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NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

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

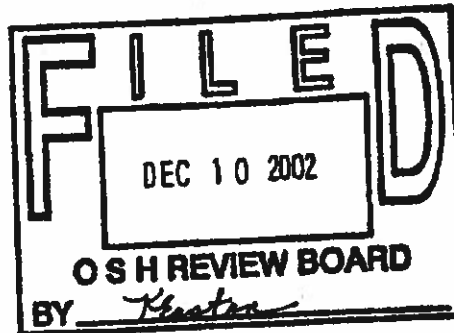
Docket No. LV 02-1285

Complainant,

vs.

CENTURY STEEL, INC.,

Respondent.



DECISION

This matter having come before the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD at a hearing commenced on the 13th day of November 2002 in furtherance of notice duly provided according to law. MR. ROB KIRKMAN, ESQ., appearing on behalf of the Chief Administrative Officer of the Occupational Safety and Health Enforcement Section, Division of Industrial Relations (OSHES), and MR. J. MICHAEL McGROARTY, ESQ. appearing on behalf of respondent, CENTURY STEEL, INC.; the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD finds as follows:

Jurisdiction in this matter has been conferred in accordance with Nevada Revised Statute 618.315.

The complaint filed by the OSHES sets forth allegations of violations of Nevada Revised Statutes as referenced in Exhibit "A", attached thereto.

1 Citation 1, Item 1(a) charges a "serious" violation of 29 CFR
2 1926.760(a)(1). The complainant alleges that the respondent
3 employer failed to ensure use of proper fall protection system(s) by
4 its employees in three specific areas of a steel erection
5 construction site. At an area designated "K" on the south side of
6 a described building construction site, an employee working without
7 a fall protection system or alternate means of protection, as
8 required by the subject standard, fell approximately 90 feet
9 resulting in fatal injury. At an area designated as "K" on the
10 north side of a described building construction site, an employee
11 was observed walking on the top of an I-beam structure at
12 approximately 59 feet above ground level and while under the direct
13 supervision of a foreman employee of respondent, without a fall
14 protection system or alternate means of protection, as required by
15 the referenced standard. At an area designated as "F" on a
16 described building construction site, an employee was observed
17 exiting an aerial lift onto the top of an I-beam structure at
18 approximately 59 feet above the ground level, without the required
19 fall protection system or an alternate means of protection, as
20 required by the referenced standard. The violative conduct was
21 classified as "willful" and a penalty proposed in the amount of
22 \$56,000.00.

23 Citation 1, Item 1(b) charges a "willful" violation of 29 CFR
24 1926.760(b)(1). The complainant alleges that the respondent
25 employer failed to ensure that employees were both provided and
26 utilized a proscribed fall protection system or acceptable alternate
27 means of protection, as required by the referenced standard. At an
28 area designated as "K" on a described building construction site,

1 employees were working on steel I-beams without a fall protection
2 system or alternate means of protection in compliance with the
3 referenced standard. Specifically OSHES alleged that static lines
4 were provided only on some beams and therefore did not permit
5 employees to utilize required fall protection while working more
6 than two stories or 30 feet above a lower level. OSHES further
7 alleged that employees designated as "connectors" were working
8 without the proscribed fall protection system or acceptable
9 alternative means of protection in the same area where an employee
10 had been fatally injured the previous day, thereby exposing the
11 subject employees to a fall hazard of approximately 90 feet in
12 height. The violation was classified as "serious" due to the height
13 of a potential fall and the reasonable possibility of serious injury
14 or death.

15 Situation 2, Item 1 charges a "serious" violation of 29 CFR
16 1926.754 e (2) (ii). The complainant alleges that the employer
17 failed to ensure a proper fall protection system was utilized,
18 specifically on a third floor of a described building construction
19 site at an area designated as section "E". An employee was observed
20 performing a work task generally described as "bolt-up" while not
21 utilizing the proscribed fall protection system or an alternative
22 means of protection, as required by the standard, thereby exposing
23 the employee to a fall hazard of approximately 27 feet in height.
24 The violation was classified as serious due to the height of a
25 potential fall and the possibility of serious injury or death. The
26 penalty was proposed in the amount of \$4,000.00.

