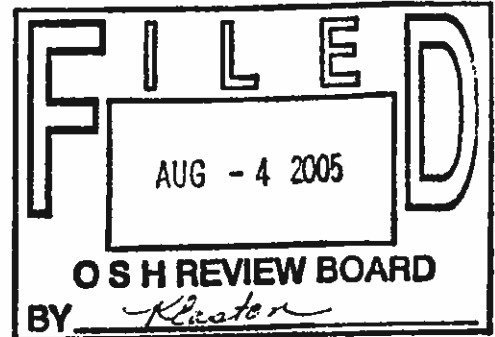


1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
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6 CHIEF ADMINISTRATIVE OFFICER
7 OF THE OCCUPATIONAL SAFETY AND
8 HEALTH ENFORCEMENT SECTION,
9 DIVISION OF INDUSTRIAL RELATIONS
10 OF THE DEPARTMENT OF BUSINESS AND
11 INDUSTRY,

Docket No. LV 05-1311



10 Complainant,

11 vs.

12 FISK ELECTRIC COMPANY,

13 Respondent.

14 DECISION

15 This matter having come before the **NEVADA OCCUPATIONAL SAFETY**
16 **AND HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of
17 July 2005, in furtherance of notice duly provided according to law,
18 STEVEN SMITH, ESQ. counsel appearing on behalf of the **Chief**
19 **Administrative Officer of the Occupational Safety and Health**
20 **Enforcement Section, Division of Industrial Relations (OSHES)**, and
21 JEFFREY BRIGGS, ESQ., appearing on behalf of respondent, **FISK**
22 **ELECTRIC COMPANY**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
23 **BOARD** finds as follows:

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

26 The complaint filed by OSHES sets forth allegations of
27 violations of Nevada Revised Statutes as referenced in Exhibit "A,"
28 attached thereto. Citation 2, Item 1a classified as "other" was

1 withdrawn during the course of the hearing.

2 Citation 1, Item 1 charges a violation of 29 CFR
3 1926.451(g)(4)(iv). The complainant alleges that on or about
4 September 13th through September 16th of 2004 the respondent employer
5 failed to ensure midrail guarding was used to protect employees from
6 falling from a scaffolding structure exposing two employees of
7 respondent to a fall hazard. The violation was classified as
8 "serious". A proposed penalty for the alleged violation is in the
9 amount of One Thousand Eight Hundred Seventy-Five Dollars
10 (\$1,875.00).

11 Citation 1, Item 2 charges a violation of 29 CFR
12 1926.501(b)(4)(ii). The complainant alleges that on or about
13 September 13th through September 16th of 2004 the respondent employer
14 failed to ensure floor holes were covered exposing employees of
15 respondent to hazards from stepping or falling into the subject
16 holes which averaged approximately 24" deep and spaced throughout
17 the area. The violation was classified as "serious". A proposed
18 penalty for the alleged violation is in the amount of Four Thousand
19 Five Hundred Dollars (\$4,500.00).

20 Citation 2, Item 1b charges a violation of 29 CFR 1926.403(h).
21 The complainant alleges that on or about September 13th through
22 September 16th of 2004 the respondent employer failed to ensure that
23 each feeder and branch circuit from subpanels and devices generally
24 known as "spider boxes" were not marked in accordance with the
25 subject standard. The violation was classified as "other". There
26 was no penalty proposed for the alleged violation.

