

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

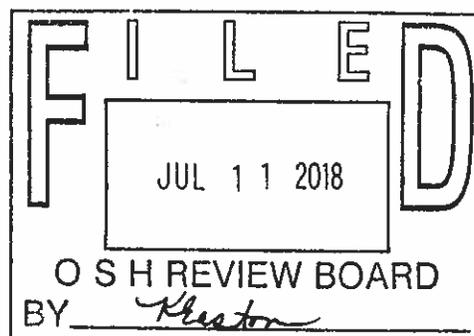
Complainant,

vs.

12 PERFORMANCE BUILDERS, INC.,

13 Respondent,
14 _____/

Docket No. LV 17-1874



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 February
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, **Performance**
22 **Builders, Inc.**, the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD**
23 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 1, charges a violation of 29 CFR 1926.451(c) (2),
2 which provides:

3 29 CFR 1926.451(c) (2). Supported scaffold poles,
4 legs, posts, frames, and uprights shall bear on
5 base plates and mud sills or other adequate firm
6 foundation.

6 NVOSHA alleged:

7 that on or about September 21, 2016 respondent
8 employees were engaged in plastering work on a
9 new building located at 2280 Paseo Verde Parkway
10 in Henderson, Nevada. The employees were working
11 from a four to five tiered fabricated frame
12 scaffold. The scaffolds were not bearing on base
13 plates and mud sills. Respondent employees were
14 exposed to fall hazards of approximately seven to
15 35 feet to the gravel surface below, which could
16 result in broken bones, head and spinal injuries
17 and up to death.

13 Instance #1: On the north side of the building,
14 two frame uprights were coupled together. One of
15 the uprights was not bearing on a base plate and
16 mud sill.

16 Instance #2: On the northeast side of the
17 building, two frame uprights were coupled
18 together. One of the uprights was not bearing on
19 a base place and mud sill.

18 Instance #3: On the southeast side of the
19 building, two frame uprights were coupled
20 together. One of the uprights was not bearing on
21 a base plate and mud sill.

21 The violation was classified as "Serious." The proposed penalty
22 for the alleged violation is in the amount of TWO THOUSAND EIGHT
23 HUNDRED DOLLARS (\$2,800.00).

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

26 29 CFR 1926.452(c) (4). Where uplift can occur
27 which would displace scaffold end frames or
28 panels, the frames or panels shall be locked
together vertically by pins or equivalent means.

1 NVOSHA alleged:

2 that on all four sides of the building at the
3 District, at GVR Pad 2, located at 2280 Paseo
4 Verde Parkway in Henderson, Nevada, employees
5 were plastering a new building while working from
6 a four to five tiered fabricated frame scaffold
7 with multiple sections that were not joined
8 together vertically by pins or equivalent means.
The scaffold was hit by a forklift, contributing
to potential uplift. The employees were exposed
to a fall hazard of approximately seven to 35
feet to the gravel surface below, which could
result in broken bones, head and spinal injuries,
and up to death.

9 The violation was classified as "Serious." The proposed penalty
10 was in the amount of TWO THOUSAND EIGHT HUNDRED DOLLARS (\$2,800.00).

11 Complainant and respondent stipulated to the admission of
12 documentary evidence identified as complainant Exhibits 1 through 4;
13 and respondent Exhibits identified as Tabs 1 through 7.

14 Both counsel waived opening statements.

15 FACTS

16 At Citation 1, Item 1, three instances of violation were
17 documented during the inspection of the subject construction project.
18 The original Certified Safety and Health Officer (CSHO) Mr. Aldo
19 Lizarraga conducted the inspection and reporting, however no longer
20 employed by NVOSHES. Mr. Jamal Sayegh was identified as the OSHES
21 supervisor who reviewed the evidence, citation process and the
22 responsible complainant witness to support the violations.