27 Situation 2, Item 2 charges a "serious" violation of 29 CFR
28 1926.761 b . The complainant alleges that the employer failed to

1 ensure that employees were properly trained in the hazards of fall
2 protection; specifically that at the Mandalay Bay Convention Center
3 work site project, employees were observed working on steel I-beams
4 without the proscribed fall protection or any acceptable alternative
5 means of protection as required by the referenced standard. OSHES
6 further alleged that employees were working at a height of
7 approximately 90 feet. The violation was classified as "serious"
8 due to the height of a potential fall and the reasonable possibility
9 of serious injury or death.

10 OSHES alleged that commencing February 19, 2002, it conducted
11 investigation and inspection of a work site in Las Vegas, Nevada,
12 described as the Mandalay Bay Convention Center Project. OSHES
13 safety and health representative (SHR) Randy Schlecht investigated
14 an accident at the project site after being notified of an employee
15 fatality. Mr. Schlecht testified that he arrived at the work site
16 and met with the foreman of respondent, Mr. Jerry Siciliano. The
17 SHR testified that prior to actually commencing the investigation of
18 the fatality he observed an employee walking on a I-beam without
19 fall protection. Mr. Schlecht noted an individual, later identified
20 as respondent's supervisor Mr. Frank Perreria, gesturing and
21 "yelling" for the subject employee to "belt off". Mr. Schlecht
22 testified he continued his investigation and focused on the fatality
23 earlier in the day wherein employee Paul Graham fell to his death
24 from a height of approximately 90 feet. SHR Schlecht determined
25 that employee Graham was wearing a harness and lanyard when observed
26 on the ground after the fall. Mr. Schlecht testified that foreman
27 Siciliano advised him there was no safety cable on the end of the I-
28 beam where Mr. Graham was working to allow him to "tie off" which

1 rendered the harness/lanyard ineffective to prevent his fall. Mr.
2 Schlecht continued his testimony and stated that foreman Siciliano
3 told him that another employee of respondent was supposed to install
4 the safety cable "as told". SHR Schlecht stated that he issued
5 Citation 1, Items 1(a) and 1(b) based upon his investigation of the
6 facts involving the fatal fall of employee Graham without use of a
7 required fall arrest system, as well as his observation of employees
8 walking on an I-beam without proper fall protection, together with
9 the inaction and non-reactive positions of the supervisory personnel
10 toward the violative conditions at the work site. Mr. Schlecht
11 testified that the subject standard requires 100% fall protection
12 due to the height of the work performed by respondent's employees
13 and the high probability of serious injury or death should a fall
14 occur.

15 During continued examination and cross-examination, SHR
16 Schlecht testified in support of his basis for issuing the subject
17 violations referenced in Citation 1, Items 1(a) and 1(b) and for
18 classifying them as "willful." Mr. Schlecht testified that his
19 particular attention was directed to the conduct and statements of
20 supervisors Siciliano, Perreria, Cole and Hunt. He testified
21 supervisors Siciliano and Perreria permitted, through inaction, an
22 employee identified as Mr. Vian (sp?) to walk on an I-beam without
23 fall protection on the very day that the fatality occurred. Mr.
24 Schlecht interpreted the actions of Mr. Perreria gesturing and
25 shouting at an employee to "belt off" as forewarning the employee an
26 OSHA inspector was onsite; rather than Mr. Perreria conducting
27 normal supervisory work assuring that the referenced employee was
28 utilizing proper fall protection. Mr. Schlecht testified he

1 concluded an indifferent attitude for fall arrest safety on the part
2 of respondent through its supervisory personnel.