27 Mr. Steven Smith, counsel for the Chief Administrative Officer
28 presented testimony and evidence with regard to the alleged

1 violations. Safety and Health Representative (SHR) Donavon Corey
2 testified that from September 13th through September 16th of 2004 he
3 conducted a comprehensive inspection at the work site of respondent
4 located at the Palms Phase II project in Las Vegas, Nevada. During
5 the course of the inspection, SHR Corey observed two employees
6 working off a scaffold more than ten feet from the ground level and
7 unprotected by a guard or midrail from a potential fall hazard. He
8 further noted there were no safety belts "tie offs" or other
9 alternate means of protection against the potential fall hazard.
10 Mr. Corey inquired of Mr. Steve Kaplan, the respondent foreman and
11 designated employer representative for purposes of the inspection.
12 Mr. Kaplan confirmed the identity of the employees on the scaffold
13 as those of the respondent. Photographic exhibits 1 and 2 depicted
14 a respondent employee working from the scaffold, and exposed to the
15 potential fall hazard. SHR Corey testified that foreman Kaplan
16 recognized the lack of guardrail/midrail protection and advised that
17 he had not noticed the scaffolding to be "unprotected" when he
18 instructed his employees to utilize same. Mr. Kaplan conducted no
19 inspection of the scaffolding himself but relied upon the "green
20 tag" attached to the scaffolding by the company responsible for
21 erection.

22 Counsel presented further testimony and evidence through SHR
23 Corey with regard to Citation 1, Item 2, regarding the failure to
24 ensure floor holes were covered, subjecting employees to a tripping
25 or fall hazard. Mr. Corey testified that he observed employees of
26 respondent working in the area of uncovered holes. He noted four
27 holes in particular and provided photographic evidence of same
28 through exhibits 8, 9, 10, 11 and 12. He measured the hole in

1 photograph number 8 which depicts an employee near same, although
2 not an individual employed by the respondent Fisk Electric. The
3 hole depth measured 24". Mr. Corey stated that the employer knew of
4 the open holes, or should have known of same with due diligence, and
5 caused same to be covered in order to avoid exposure of its
6 employees to the potential tripping hazard associated with same.

7 SHR Corey further testified that he informed foreman Kaplan of
8 the exposed holes when he initiated the subject inspection and that
9 Mr. Kaplan agreed that same should be covered as the subject site
10 was within his scope of authority under the construction documents.

11 Counsel for the complainant concluded presentation of evidence
12 and testimony in its case and chief through Mr. Corey regarding
13 Citation 2, Item 1b as to 29 CFR 1926.403(h). Mr. Corey testified
14 that he inspected various electrical branch or feeding panels known
15 as "spider boxes." He observed boxes without disconnect or
16 appropriate markings as required by the standard and identified
17 photographic evidence in support of same through exhibits 18 and 19.
18 He testified that without appropriately marking the circuit boxes it
19 is impossible to determine which breaker would shut down which
20 circuit should a problem occur. The subject standard provides that
21 the subject boxes be ". . . marked to indicate . . . purpose . . .
22 unless the 'purpose' is evident." Mr. Corey testified that the
23 markings on the subject box as depicted in the photograph and
24 inspected by him were not marked in accordance with the standard.

25 Counsel for respondent conducted cross examination of SHR
26 Corey. Mr. Corey testified that the scaffold structure was in clear
27 violation and that respondent's employees were working from same
28 with no direct or alternative means of protection. Counsel for

1 respondent inquired as to the uncovered holes referenced in Citation
2 1, Item 2, 29 CFR 1926.501(b)(4)(ii). Mr. Corey responded that
3 there were no Fisk employees working in the area at the time of his
4 inspection. Photographic exhibit 8 depicted an individual near an
5 uncovered hole but not an employee of Fisk Electric. Mr. Corey then
6 testified on further cross examination that he understood or was
7 told that Fisk would not begin working in the area subject of the
8 holes until the following week. On continued cross examination, Mr.
9 Corey testified that the general contractor advised him that the
10 hole covering was within the scope of authority of Fisk Electric.
11 He also testified that when he spoke to Mr. Kaplan regarding the
12 open holes, Mr. Kaplan agreed the holes should be covered. Further
13 cross examination occurred with regard to Citation 2, Item 1b
14 regarding 29 CFR 1926.403(h).

15 Mr. Jeff Briggs, respondent's counsel, presented testimony and
16 evidence in defense of the alleged violations contained in the
17 complaint. Mr. Steve Kaplan, the foreman of respondent, testified
18 with regard to each of the alleged violations.