23 The narrative reports and photographic exhibits stipulated in
24 evidence describe an initial inspection on September 21, 2016 based
25 upon a "referral" complaint. The building construction site was
26 observable by CSHO Lizarraga from public street level. He reported
27 ". . . the scaffolding work did not look safe." An employee was
28 observed standing on the top rail at the top level of the scaffold.

1 During the course of the referral inspection, CSHO Lizarraga was
2 informed that on the day prior a forklift struck a scaffold while
3 attempting to remove a scissor lift. He confirmed no employees were
4 working nor injured at the time of the incident due to the lunch
5 break, but determined employees could have suffered serious injury or
6 death had they been working when the incident occurred due to
7 displacement of the tubular framing. CSHO Lizarraga found the
8 scaffolding frames and panels were not locked together vertically, by
9 ". . . pins or equivalent means." At the conclusion of the
10 inspection, including interviews with employees and respondent
11 representatives, CSHO Lizarraga recommended issuance of Citation 1,
12 Item 1, and Citation 1, Item 2.

13 DISCUSSION

14 Counsel for the Chief Administrative Officer presented witness
15 testimony and documentary evidence with regard to the alleged
16 violations. Mr. Jamal Sayegh identified himself as a compliance
17 supervisor with NVOSHES. He described his experience and background,
18 including between 200 and 300 investigations; and one-half years as
19 supervisor, overseeing between 150 and 200 cases. Mr. Sayegh
20 identified photographic exhibits stipulated in evidence, Exhibit 1,
21 pages 77 through 87 and correlated the CSHO findings with the
22 violation worksheet at Exhibit 1, commencing at page 39. He testified
23 particularly with regard to the lack of a "base plate or mud sill" as
24 depicted, particularly in Exhibit 1, pages 77 through 80. Mr. Sayegh
25 further testified as to each instance noted in the citation regarding
26 the coupling of frame uprights together, and the CSHO determination
27 supported by his review regarding the inability of the uprights to
28 support the structure, because not bearing on base plates and mud

1 sills.

2 Respondent conducted cross examination as to Citation 1, Item 1.
3 He referenced Tab 7 and challenged the witness explanation as to the
4 facts of violation. Mr. Sayegh testified ". . . nothing in the
5 standard prohibits two scaffold frames connected which can bear upon
6 one mud sill . . ." Respondent counsel again challenged the basis for
7 the citation because there is no "standard prohibiting two legs of a
8 scaffold tied and set on one mud sill base." On continued cross
9 examination, counsel asserted photographic Exhibit 1, page 77 does in
10 fact depict two scaffold legs on one base plate/mud sill. Mr. Sayegh
11 testified that while it does depict the conditions represented, it
12 does not show that it is "load bearing." Counsel questioned the fact
13 that the "load weight is bearing on the base plate, correct?" Mr.
14 Sayegh answered yes.

15 In further cross examination respondent counsel questioned
16 whether there was any OSHA requirement for "filling in gaps . . ."
17 between two legs. Mr. Sayegh responded "no." When asked if NVOSHA
18 conducted a weight load analysis, Mr. Sayegh testified "no." On final
19 questioning respondent counsel asked "so you have no evidence the
20 plate was not sufficient to bear weight?" Mr. Sayegh responded
21 "correct." On continued questioning, Mr. Sayegh admitted from his
22 identification of the photograph at page 78 that a base plate can be
23 observed in place, although covered by some debris. Mr. Sayegh
24 testified as to photographic Exhibit 1, page 80, that he can identify
25 a base plate on top of the mud sill, although the base appears covered
26 with debris.

27 At Citation 1, Item 2, referencing 29 CFR 1926.452(c)(4),
28 complainant counsel identified the core issue to involve the four or

1 five tiered fabricated frame scaffolding with multiple sections not
2 joined together vertically by pins or equivalent means as required by
3 the standard. When the subject scaffold was hit by a forklift, that
4 contributed to the potential for uplift. The employees were exposed
5 to potential fall hazards of approximately 7 to 35 feet to the gravel
6 surface below, although not present during the lunch period when the
7 accident occurred.