3 Mr. Schlecht testified that he and SHR Ms. Debby Austin, a
4 safety supervisor, observed two other employees of respondent, later
5 identified as Messrs. Germaine and Valling (sp?), working without
6 fall protection while continuing their inspection in the presence of
7 employer supervisory personnel Messrs. Cole and Hunt. Mr. Schlecht
8 testified that he and SHR Austin observed the employees wearing
9 harnesses and lanyards in the vicinity of a safety cable for tie off
10 protection, but neither were utilizing their equipment to actually
11 secure themselves as required by the standard. SHR Schlecht
12 determined the employees were unprotected while working; and
13 particularly noted the condition as occurring in the presence of
14 supervisors Cole and Hunt. Mr. Schlecht stated the supervisors took
15 no prompt action to correct the violative conditions and exposure to
16 hazard. SHR Schlecht testified that he and SHR Austin questioned
17 the supervisors to determine whether they were going to do anything
18 about the violative conditions. Mr. Schlecht stated that only after
19 the demanding inquiry did the supervisors call the employees down
20 from the exposed area. Mr. Schlecht testified he saw no evidence of
21 discipline to the two employees observed by he and SHR Austin in the
22 presence of Messrs. Cole and Hunt in violation of the fall arrest
23 standard in any of the files furnished by the respondent employer.

24 Mr. Schlecht testified that respondent employees were
25 generally ". . . moving around. . ." the work areas at heights of 27
26 to 30 feet without use of tie offs to safety cable or other fall
27 restraint systems.

28 Counsel for the complainant presented further evidence and

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1 testimony from SHR Schlecht in support of the violations charged in
2 Citation 2, Item 1 and Item 2, referencing respectively 29 CFR
3 1926.754 e (2) (ii) and 29 CFR 1926.761(b). Both violations were
4 classified as "serious." Mr. Schlecht testified that the day after
5 the fatality he inspected the third floor work area of the subject
6 construction work site and determined the employer failed to ensure
7 proscribed fall protection systems or acceptable alternative means
8 of protection were being utilized in accordance with the referenced
9 standard. Photographic exhibits together with the SHR worksheets
10 were introduced into evidence without objection. Mr. Schlecht
11 testified the records furnished by the employer, together with his
12 observations at the work site and responses to investigatory
13 questions, provided him with sufficient basis to cite the employer
14 for the serious violations set out in Citation 2, Items 1 and 2 as
15 referenced.

16 On cross-examination, Mr. Schlecht testified there was no
17 question as to the violative conditions found and subject of
18 Citation 2, Items 1(a) and 1(b). He classified the violation as
19 willful due to the repeated violative conditions after the fatality
20 and because of the responses, attitude, and observations of the
21 supervisory personnel in failing to ensure and enforce compliance
22 with the fall arrest standards. Mr. Schlecht testified as to his
23 opinion of the difference between "bolt-up" work and "connecting"
24 work in furtherance of questions of respondent's counsel referencing
25 Citation 2, Item 1.

26 Counsel further directed cross-examination to Mr. Schlecht's
27 direct testimony regarding his observation of employee Boggs, who
28 was observed exiting an aerial lift to the top of an I-beam at

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1 approximately 59 feet above ground level without a proper proscribed
2 fall protection system or alternative means of protection. SHR
3 Schlecht testified he observed an employee identified as Mr. Boggs
4 exiting an aerial lift without tie off means for his harness and no
5 other alternative means of protection. Mr. Schlecht testified that
6 Mr. Boggs was terminated but rehired after only a "few days" off the
7 job site. SHR Schlecht determined the rehire of Mr. Boggs after
8 only a "few days" of termination confirmed his finding of the
9 employer's disregard for enforcement of the fall arrest standard
10 safety requirements. Mr. Schlecht testified that he observed Mr.
11 Boggs to be exposed to a fall of approximately 59 feet. He further
12 testified that when supervisor Hunt observed the violative condition
13 he terminated Mr. Boggs. Mr. Schlecht questioned the attitude of
14 enforcement of the standards on the part of the employer as further
15 support of the willful violation classification because of his
16 observation of Mr. Boggs back on the work site "three days after the
17 inspection and approximately two days after the (fatal fall
18 accident. . ."