19 As to Citation 1, Item 1, Mr. Kaplan testified there indeed
20 was no midrail or guardrail on the subject scaffold as depicted in
21 the photograph showing Fisk employees working off the structure. He
22 testified that other trades erected and utilized the subject
23 scaffolding and he relied upon the "green tag" when he directed his
24 employees to work from same. Mr. Kaplan testified that he did not
25 personally inspect the scaffolding himself, although electricians
26 are trained in scaffold erection and safety. He further testified
27 that the employees on the scaffolding were given a safety warning by
28 the employer for utilizing the scaffolding and that he himself as a

1 foreman requested that a warning be issued against him as well.

2 Mr. Kaplan testified as to Citation 1, Item 2 regarding the
3 open floor holes and the alleged violation for exposure to Fisk
4 employees. He testified that he did not advise SHR Corey that the
5 covering of the holes was the obligation of Fisk within its scope of
6 work but only that Fisk was required to work in the area soon and he
7 would ". . . get someone to fix it . . ." He further testified that
8 when the open holes were noted by the SHR during the inspection, and
9 notwithstanding his assurance that he would follow up to have the
10 holes covered either through his company effort or others, the holes
11 were in fact covered by the time Fisk employees actually commenced
12 working in the area. Mr. Kaplan also testified that he placed
13 caution tape around the areas of the floor openings during the
14 course of the inspection but apparently same were removed when the
15 photographs of the area were taken by Mr. Corey.

16 Mr. Kaplan testified as to Citation 2, Item 1b relating to the
17 alleged violations regarding the "spider boxes." He testified that
18 the boxes were sufficiently marked for utilization by electricians
19 and contained appropriate information in accordance with the
20 standard. He further testified that the units are tested every two
21 weeks and information with regard to same is contained in an
22 information log such that any defective units are taken out of
23 service periodically in accordance with the testing procedures.

24 Mr. Dan Oliver was called as a witness on behalf of
25 respondent. He testified that he is the general superintendent and
26 safety manager of respondent and issued the warning notifications to
27 two employees for utilizing the unsafe scaffolding. He further
28 testified that the National Electric Code (NEC) is less stringent as

1 to temporary wiring than that with regard to permanent wiring code
2 regulations.

3 At the conclusion of the hearing, complainant and respondent
4 presented closing arguments.

5 The complainant argued that as to Citation 1, Item 1 the
6 evidence and testimony established a violation that was
7 uncontroverted and clear. Counsel argued that any defense of
8 isolated employee misconduct was not available under Occupational
9 Safety and Health Law due to the knowledge of Mr. Kaplan, a
10 supervisor, which is imputed to the employer. Counsel argued that
11 the alleged violation as to Citation 1, Item 2, should be confirmed;
12 and that even though the photo exhibit did not depict exposure to a
13 Fisk employee the photograph did show a work box marked with Fisk
14 identification to establish that Fisk employees were in the area.
15 Counsel stated that the SHR observed uncovered holes on day one of
16 the inspection which remained uncovered at the conclusion of his
17 inspection. He argued that the Fisk employees would be exposed to
18 the potential hazard when they began work in the area unless the
19 holes were covered to prevent the potential for an accidental
20 tripping or stepping hazard. Finally counsel argued as to Citation
21 2, Item 1b that the spider box was not fully marked as required; and
22 that there had been no refutation of the test conducted by the SHR
23 showing the spider box clearly demonstrated a defect.

24 The respondent argued that the scaffolding did not belong to
25 Fisk nor was it erected by Fisk and the employee depicted in the
26 photographic evidence simply worked from same erroneously such that
27 the employer should not be held responsible for the hazard exposure.
28 He further argued as to Citation 1, Item 2, that hole covering was

1 not within the Fisk scope of work nor was there any violation based
2 upon lack of employee exposure to the potential hazard. Counsel
3 concluded his argument as to Citation 2, Item 1b stating that the
4 spider boxes contained enough information for an electrician to know
5 of a problem and that same were not in violation of the standard
6 requirements.