8 Mr. Sayegh described the types of serious injuries or death that
9 can occur from potential uplift. He testified from the reportings of
10 the CSHO inspector that employees had been working on the scaffolding
11 prior to the accident, therefore exposed to potential serious injuries
12 or death.

13 Counsel inquired as to "what is uplift?" CSHO Sayegh explained
14 his opinion of uplift; but testified there is no actual definition in
15 the OSHA standards. Mr. Sayegh referenced the CSHO narrative
16 reporting at Exhibit 1, pages 19 and 20 and the witness statements
17 regarding the subject scaffolding erection problems prior to the
18 inspection. He testified uplift can occur if the scaffold is not
19 assembled properly. He described instances when a forklift is used
20 during the loading of material to the employees working from the
21 scaffold while engaged in plastering work. He testified the CSHO
22 found "employer knowledge" of the uplift issues based upon company
23 policy because management does not require use of pins as a matter of
24 practice. He referenced page 20 of the inspection report interview
25 with foreman supervisor, Mr. Salvador Loera. Mr. Loera reported
26 difficulties with stabilization of the scaffolding due to the non-
27 level ground surface at the site location. This required the scaffold
28 framing be "cut" prior to assembly to accommodate the ground surface

1 and other conditions to achieve a level structure. Mr. Sayegh
2 referenced the Loera witness statement, at page 35, reflecting
3 ". . .we only put pins in when we have outriggers . . ."

4 Mr. Sayegh continued direct testimony identifying the potential
5 for serious injury and death from working on scaffolding at the
6 existent substantial heights as both observed and reported by CSHO
7 Lizarraga and admitted from employee interviews. He further explained
8 the penalty analysis and assessment for probability, severity and
9 gravity, all as more specifically described at Exhibit 1, in the
10 violation worksheets.

11 Mr. Sayegh testified as to an email exchange between respondent
12 representatives and the CSHO confirming supervisor and **competent**
13 **person** responsibilities for scaffolding erection. He identified
14 photographic Exhibit 2, page 93, demonstrating the leg alteration and
15 effect on stability. At Exhibit 4, pages 186 through 188 Mr. Sayegh
16 identified the published "**uplift**" information, and guidance
17 documentation provided by Federal OSHA. He testified that scaffolding
18 can be made stable if set on base plates or other firm foundations.
19 He identified Exhibit 4, page 193 as the Federal documentation on
20 scaffold "pinning requirements" for protection against uplift. Mr.
21 Sayegh testified at Exhibit 4, page 211 as to the advisory
22 interpretation of NVOSHA through Federal OSHA on when an employer
23 should use locking pins for protection against uplift.

24 Respondent counsel conducted cross examination on the Citation
25 1, Item 2 allegations and direct testimony. Counsel referenced
26 respondent Tab 7, as a copy of the standard, and requested the witness
27 read from page 292. He inquired whether Mr. Sayegh knew the
28 difference between a "locking pin" and a "stacking pin" for

1 explanation. The witness testified a ". . .connector is also known
2 as a stacking pin" and testified they are always needed to erect
3 scaffolding so it can stay connected. He further testified that a
4 locking pin is not always required unless there are other conditions
5 which may result in an uplift and displacement of the structure. He
6 referenced respondent Tab 2, pages 192 and 193. Mr. Sayegh testified
7 that uplift can result from a force strong enough to lift the entire
8 frame up approximately 4 inches and pull it out of the frame
9 connection.

10 Counsel inquired of the witness as to the **forklift striking** the
11 scaffolding and his knowledge or information of the incident. Mr.
12 Sayegh testified ". . . they don't know who hit the scaffold . . ."
13 based upon the interview information. ". . . Respondent employees
14 were at lunch, . . . but it was another contractor that hit the
15 scaffold. . ." Counsel challenged the witness as finding "**employee**
16 **exposure**" when they were away at lunch. The witness responded the
17 employees could have easily been on the scaffold when the forklift was
18 operating in the area; and because there was no pinning and a hit,
19 there was a greater potential for uplift and displacement which could
20 result in serious injury or death to the employees. Counsel asked
21 whether locking together end frames is only required where uplift
22 forces are strong enough to displace the end frames. Mr. Sayegh
23 testified no; but then corrected himself answering, yes the pinning
24 is only needed if uplift could occur.