19 Counsel for the complainant presented additional evidence and
20 testimony from SHR Ms. Debby Austin. Ms. Austin testified in
21 support of the testimony of Mr. Schlecht regarding her observations
22 of employees Germaine and Valling working without fall protection in
23 the presence of supervisors Cole and Hunt. She confirmed the
24 attitude on the part of Messrs. Cole and Hunt to be in disregard of
25 enforcement of the fall arrest standards noting particularly their
26 enforcement action occurring only after an insistent reminder by the
27 SHRs.

28 Respondent presented evidence and witness testimony.

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1 Mr. Jerry Siciliano, the foreman of respondent, testified that
2 employee Graham who fell to his death was in the wrong area of the
3 work place and where he was not authorized to be working due to
4 there being no means for attachment of his harness or lanyard to a
5 steel cable for "tie off". He testified that the employee was not
6 supposed to be in the area and had no explanation as to why Mr.
7 Graham was in referenced location. Mr. Siciliano further testified
8 that on the morning after the accident there was a meeting with all
9 employees where he and others emphasized the importance of safety
10 and that safety equipment must be worn by all employees, except
11 those working under 30 feet, within his understanding and
12 interpretation of the mandates of the standard. Mr. Siciliano also
13 testified that he prefers utilization of what is described as
14 "choker" safety attachment device as he dislikes the steel cable
15 means for tie off because of a potential for greater hazard if it is
16 kicked or bumped by a co-worker. He further testified that he
17 understands part "R" of the standard to mean no tie off is required
18 under 30 feet but only that one must carry a means for tie off if
19 above six feet. He testified that it was the decision of employee
20 Graham to utilize a choker and to have one with him on the day of
21 the accident, that all safety equipment is furnished by the
22 employer, and there was no negative attitude on the part of the
23 respondent employer regarding safety and enforcement of the fall
24 arrest standards.

25 Mr. Siciliano testified on cross-examination and questioned
26 what was described as depicted in some of the photographic evidence.
27 Specifically, Mr. Siciliano testified that employee Germaine was
28 wearing sufficient fall protection in the photographic exhibit

1 because he was working under 30 feet in height. He testified that
2 he personally did not care for the use of steel cable for tie off
3 and preferred utilization of choker systems when appropriate. He
4 testified that 100% tie off means only over "open holes" or
5 depending upon the working heights that may vary on the job site.
6 Mr. Siciliano testified that he fired two employees over the last
7 nine months for failing to tie off which he asserted demonstrated
8 the attitude of the employer to enforce the subject safety
9 requirements.

10 Respondent presented additional testimonial evidence from Mr.
11 Scott Charette, the safety director of respondent. Mr. Charette
12 testified that he was hired in March of 2002, after the fatal
13 accident and commencement of the inspection leading to the citations
14 subject of the complaint and hearing. He explained that employee
15 Boggs was rehired only after he was retrained, and that his
16 termination period existed for eight or nine days rather than the
17 two or three days as testified by Mr. Schlecht. He further
18 testified there was no choice but to rehire Mr. Boggs due to a union
19 requirement.

20 Additional testimonial evidence was presented by respondent
21 through Mr. Frank Perreria. Mr. Perreria testified that he is a
22 foreman of respondent and the one subject of Mr. Schlecht's
23 testimony who was observed on the job gesturing and yelling to an
24 employee to "belt up." Mr. Perreria explained his activity was not
25 as described by Mr. Schlecht in reaction to an OSHA inspector being
26 on site and thus contrary to enforcement of standards. Mr. Perreria
27 testified that 100% tie off was indeed the topic of the meeting on
28 the day of the accident; but he interpreted same to mean 100% tie

1 off only if working above 30 feet.

2 Further testimonial evidence was presented through witness Mr.
3 Russell Boggs. Mr. Boggs testified that he was indeed the employee
4 who was terminated as described by SHR Schlecht for failure to
5 utilize his safety equipment. Mr. Boggs stated he was rehired after
6 eight to ten days because his union was able to re-offer his
7 employment to the respondent. He testified that the employer had a
8 "three strikes and your out" policy for termination, and was rehired
9 because he had only one strike for failure to use his safety
10 equipment.