7 In considering the testimonial evidence, exhibits, and
8 arguments of counsel, the Board reviewed the elements required to
9 establish violations under recognized Occupational Safety and Health
10 Law based upon the statutory burden of proof and competence of the
11 evidence.

12 In all proceedings commenced by the filing of
13 a notice of contest, the burden of proof
14 rests with the Administrator. (NAC
15 618.788(1)).

16 To prove a violation of a standard, the
17 Secretary must establish (1) the
18 applicability of the standard, (2) the
19 existence of noncomplying conditions, (3)
20 employee exposure or access, and (4) that the
21 employer knew or with the exercise of
22 reasonable diligence could have known of the
23 violative condition. See Belger Cartage
24 Service, Inc., 79 OSAHRC 16/B4, 7 BNA OSHC
25 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373
26 (No. 76-1948, 1979); Harvey Workover, Inc.,
27 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90,
28 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-
1408, 1979).

29 All facts forming the basis of a complaint
30 must be proved by a preponderance of the
31 evidence. See Armor Elevator Co., 1 OSHC
32 1409, 1973-1974 OSHD ¶16,958 (1973).

33 A respondent may rebut allegations by showing:

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

1 The sworn testimony of SHR Corey was credible and
2 uncontroverted as to the observed hazard exposure for the
3 scaffolding violation set forth in Citation 1, Item 1. The
4 employees were identified as those of Fisk as admitted by foreman
5 Kaplan. Further, Mr. Kaplan testified that he instructed the Fisk
6 employees to work off the scaffolding, failed to inspect same before
7 so doing and relied solely upon a "green tag" placed on the
8 scaffolding by others. Because Mr. Kaplan is a supervisory
9 employee, there is no availability of the defense of isolated
10 employee misconduct under recognized Occupational Safety and Health
11 Law.

12 The courts have long recognized that for an employer to
13 prevail on the grounds of unforeseeable employee misconduct, the
14 employer must prove that because of a thorough and adequate safety
15 program which is communicated and enforced as written, the conduct
16 of its employee in violating that policy was unforeseeable.
17 Further, and most importantly however, the respondent may not rely
18 on the defense of employee misconduct even if a sufficient and
19 adequately enforced safety program supports same when a supervisory
20 employee is involved in or has knowledge of the employee misconduct.
21 For the defense to apply, the respondent must establish and bear the
22 burden of proof not only as to the existence of an effectively
23 communicated and enforced safety program, but also the
24 unforeseeability on the part of the employer to protect against the
25 misconduct of its employees. Mr. Steve Kaplan, the supervisory
26 employee (foreman) of respondent observed the scaffolding and
27 directed the employees to work from same. His knowledge as a
28 supervisor is imputed to the cited employer to establish

1 foreseeability. Federal occupational safety and health case law
2 with regard to availability of the defense was confirmed by the
3 Nevada Supreme Court which provided ". . . a supervisor's knowledge
4 of deviations from standard building practices is properly imputed
5 to the respondent . . ." See Division of Occupational Safety and
6 Health vs. Pabco Gypsum, 105 Nev. 371, 775 P.2d 701 (1989).

7 Existence of the violation and exposure to the hazard by the
8 employees of respondent, including the involvement of the supervisor
9 employee, were clearly established by the evidence and testimony
10 presented by both SHR Corey and foreman Kaplan. There was no
11 evidence of alternate compliance.