25 Respondent counsel questioned how the respondent employer or
26 supervisors could foresee a forklift hitting the scaffold while the
27 employees were at lunch. Mr. Sayegh testified that was the improper
28 way to look at the interpretation of the standard. OSHA requires the

1 employees be protected against any equipment, any time being
2 accidentally hit. He testified the ". . . possibility of uplift must
3 be protected . . ."

4 During redirect examination Mr. Sayegh testified that a "gap" due
5 to the framing being cut and the resultant assembly process, reduces
6 scaffold stability factors. The scaffold design must be conducted by
7 a qualified **competent person**. Mr. Sayegh testified the construction
8 site was determined to be a **multi-employer work site** as defined under
9 OSHA enforcement policies due to other employers involved in related
10 construction work activity. The classification creates an expectation
11 for heightened awareness by employers for employee safety.

12 On re-cross examination Mr. Sayegh testified it was possible that
13 employee Rodriguez was a qualified scaffold inspector but he had no
14 evidence to establish same. When asked if Mr. Rodriguez had 20 years
15 experience could he possibly be qualified; Mr. Sayegh responded yes.
16 On follow up examination, Mr. Sayegh testified that locking pins are
17 only required when there is a possibility of uplift.

18 Complainant counsel presented witness testimony from Mr. Cesar
19 Cavillo. Mr. Cavillo testified he formerly visited the subject site
20 as an independent safety inspector for other employers. He testified
21 that he was on the site the day before the accident involving the
22 forklift striking the scaffolding. He observed the respondent
23 scaffolding was missing pins and saw that forklifts were working
24 around scaffolding.

25 On cross examination, counsel challenged the witness as not
26 credible, based on testimony that he saw "all employees on a roof
27 . . ." He further challenged the witness as to having no photographs
28 to support his testimony.

1 At the conclusion of complainant's case, respondent presented
2 witness testimony from Mr. Vincente Valentin, Ms. Laura Sorensen, and
3 Mr. Luke Griffis.

4 Mr. Vincente Valentin testified through an interpreter. He
5 identified himself as a 12 to 13 year employee of respondent,
6 currently working in the capacity of foreman. Mr. Valentin testified
7 he has authority to stop work if anyone is operating a forklift or
8 equipment near the scaffolding. He further testified he is
9 responsible for setting up scaffolding stating ". . .yes . . . I do
10 it every day. . ." Mr. Valentin testified he was at the work site on
11 the day the forklift struck the scaffolding, although did not see it
12 actually occur. He testified there were people in the area working
13 near the scaffolding but did not continue work when he or employees
14 were on the scaffolding. He testified that people are not allowed to
15 enter the building when he's working from the scaffold, other than
16 access doors for individuals. Mr. Valentin testified the
17 subcontractors are allowed to continue their work while he or his men
18 are on the scaffolding but they cannot come near the scaffolding
19 itself.

20 Ms. Sorensen testified she is the president and co-owner of the
21 respondent company. Ms. Sorensen identified photographic evidence and
22 testified as to the definition of **base plates**, stating they support
23 and spread the load on the scaffolding structure. She testified that
24 **mud sills** are used to spread the load more and support the
25 scaffolding. At Exhibit 1, page 78, she identified the "**screw jacks**"
26 and identified the "base plate and mud sills" in the exhibits and
27 explained the uses in the respondent business operations. She
28 testified that all the company scaffolding bears on base plates and