11 Mr. Gordon Young testified on behalf of the respondent. Mr.
12 Young stated that he is the structural division manager for
13 respondents. He testified that there were many chokers on the job
14 site before Mr. Graham died; and that the company does not have an
15 attitude contrary to safety. Mr. Young testified that in his
16 opinion the only reason some people were observed not utilizing tie
17 off to comply with the safety standards on the day after the
18 accident was due to simple neglect on the part of some people and
19 not anything to be attributed to the respondent employer.

20 Complainant presented the rebuttal testimony of SHR Austin to
21 clarify confusion as to interpretation of subpart "R" of the
22 relevant standard cited. She testified that the subpart was in
23 effect on January 18, 2002, prior to the time of the accident. She
24 further stated that every employer is required to follow the
25 standard. She interprets the standard to require compliance at 15
26 feet exposure to a fall hazard unless working as a connector or
27 decking exists below; and at 30 feet or more all employees must be
28 tied off. Ms. Austin testified that there was no choker found on

1 the body of the deceased employee nor to her knowledge collected at
2 the site by the coroner.

3 On closing argument the complainant argued that the case
4 presented undisputed violations of the standards in both Citations
5 1 and 2. Counsel asserted that the willful violations
6 classification referenced in Citation 1, Items 1(a) and 1(b) were
7 based upon the SHR and witness testimony, Nevada Revised Statute
8 618.635 and factual applicability of the standards. Counsel argued
9 that despite the employee fatality due to a lack of appropriate fall
10 protection, other employees were observed on the day of the
11 inspection and a day later in violation of the same fall protection
12 standards. Counsel argued that while the SHRs were touring the
13 property and conducting their investigation with two management
14 employees, Cole and Hunt, the latter had to be persuaded to take
15 action despite the violations observed by SHR Schlecht, SHR Austin,
16 and Messrs. Cole and Hunt. Counsel further asserted that Mr.
17 Ferreria's gesture and shout as observed by SHR Schlecht on the day
18 of the initial inspection was a further demonstration that the
19 supervisory employee knew its employee(s) were not properly tied off
20 and was reacting to the presence of the inspector. Counsel argued
21 that the violative conduct testified to by SHR Schlecht and SHR
22 Austin occurring in the presence of or under the control of the
23 supervisory employees is imputed to the employer under applicable
24 general occupational safety and health law. Counsel argued that the
25 case law for finding willful violations did not require malicious
26 intent but only a plain indifference to safety. Counsel further
27 asserted and emphasized that NRS 618.635 defines a willful violation
28 to be one where an employer willfully or repeatedly violates any

1 requirements of the chapter.

2 Respondent presented closing argument challenging the willful
3 classifications in Citation 1. Counsel argued that while the
4 violations might be considered serious, there was no element of
5 intent on the part of the employer to support a willful
6 classification. He argued that deceased employee Graham was doing
7 something he was not supposed to do and in an inappropriate
8 unauthorized area. He argued that if Mr. Graham had been on the
9 correct beam he might have fallen only 27 feet. Counsel asserted
10 there was no evidence of willful conduct or plain indifference to
11 safety by the employer. Counsel further argued there was no
12 evidence to support a serious violation for failure to train
13 employees, and therefore no violation of Citation 2, Item 2.
14 Counsel questioned the definition and proof of the employee work
15 task as "bolt-up" or "connecting" and argued there was insufficient
16 evidence to establish a violation of Citation 2, Item 1. Counsel
17 concluded that there was no evidence to support a willful violation,
18 that the violations and penalty proposed be reduced to serious as to
19 Citation 1, and dismissed in Citation 2, Item 2, be dismissed.

20 The board reviewed the facts, and evidence, and weighed the
21 testimony provided by the witnesses of complainant and respondent.
22 The board finds a preponderance of evidence to find violations of
23 Citation 1, Items 1(a) and 1(b).