12 In reviewing the alleged violation of Citation 1, Item 2
13 regarding the uncovered floor holes, focus upon the burden of proof
14 is necessary. As provided by the statutory reference and case law,
15 the burden of proof to establish a violation rests with the Chief
16 Administrative Officer as the complainant. (NAC 618.788(1)). An
17 essential element of violation requires proof of employee exposure
18 or access to the hazard. However the facts, evidence, and testimony
19 presented by the complainant did not demonstrate either clearly or
20 by a sufficient quantum of evidence that the employee(s) of the
21 subject respondent were exposed to the hazard or potential hazard
22 created by uncovered floor holes. The testimony of SHR Corey was
23 equivocal. He could only testify that the employees of Fisk were
24 preparing to eventually work in the subject area. While that was
25 supported by the photographic exhibit showing a work box belonging
26 to Fisk, there was insufficient competent evidence to establish
27 direct exposure or actual access to the hazardous condition by Fisk
28 employees. On direct examination, SHR Corey testified Fisk

1 employees were working in the area; yet on cross examination, he
2 testified there were no Fisk employees working in the area at the
3 time of his inspection. The Board could only find that while Fisk
4 employees were preparing to work and owned equipment in the area,
5 they had not yet commenced work or encountered exposure.

6 Mr. Kaplan testified the holes were covered by the time Fisk
7 employees began work in the area. Without other evidence or
8 testimony, the Board could only speculate that either the floor
9 openings were uncovered by the time Fisk employees actually
10 commenced work, which would require them to cover and then uncover
11 same to work in the holes to complete their job task; or that Fisk
12 employees who were to actually work in the holes arrived to perform
13 their work task in same and were required to either uncover any
14 covered holes or commence work in the openings as they found them.
15 SHR Corey's testimony indicated that the subject site was ". . .
16 turned over to Fisk . . ." from the standpoint of the openings
17 having been prepared by the general contractor or others for Fisk
18 work, but there was no competent evidence that covering the holes
19 was actually the job of Fisk when it arrived on the site rather than
20 the traditional method of the general contractor providing the site
21 to the electrical subcontractor with either the holes safely covered
22 or open with appropriate notification so that the subcontractor
23 might commence its work.

24 Established case law controlling multi-employer work sites
25 recognizes that if a subcontractor neither created nor controlled
26 the hazards, then the issues of violation and responsibility become
27 more complex. Once a cited construction subcontractor has
28 established that it neither created nor controlled the hazardous

1 condition, it may affirmatively defend against the charges by
2 showing, among other things, that its employees were not exposed or
3 did not have "access" to the subject hazard. By merely agreeing
4 verbally during the inspection, or attempting to cover the hole
5 openings, the respondent did not, through foreman Kaplan, assume any
6 additional liability for creation or control. The fact that the
7 construction task in the holes was that designated for electrical
8 contractor employees requires that at some time upon commencing work
9 the holes must be uncovered to effectuate the job task. The Board
10 simply could not find sufficient evidence of exposure directly or
11 indirectly to meet the burden of proof to find a violation.

12 In reviewing the evidence and testimony with regard to
13 Citation 2, Item 1b, the Board reviewed the specific terms of the
14 cited standard. The standard requires that a feeder or "spider" box
15 device is to be "marked . . . to indicate purpose . . . unless the
16 purpose is evident . . ." While the box itself may have failed a
17 test, the subject standard controls the markings to give notice of
18 purpose which may be required unless evident. The subject device is
19 commonly used in construction sites. Construction employees,
20 particularly electrical employees, could reasonably discern the
21 purpose from the boxes as marked because it appeared evident. The
22 Board could find no violation of the cited standard under the terms
23 of the standard.

24 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND**
25 **HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did
26 occur as to Citation 1, Item 1, 29 CFR 1926.451 (g)(4)(iv). The
27 violation charged is confirmed and the proposed penalty in the
28 amount of ONE THOUSAND EIGHT HUNDRED SEVENTY-FIVE DOLLARS

1 (\$1,875.00) approved. The alleged violation as to Citation 2, Item
2 2 classified as serious is denied and the penalty disallowed. The
3 alleged violation as to Citation 2, Item 1b classified as "other" is
4 denied and with no penalty proposed same is dismissed.

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

17 DATED: This 4th day of August 2005.

18 NEVADA OCCUPATIONAL SAFETY AND HEALTH
19 REVIEW BOARD

20 
21 TOM B. WATTERS, CHAIRMAN