1 mud sills; and explained the latter consist of a wood board underneath
2 the plate unit. Ms. Sorensen testified on the company policy for
3 scaffolding and the process of erection and use of components. She
4 testified that wind has little effect on the scaffolding, that the
5 company safety program identifies issues for work under various
6 conditions and described the policy for disciplining employees who
7 violate the safety program. She further explained that scaffolds
8 always have stacking pins in the frame and described the assembly
9 process. She described the difference between "coupling or stacking
10 pins" and "locking pins." Ms. Sorensen read from the document
11 subsection 4, which provided "Where uplift can occur which would
12 displace scaffold in frames or panels . . . frames or panels shall be
13 locked together, whether vertically by pins or equivalent means." She
14 testified that locking pins are only required where uplift can occur
15 which could displace the end frame. She testified on circumstances
16 when the company policy requires use of locking pins to include ". . .
17 if we're going to attach anything to the scaffolding that's going to
18 change the way the wind would affect it . . . for instance if we have
19 to put like tarps on the outside of the building either to keep in
20 heat or weather out, we would definitely need to have pins in that
21 scenario . . . if we we're going to attach a cantilever bracket . .
22 . we need to have pins to keep the frames from uplifting . . . If
23 we're are going to be using a material hoist that's going to be strong
24 enough to displace the scaffolding below it, we would definitely need
25 to have pins in place." (Tr. pgs 150-151) Ms. Sorensen testified she
26 learned of the accident involving a forklift striking the respondent
27 scaffolding after it had occurred. She testified the company
28 employees are trained and instructed on non-use of scaffolding

1 whenever equipment is operating nearby; and when pinning is required.

2 On cross-examination Ms. Sorensen answered questions describing
3 the OSHA definitions of **competent and qualified persons**. She answered
4 questions regarding the diagram for scaffolding assembly. She
5 testified that photographic Exhibit 1, page 77 of the site shows it
6 was not a flat surface, but explained the base plates were not set on
7 top of debris. She further testified "scaffolding must always bear
8 upon mud sills . . ."

9 Mr. Luke Griffis identified himself as a professional engineer
10 for 13 years; and a qualified retained expert to address citations 1
11 and 2. He defined a **competent person** for purposes of scaffolding work
12 as one who can identify safety and anything requiring immediate action
13 to assure safety. He identified respondent Tab 2, page 192 and
14 described the clamping of frames by the respondent to be in accordance
15 with applicable procedures and safety requirements. He further
16 testified ". . . pins are not always required . . . it's up to a
17 competent person to decide . . ." At Exhibit 1, page 77 he testified
18 the separation between the frame legs on the scaffolding is not a
19 hazard. Mr. Griffis testified in his opinion the clamping frame legs
20 together with use of a single screw jack, base plate and mud sill is
21 appropriate (Tr. pg. 186).

22 Mr. Griffis testified ". . . locking pins not always required
23 . . . depends on other factual conditions . . ." He explained by
24 example that if uplift could be caused by equipment utilized to lift
25 materials up to the top of the scaffolding that is a concern for
26 safety because the material could pull the frame out of connection;
27 so in that instance locking pins are appropriate to prevent "uplift."
28 He further testified that you can also use those if a strong wind is

1 in the area when tarps or "shrink wrap" are there because those can
2 "catch the wind" so additional precautions are required in those
3 conditions.

4 Mr. Griffis identified Exhibit 3, page 182, as the written
5 opinion from another engineering firm authorizing the cutting of frame
6 legs. He additionally testified that ". . . uplift loads are not
7 reduced by cutting posts . . ."

