

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,

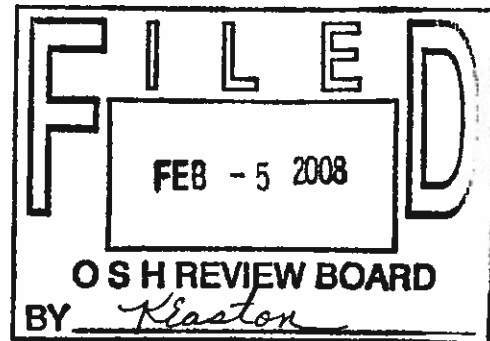
Docket No. LV 08-1334

Complainant,

vs.

10 SILVER STATE WIRE ROPE & RIGGING,

Respondent.



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12
13 DECISION

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 9th day of January
16 2008, in furtherance of notice duly provided according to law, MR. JOHN
17 WILES, ESQ., counsel appearing on behalf of the Complainant, **Chief**
18 **Administrative Officer of the Occupational Safety and Health**
19 **Administration, Division of Industrial Relations (OSHA)**; and MR. GEORGE
20 GRAFF, appearing on behalf of Respondent, **Silver State Wire Rope &**
21 **Rigging**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds
22 as follows:

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

25 The complaint filed by the OSHA sets forth allegations of violation
26 of Nevada Revised Statutes as referenced in Exhibit "A", attached
27 thereto.

28 Citation 1, Item 2(a) charges a "serious" violation of 29 CFR

1 1910.333(a). Complainant alleges that the Respondent employer failed
2 to ensure that safety-related work practices were utilized at a work
3 site in North Las Vegas, Nevada. Two employees of Respondent were
4 performing radio transmitter/receiver repairs on an energized crane
5 bridge electrical control panel without having employed safety-related
6 work practices to prevent electrical shock. The violation was
7 classified as serious due to the potential for serious injury or death
8 with could reasonably result. The proposed penalty for the serious
9 violation is in the amount of ONE THOUSAND FIVE-HUNDRED DOLLARS
10 (\$1,500.00).

11 Prior to commencement of the hearing, division counsel dismissed
12 Citation 1, Item 1 charging a "serious" violation of 29 CFR
13 1910.132(d)(1), and Citation 1, Item 2(b) charging a "serious" violation
14 of 29 CFR 1910.333(c)(2).

15 Counsel for the Chief Administrative Officer presented testimony
16 and evidence with regard to the alleged violation. Safety and Health
17 Representative (SHR) Corey Church testified that he inspected the work
18 site of Respondent at the Jensen Precast facility located in North Las
19 Vegas, Nevada on or about August 3, 2007 based upon notification that
20 a serious injury and death had occurred. The SHR presented photographic
21 and documentary evidence which was subject of stipulation and admitted
22 into the record. Mr. Church testified that from his investigation
23 Respondent employee, Mr. Lynn Lloyd, was engaged in placing a remote
24 control transmitter/receiver component on an overhead bridge crane while
25 its electrical control panel was energized. The SHR determined based
26 upon interviews and investigation that the hot temperature of the
27 working environment may have caused extensive sweating fluid on the skin
28 causing greater susceptibility to electrical shock. He further found

1 that the employee was working with needlenose pliers that lacked a
2 portion of insulation on one arm thereby exposing the subject employee's
3 unprotected hand to metal. SHR Church noted that the employee was
4 sitting on an overturned bucket and likely leaning back against the
5 metal guard railing of the crane's catwalk. Mr. Church concluded in his
6 investigation that each of the foregoing factors contributed to the
7 death of the employee when he apparently grasped an energized conductor.

8 On continued direct examination Mr. Church testified that based
9 upon his investigation, the employer did not conduct a workplace hazard
10 assessment and no documentation of such an assessment was produced
11 despite request. He further testified that the employee was not wearing
12 appropriate personal protective equipment while working on an energized
13 circuit. Mr. Church testified that the employer did not employ safety-
14 related work practices prior to sending the two employees to perform the
15 subject work tasks; and that the employer could have corrected the
16 hazardous conditions in the workplace through reasonable compliance with
17 the cited standard.