24 N.A.C. 613.798(1) provides:

25 In all proceedings commenced by the filing of
26 a notice of contest, the burden of proof
rests with the Administrator.

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

1 To establish a prima facie case, the
2 Secretary (Chief Administrative Officer) must
3 prove 1) the cited standard applies; 2) the
4 requirements of the standard were not met; 3)
5 employees were exposed to or had access to
6 the violative condition; 4) the employer knew
7 or, through the exercise of reasonable
8 diligence could have known of the violative
9 condition; 5) there is substantial
10 probability that death or serious physical
11 harm could result from the violative
12 condition (in a "serious" violation case).
13 See Bechtel Corporation, 2 OSHC 1336, 1974-
14 1975 OSHD ¶ 18,906 (1974); D.A. Collins
15 Construction Co. Inc., v. Secretary of Labor,
16 117 F.3d 691 (2nd Cir. 1997). (Emphasis added)

17 The board further finds, that the classification of the
18 violations as willful and assessment of penalty referenced in
19 Citation 1, Items 1(a) and 1(b) are well supported by the facts,
20 evidence, testimony, and applicable occupational safety and health
21 law.

22 NRS 618.635 Willful or repeated violations.

23 Any employer who willfully or repeatedly
24 violates any requirement of this chapter, any
25 standard, rule, regulation or order
26 promulgated or prescribed pursuant to this
27 chapter, may be assessed an administrative
28 fine of not more than \$70,000 for each
violation, but not less than \$5,000 for each
willful violation.

To establish that a violation was willful,
the Secretary bears the burden of proving
that the violation was committed with either
an intentional disregard for the requirements
of the Act or with plain indifference to
employee safety. Williams Enterp., 13 BNA
OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶27,893,
p. 36,589 (No. 85-355, 1987). There must be
evidence that an employer knew of an
applicable standard or provision prohibiting
the conduct or condition and consciously
disregarded the standard. Hern Iron Works,
Inc., 16 BNA OSHC 1206, 1215, 1993 CCH OSHD
¶30,046, p. 41,256 (No. 85-433, 1993). A
violation is not willful if the employer had
a good faith belief that it was not in
violation. The test of good faith for these

1 purposes is an objective one - whether the
2 employer's belief concerning the
3 interpretation of a rule was reasonable under
4 the circumstances. General Motors Electro-
Motorive Div., 14 BNA OSHC 2064, 2068, 1991-93
5 CCH OSHD ¶29,240, p. 39,168 (No. 82-630,
6 1991).

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8 Secretary of Labor v. S.G. Loewendich and
Sons, 16 BNA OSHC 1954, 1958 (1994).
9 Dillingham Constr. Pacific Basin, LTD., 2000
10 CSHD ¶32,121 at p. 48,343.

11 The observed repeated conduct of respondent employees,
12 supervisors Hunt and Cole, after a recent fall hazard fatality, the
13 testimony of supervisors Siciliano and Perreria, the latter who both
14 stated their dislike for aspects of the fall hazard safety
15 standards, taken together demonstrate a plain indifference to
16 employee safety through compliance with the subject fall arrest
17 standards. The testimonial evidence of Messrs. Siciliano and
18 Perreria, together with the testimonial observations of SHRs
19 Schlecht and Austin regarding the actions of Messrs. Cole and Hunt,
20 coupled with the termination and rehiring procedures involving Mr.
21 Boggs, demonstrate an intentional disregard for compliance with the
22 fall arrest standards under occupational safety and health law. The
23 violations were properly classified as willful. There was competent
24 testimonial evidence to support that the violations were committed
25 with a knowing or voluntary disregard for the occupational safety
26 and health acts requirements, and demonstrate clearly a plain
27 indifference to employee safety. See Williams Enter. Inc., 13 BNA
28 OSHC 1249, 1256 (No. 85-355, 1987).

There was no evidence of a good faith belief by the employer
that it was not in violation of the standards. To the contrary,
four supervising employees testified in a demeanor, attitude or

1 directly of the violative conduct and their various dislikes of the
2 fall arrest standards. This knowledge, attitude and lack of good
3 faith is imputed to the employer.