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

10 Complainant counsel asserted the job site conditions reflected
11 a non-stable foundation so it was very important for safety to set up
12 scaffolding properly to assure loads are supported. Counsel argued
13 ". . . not all the mud sills were in place, according to witness
14 Valentin." Counsel asserted no locking pins were in place based upon
15 the employer claims of no potential for uplift, which gives an
16 impression that there were some uplift issues. Counsel asserted the
17 scaffold components and frames were not all from the same
18 manufacturer, therefore not a "common fit" and ". . . the gaps shown
19 in the framing would have an effect on stability . . ." Counsel argued
20 the respondent engineer was not fully supportive of respondent's
21 scaffolding and had to speculate because he was not at the site at the
22 time or shortly after the accident. Counsel admitted there is not a
23 definition of "uplift" in the OSHA standards so it's subject to some
24 debate; however clearly affected by various issues. For example
25 hoisting up material, use of pulleys, wind and other factors. Counsel
26 further asserted that although prior NVOSHA advisory opinion is not
27 controlling, it still provides some interpretative guidance. Counsel
28 argued ". . . the exposure didn't come from the accident with the

1 forklift. The exposure comes from the knowledge that uplift was a
2 potential when they're working on a scaffold, not only from this . .
3 . this site, because they have . . . they were on a very active
4 multiemployer work site." (Tr. pg. 218, lines 14-18)

5 Respondent provided closing argument. Counsel asserted
6 complainant failed to meet the required burden of proof to establish
7 violations for both Citation 1, Item 1, and Citation 1, Item 2. The
8 evidence clearly demonstrates, particularly through the photographs,
9 that the scaffold frame legs were on a stable foundation from the mud
10 sills and base plates which provided a "bearing base." There is no
11 requirement in the OSHA standards for there to be separate mud sills.
12 The CSHO testified it was okay to share the same mud sills and so did
13 the expert engineer. There was no evidence by a preponderance of a
14 violation. Every photograph in evidence shows all the scaffolding set
15 on "bearing supports." There was no evidence nor any testimony
16 whatsoever to support the violation; on the other hand the pictures
17 did in fact demonstrate compliance.

18 As to the uplift issue at Citation 1, Item 2, there are no
19 locking pins required under the OSHA standards because its up to a
20 **competent person** to determine. Here, there was no basis for a
21 potential uplift. The documentary evidence from the OSHA
22 investigation and the testimony reflected the scaffolding was erected
23 by qualified people and they had no reason to find locking pins would
24 be necessary. There was no evidence that hoisting of materials up to
25 the scaffold was ever used on the job. The accident was due to a
26 forklift hitting the structure. There was no way for the respondent
27 to know that would happen based upon the safety policy restricting
28 operating machinery in proximity to the scaffolding. There were no

1 facts to expect pinning should be utilized. However "the pinning
2 would not have prevented this accident." There were no employees
3 exposed to the hazardous condition of an unknown forklift striking the
4 unit when they were at lunch. There was ". . . no burden of proof met
5 from the evidence . . . no elements to support the violation; and
6 particularly no employee exposure for violative conditions. Pins are
7 not always required . . . see the OSHA Federal documentation in
8 evidence and the testimonial evidence . . . no facts or conditions at
9 the work site warranted (pinning) . . . and that is okay with OSHA
10 . . ." The complainant cannot use an accident itself to show or prove
11 a violation.

12 Counsel referenced the Secretary of Labor Opinion 93-1972 (1994),
13 Tr. pg. 230, where an employer was cited for operating a "low lift"
14 to deliver material to the top of scaffolding. OSHA cited the
15 respondent, but the Secretary ruled - there was no potential uplift
16 as defined by OSHA to require pins. "Pins are not always required."
17 There are no facts here to foresee the accidental forklift contact
18 with the scaffold during removal of a scissor lift from the work site.
19 There were no other factors such as tarps, hoisting, or other
20 potential contact; and the company safety plan, as testified to by the
21 respondent witnesses, shows there was training to address the events
22 that would require pinning. Counsel concluded that to find a
23 violation, ". . . there is a need for a potential uplift that could
24 displace the frame . . . to require pinning and there was no evidence
25 of that . . ."

26 APPLICABLE LAW

27 The Board is required to review the evidence and recognized legal
28 elements to prove violations under established occupational safety and

1 health law.

