point to the ground level, vis-a-vis the reasonable ability of safety equipment to sufficiently arrest an employee fall before striking a hard surface.

At the hearings, complainant presented confusing testimony, facts, and measuring data to endeavor support of necessary proof elements to establish **employee exposure** to injuries from a fall. The testing, measurements, calculations and safety system operational theories were not clear, convincing, nor certainly preponderant evidence to establish a violation under Nevada occupational safety and health law. Similarly, respondent's arguments, assertions and estimates were confusing; however it is the **complainant that bears the burden of proof to establish by preponderant evidence all of the required proof elements to support a finding of violation.** The evidence in total portrayed utilization of a recognized safety device, **under the particular conditions at this**

worksite, that would reasonably address the protection required to prevent an employee from striking the bottom level in the event of a fall. Again, it is the complainant that must prove by preponderant evidence that **exposure** to serious injury from a fall hazard could potentially occur based upon allegations the safety line device was misused and ineffective to protect the employee as required by the OSHA standards.

A fair and independent review of all relevant factors at the worksite to support a violation requires persuasive preponderant evidence. Here, for example, the height of the employee involved was not subject of measurement or submitted competent evidence. For example a 5 foot 2 inch employee standing or kneeling on a work platform 9 foot 1 inch from the ground level and attached to the Werner yoyo device, could fall and a resultant arrest occur well above the hard surface. While it is arguable an employee attached to the lifeline while moving around on the work surface; and/or a fall occur during an assumed retraction operation of the device resulting in possible contact with the surface below, that is speculative. This would require the Board to rely on speculation **estimates**, **assumptions**, and/or **inferences** as to what might or could occur in a series of events. However, it is incumbent upon the **complainant to meet the burden of proof by preponderant evidence to establish a violation.**

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

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

The Board concludes that reasonable protection was in place at the **subject employer worksite** in compliance with required fall safety protection standards through employee use of the recoil device anchored at foot level. Utilization of the recoil device, merely contrary to manufacturer's instructions; and/or the various opinions or estimates as to a failure point for "braking" or arresting a fall were not proven to be in violation of the standard by a preponderance of evidence. Accordingly OSHES did not meet the burden of proof as to **employee exposure.**

Further there was no preponderant evidence for the proof element of **employer knowledge.** While it appears the respondent manager, co-owner and safety director were aware the Werner retractable device was being utilized, there was no proof of **employer knowledge** of the **existence of non-complying conditions** simply because the manufacturer does not recommend tie-off at foot level. Indeed an anchor point at foot level is recognized as being appropriate in **certain working conditions** or **under circumstances** that would make the work operation more difficult, impractical and/or dangerous even though not arising to the level for defensive elements of **infeasibility, economic or technological, or greater hazard.** The Board need not reach the proof elements of **infeasibility** or **greater hazard** because there was no prima facie case of violation established; nor is the respondent required to prove same under the Board's analysis of the exceptions provided under

29 CFR 1926.502(k) based upon the finding of no exposure.

Additionally, respondent witnesses testified they believed the employees to be better protected under utilization of the Werner device than various options that might have been available which approximated, although not proven, to be a greater hazard or infeasible. They believed OSHA permitted tie off at foot level. The testimony was credible. That belief was supported in the federal OSHA interpretation letter. Inferences may be drawn from the totality of testimony and evidence from both sides to support the admitted evidence. Accordingly, the Board further finds and concludes there was no sufficient preponderant evidence to prove the element of **non-complying conditions** at the employer jobsite for an unprotected fall hazard.

> When the Secretary has introduced evidence showing the existence of a hazard in the workplace, the **employer may, of course, defend by showing that it has taken all necessary precautions to prevent the occurrence of the violation.** *Western Mass. Elec. Co.*, (supra pg. 14) (Emphasis added)

At Citation 2, Item 1, the Board finds evidence the respondent maintained the appropriate safety data (SDS) information. However, the employer was unable to actually produce the document at the jobsite during the initial OSHA request. The Board finds that while the citation was classified as "other" and no penalty proposed, violations of any type affect an employer's work record. The weight of evidence and lawful inference demonstrated the existent SDS information, but an incorrect document transmitted to the jobsite and not immediately available electronically. The SDS was presented to OSHES, but not timely. The condition was promptly abated. The testimony was credible and unrebutted. On balance, the weight of facts in evidence, including prompt abatement demonstrate effective compliance with the purposes of

the SDS requirements. However this specific finding is limited to the facts and circumstances in evidence. Worksite safety requirements even though of a "paper" violation nature should not be treated lightly by respondent or any employer. The overall protective scheme for workplace safety through OSHA standards is dependent upon a variety of components. It was appropriate for CSHO Snell to investigate, request documentation, and pursue the issue of the SDS. The Board's determination of no violation is based upon a fairness analysis, and principally reliant upon the SDS information having been actually existent, but simply not timely produced. Therefore, an adjustment appropriate due to the potential harsh results from a strict interpretation and finding of violation. Citation 2, Item 1 and the proposed violation are dismissed.

The Board concludes, as a matter of fact and law, that no violations occurred and the proposed penalty denied.

It is the decision of the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD that no violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR 1926.501(b)(13) and the proposed penalty is denied.

It is further the decision of the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD that no violation of Nevada Revised Statutes did occur as to Citation 2, Item 1, 29 CFR 1910.1200(g)(8) and the proposed zero penalty and classification dismissed.

The Board directs counsel for the Respondent to submit proposed Findings of Fact and Conclusions of Law to the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD and serve copies on opposing counsel within twenty (20) days from date of decision. After five (5) days time for filing any objection, the final Findings of Fact and Conclusions of Law shall be submitted to the NEVADA OCCUPATIONAL SAFETY AND

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

DATED: This 26th day of July 2017.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JAMES BARNES, Chairman

NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY,

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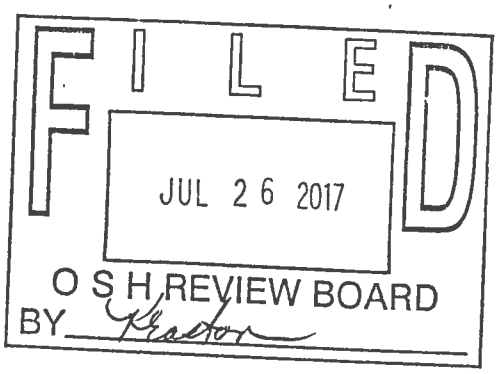

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of SCARPELLO & HUSS, LTD., and that on July 26, 2017, I deposited for mailing, certified mail/return receipt requested, at Carson City, Nevada, a true copy of the **DECISION** addressed to:

Salli Ortiz, Esq.
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400 West King Street, Suite 201
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DATED: July 26, 2017

Karen A Easton
KAREN A. EASTON