4 "A supervisor's knowledge of deviations . . .
5 is properly imputed to the respondent
(employer)." (Emphasis added.) Division of
6 Occupational Safety and Health vs. Pabco
Gypsum, 105 Nev. 371, 775 P.2d 701 (1989)

7 It is well settled that the knowledge, actual
8 or constructive, of an employer's supervisory
9 personnel will be imputed to the employer,
10 unless the employer establishes substantial
11 grounds for not doing so. Ormet Corp., 14
12 BNA OSHC 2134, 1991-93 CCH OSHD ¶29,254 (No.
13 85-531 1991). The Commission held that once
14 there is a prima facie showing of employer
15 knowledge through a supervisory employee, the
16 employer can rebut that showing by
17 establishing that the failure of the
18 supervisory employee to follow proper
19 procedures was unpreventable. In particular,
20 the employer must establish that it had
21 relevant work rules that it adequately
22 communicated and effectively enforced.
23 Consolidated Freightways Corp., 15 BNA OSHC
24 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-531,
25 1991).

17 The board finds the conduct and/or attitude demonstrated by
18 supervisory employees Hunt, Cole, Siciliano and Perreria imputed by
19 law to the employer fail to support an unpreventable employee
20 misconduct defense.

21 In order to establish an unpreventable
22 employee misconduct defense, the employer
23 must establish that it had: established work
24 rules designed to prevent the violation;
25 adequately communicated those work rules to
26 its employees (including supervisors); taken
27 reasonable steps to discover violations of
28 those work rules; and effectively enforced
those work rules when they were violated.
New York State Electric & Gas Corporation, 17
BNA OSHC 1129, 1195 CCH OSHD ¶30,745 (91-
2897, 1995).

28 The board finds there was competent testimonial and pictorial

1 evidence to demonstrate that the respondent had a heightened
2 awareness of the violative conduct of its employees with regard to
3 fall hazard safety. The testimony established that on the very day
4 of a fatal accident involving a fall hazard, an employee was
5 observed and photographed by an SHR walking on an I-beam in clear
6 violation of the standard. The testimony of respondent's witnesses
7 was that after the accident a meeting was conducted emphasizing
8 safety requirements. However the competent testimony and evidence
9 establishes that employees were again violating the same fall hazard
10 standard two days after the fatal accident and in the presence of
11 two supervisors. See Brock v. Morello Bros. Constr., 809 F.2d 161,
12 164 (1st Cir. 1987). Also Pentecost Contrac. Corp., 17 BNA OSHC
13 1953, 1955, 1995-97 CCH OSHD ¶31,289, P. 43,965 (No. 92-3788, 1997),
14 A.G. Mazzeschi, Inc., 2000 OSHD ¶32,095 at p. 48,202.

15 The board finds there was evidence of training on the part of
16 the respondent and testimonial evidence regarding the pre-employer
17 training or concurrent employer training through the union
18 representing employees; however, there was no sufficient or
19 competent evidence or testimony with regard to adequate
20 communication of the safety rules to the employees or that there
21 were proactive steps taken to discover violations, violative
22 conduct, nor an effectively enforced safety program underway.

23 In order to establish the affirmative defense
24 of unpreventable employee misconduct, an
25 employer is required to prove: (1) that it
26 had established work rules designed to
27 prevent the violation, (2) that it has
28 adequately communicated these rules to its
employees, (3) that it has taken steps to
discover violations, and (4) that it has
effectively enforced the rules when
violations are discovered. E.g., Precast
Services, Inc., 17 BNA OSHC 1454, 1455 (No.
93-2971, 1995), aff'd without published

1 opinion, 106 F.2d 401 (60th Cir. 1997). R.P.
2 Industries, Inc., 2000 OSHD ¶32,266 at p.
3 49,197.