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

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

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

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

12 To prove a violation of a standard, the Secretary
13 must establish (1) the applicability of the
14 standard, (2) **the existence of noncomplying**
15 **conditions**, (3) **employee exposure or access**, and
16 (4) that the **employer knew or with the exercise**
17 **of reasonable diligence could have known of the**
18 **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
20 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp.
21 28,908-10 (No. 76-1408, 1979); *American Wrecking*
Corp. v. Secretary of Labor, 351 F.3d 1254, 1261
22 (D.C. Cir. 2003). (emphasis added)

23 A respondent may rebut allegations by showing:

- 24 1. The standard was inapplicable to the
25 situation at issue;
- 26 2. The situation was in compliance; or lack of
27 access to a hazard. See, *Anning-Johnson Co.*,
28 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**

1 **did not and could not, with the exercise of**
2 **reasonable diligence, know of the presence of the**
3 **violation.**" (emphasis added)

4 The **burden of proof** to confirm a violation rests with OSHA under
5 Nevada law (NAC 618.788(1)); but after establishing same, **the burden**
6 **shifts to the respondent to prove any recognized defenses.** See *Jensen*
7 *Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶ 23,664 (1979). Accord,
8 *Marson Corp.*, 10 OSHC 2128, 1980 OSHC 1045 ¶ 24,174 (1980).

9 As a general rule, every employer on a **multi-**
10 **employer work site** has the responsibility to
11 protect its own employees from unsafe conditions,
12 regardless of who created or **controlled** the
13 hazard. To escape OSHA liability, an employer
14 that neither created **nor controlled the hazardous**
15 **condition** must show that it either took
16 alternative measure to protect its employees or
17 did not know and could not reasonably have known
18 that the condition was hazardous. Recognizing
19 that requiring a non-creating, non-controlling
20 employer to take "realistic alternative measures"
21 to protect its employees is a rather broad
22 command, OSHRC has addressed the requirement on
23 a number of occasions. OSHRC has stated that
24 "our [Anning-Johnson/Grossman Steel] decisions
25 make respondent's ability to use realistic
26 measures to comply fully with the standard a
27 **material issue of fact.** A *Practical Guide to*
28 *OSHA* § 8.01[3] (2002). (emphasis added)

19 At Citation 1, Item 1, referencing 29 CFR 1926.451(c)(2), the
20 Board finds the complainant did not establish a prima facie case of
21 violation under the required burden of proof as codified under
22 occupational safety and health law. The undisputed photographic
23 evidence clearly demonstrated the scaffold framing was set on mud
24 sills and base plates which provided "bearing support." Accordingly
25 the lack of proof for finding a violation based upon the elements of
26 non-compliant conditions and employee hazard exposure prohibit any
27 finding of violation. The cited condition was compliant.

28 At Citation 1, Item 2, referencing 29 CFR 1926.452(c)(4), the

1 Board finds the proof elements required to support a violation were
2 met by the preponderant evidence. The work site was comprised of more
3 than one employer and satisfied the legally recognized criteria for
4 classification as a **multi-employer work site**. See *A Practical Guide*
5 *to OSHA § 8.01[3]* (2002), *supra*. At a multi-employer work site,
6 employer safety awareness is heightened for not only its own employees
7 but also the employees of other contractors on the site. At the
8 subject multi-employer work site, employee exposure to the potential
9 hazardous conditions involving forklift(s) operated by another
10 employer(s) striking scaffolding, must be subject of employee
11 protection. The respondent employees were exposed to potential fall
12 hazards given the lack of control by the respondent employer over
13 employees of other employers operating equipment on the site. There
14 was no direct evidence for the typical recognized conditions requiring
15 "pinning" of the scaffolding to address potential uplift and resultant
16 displacement of the scaffolding. However, the respondent knew,
17 directly or constructively from supervisor imputation, or with the
18 exercise of reasonable diligence required to know, that at the subject
19 multi-employer work site, fork lift operations by other employers was
20 occurring. Further, the scissor lift equipment belonging to another
21 employer parked near the respondent employee scaffolding, could
22 reasonably be expected as subject of movement or removal by a
23 forklift. That and other equipment operation could potentially cause
24 uplift/displacement of the scaffolding and resultant fall hazard
25 exposure to employees. Employer knowledge of the multi-employer work
26 site factual conditions for potential scaffolding uplift and
27 displacement, or through the principle of employer knowledge by
28 imputation through supervisory personnel for constructive application,