4 The respondent provided no competent evidence or testimony to
5 establish the recognized defense of "greater hazard" under
6 occupational safety and health law. While Mr. Siciliano testified
7 as to his preference of a choker versus tie off to steel cable
8 because of the potential of a bump or kick, the testimony did not
9 establish that an alternate means of protection, that is utilization
10 of the choker, was in place either as to Mr. Graham who fell to his
11 death or other employees subject of citation. While Mr. Young
12 testified there were many chokers on site, there was insufficient
13 competent evidence to establish that Mr. Graham had a choker on his
14 person at the time of his death or that other employees were
15 utilizing chokers when observed in apparent violation of the fall
16 arrest standards.

17 George A. Hormel and Company, 2 OSHC 1190,
18 1974-1975 OSHD ¶ 18,685 (1974); Meilman Food
19 Industries, 5 OSHC 2060, 1977-1978 OSHD ¶
20 22,275 (1977): "Since the respondent did not
21 prove that alternative means of protection...
22 were unavailable, and because it had not
23 applied for a variance, the judge properly
24 rejected the respondent's greater hazard'
25 defense."

26 A. J. McNulty & Co., Inc., 4 OSHC 1097, 1975-
27 1976 OSHD ¶ 20,600 (1976): Employee
28 misbehavior, standing alone, does not relieve
an employer. Where the Secretary shows the
existence of violative conditions, an
employer may defend by showing that the
employee's behavior was a deviation from a
uniformly and effectively enforced work rule,
of which deviation the employer had neither
actual nor constructive knowledge.

29 The board in reviewing the facts, evidence and testimony with
30 regard to Citation 2, Items 1 and 2, finds that the complainant did

1 not meet its burden of proof to establish the existence of
2 violations by a preponderance of evidence. Specifically, the
3 testimony and pictorial evidence with regard to the type of work
4 being performed by the employee referenced in Citation 2, Item 1,
5 did not establish the safety requirements necessary which were keyed
6 to the type of work being performed. Similarly, there was some
7 evidence of training, although a lack of adequate communication and
8 enforcement of work rules. The board does not find violations of
9 Citation 2, Items 1 and 2, based upon the evidence and testimony
10 when weighed against the burden of proof incumbent upon complainant.

11 See N.A.C. 618.788(1):

12 In all proceedings commenced by the filing of
13 a notice of contest, the burden of proof
rests with the Administrator.

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

17 To establish a prima facie case, the
Secretary (Chief Administrative Officer) must
18 prove 1) the cited standard applies; 2) the
requirements of the standard were not met; 3)
19 employees were exposed to or had access to
the violative condition; 4) the employer knew
20 or, through the exercise of reasonable
diligence could have known of the violative
21 condition; 5) there is substantial
probability that death or serious physical
22 harm could result from the violative
condition (in a "serious" violation case).
23 See Bechtel Corporation, 2 OSHC 1336, 1974-
1975 OSHD ¶ 18,906 (1974); D.A. Collins
24 Construction Co., Inc., v. Secretary of Labor,
117 F.3d 691 (2nd Cir. 1997). (Emphasis added)

25 Based upon the above and foregoing, it is the decision of the
26 NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD that violations
27 of Nevada Revised Statutes did occur as to Citation 1, Item 1(a) 29
28 CFR 1926.760(a)(1) and Citation 1, Item 1(b) at 29 CFR

1 1926.754(b)(1). The violations were properly classified as
 2 "willful" and the penalty proposed of FIFTY SIX THOUSAND DOLLARS
 3 (\$56,000.00) is confirmed.

4 It is the further decision of the NEVADA OCCUPATIONAL SAFETY
 5 AND HEALTH REVIEW BOARD that no violation of Nevada Revised Statutes
 6 did occur as to Citation 2, Item 1 at 29 CFR 1926.754(e)(2)(ii) nor
 7 Citation 2, Item 2 at 29 CFR 1926.761(b). The penalties asserted
 8 are denied.

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

21 DATE: This 10th day of December, 2002.

22 NEVADA OCCUPATIONAL SAFETY AND HEALTH
 23 REVIEW BOARD

24 By: _____ /s/
 25 THOMAS A. JENNINGS
 26
 27
 28