1 was supported by the evidence. Direct evidence and reasonable
2 inference drawn from the record reflected forklift operations at the
3 multi-employer work site. Employee Sanchez reported in his witness
4 statement in evidence (Exhibit 1, page 38), "we have people hitting
5 our scaffolding all the time." These conditions established a
6 heightened awareness for employee safety including a requirement to
7 "pin" the scaffolding. Employer knowledge is a critical proof element
8 under occupational safety and health law.

9 The Board concludes, based upon the evidence as a matter of fact
10 and law, the cited violation at Citation 1, Item 1 must be dismissed
11 based upon a failure of preponderant evidence to meet the statutory
12 burden of proof to establish the violative conditions.

13 At Citation 1, Item 2, the Board concludes, based upon the
14 preponderant evidence as a matter of fact and law, the cited violation
15 occurred, and properly classified as Serious. The proposed penalty
16 in the amount of \$2,800.00 is confirmed.

17 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
18 **REVIEW BOARD** that no violation of Nevada Revised Statutes did occur
19 as to Citation 1, Item 1, 29 CFR 1926.451(c)(2), and the proposed
20 classification and penalty denied.

21 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**
22 **HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did
23 occur as to Citation 1, Item 2, 29 CFR 1926.452(d)(4), the violation
24 properly classified as Serious, and the proposed penalty in the amount
25 of Two Thousand Eight Hundred Dollars (\$2,800.00) approved and
26 confirmed.

27 The Board directs counsel for the **Complainant**, Chief
28 Administrative Officer of the Occupational Safety and Health

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

10 DATED: This 29th day of June 2018.

11 NEVADA OCCUPATIONAL SAFETY AND HEALTH
12 REVIEW BOARD

13 By: _____

14 Steve Ingersoll
15 ~~STEVE INGERSOLL~~, CHAIRMAN
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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

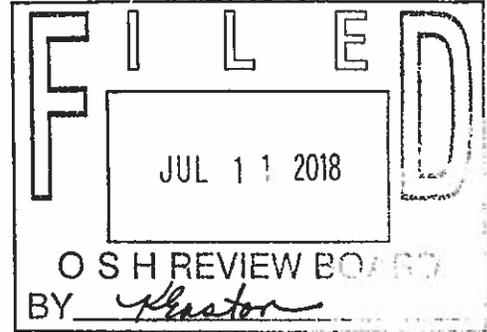
Docket No. LV 17-1874

Complainant,

vs.

10 PERFORMANCE BUILDERS, INC.,

Respondent.



11
12 CERTIFICATE OF MAILING

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

24 *Karen A. Easton*
25 KAREN A. EASTON

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

7/12 S/B Decision
not Notice of Hrg.
I called Karen
at OSHRB - she
will correct
Bobare

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

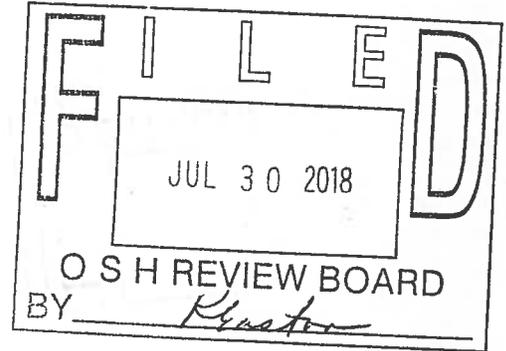
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Respondent.



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

23 DATED: July 30, 2018

24 
25 KAREN A. EASTON

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27 JUL 31 2018
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CARSON CITY OFFICE