18 Counsel for Respondent conducted cross-examination of SHR Church.
19 Mr. Church testified that the applicable standards do in fact permit
20 employees to perform the subject repair on an energized circuit and that
21 same was subject of an option of the employees. He further testified
22 that employee Lloyd apparently chose to work on the system while it was
23 energized for his own reasons. Mr. Church identified photographic
24 evidence depicting the existence of a test meter and the frayed nose
25 pliers apparently utilized. Mr. Church testified that he found no
26 evidence that the subject employees had been subjected to safety-related
27 practices in training and was told by an employee of Respondent that the
28 company did not conduct same.

1 On board examination Mr. Church testified that documentary evidence
2 stipulated into the record appears to establish the existence of a
3 safety program contrary to his previous testimony. Further board
4 examination confirmed dismissal of Citation 1, Item 1 and Citation 1,
5 Item 2(b) involving personal protective equipment was based upon it
6 having been demonstrated to the Complainant that the deceased employee
7 was sufficiently experienced in the field and qualified to self
8 determine whether he would work on an energized or de-energized system
9 without said protection.

10 Complainant presented evidence and testimony from witness Jacob
11 Leavitt. Mr. Leavitt identified himself as an employee of Respondent
12 and co-worker of the deceased, Mr. Lynn Lloyd. Mr. Leavitt testified
13 he was a trainee on the job, had never before worked on an energized
14 circuit. He stated that he understood the circuit remained energized
15 during the work task per Mr. Lloyd in order that other tests might be
16 performed. Mr. Leavitt testified that he was provided safety training
17 before being sent to the job by Mr. Andrew Rogers, the company crane
18 supervisor. He also testified that the job task was reviewed by he and
19 Mr. Lloyd with Mr. Rogers and that instructions were given to take
20 harness safety and appropriate shoe wear. He further testified that he
21 was merely a helper and only assigned to assist Mr. Lloyd who he
22 understood to be experienced in the subject job task. Mr. Leavitt also
23 testified he was trained in electrical shock remedial action but on the
24 day of the accident grabbed the decedent while he was being shocked
25 because he acted spontaneously.

26 On cross-examination Mr. Leavitt testified that the company did
27 have a work policy at the time of the accident that permits an employee
28 to stop work for stress, comfort, water, or can quit work for the day

1 if conditions so warrant.

2 On board questioning Mr. Leavitt testified that when he was hired
3 by Respondent he was given safety training for shop but not electrical
4 work.

5 Counsel for Complainant called Mr. William Wilson as a witness.
6 He testified he is an employee of Respondent serving as an overhead
7 crane technician and experienced in working on electrical panels. He
8 stated that he has worked on energized and de-energized panels over
9 approximately 16 years and experienced in the work and OSHA standards.
10 Mr. Wilson further testified that his supervisor Mr. Rogers always
11 reviewed the job and job requirements with him before sending him to a
12 worksite. He stated that Mr. Rogers reviewed the job with he and Mr.
13 Lloyd before sending them to the site. He testified that he never wears
14 insulated gloves as it interferes with the work task, uses a meter to
15 test for voltage and problems, and commonly works only on 110 volt lines
16 rather than high-voltage as an employee of Silver State. Mr. Wilson
17 testified that he had previously worked with the decedent Mr. Lloyd and
18 felt that he was capable and skilled. He and Mr. Lloyd had installed
19 the same system as on the day of the accident four or five times during
20 the year.

21 On cross-examination counsel for Respondent Mr. Wilson, testified
22 and identified documentary evidence that he (Wilson) was trained in
23 lock-out/tag-out, attended weekly safety meetings, and confirmed his
24 statement in the exhibit that he was trained in electrical safety
25 practices. Mr. Wilson testified, in contravention of SHR Church's
26 testimony that he (Wilson) did not make any statement which Mr. Church
27 reflected in the investigative file that he was not trained in safety
28 practices by Respondent. Mr. Wilson testified in furtherance of

1 Respondent's Exhibit A in evidence, as to safety meeting minutes and
2 training. Exhibit A-1 demonstrated that Mr. Wilson signed safety
3 meeting minutes. The evidence also reflected the signature of Mr.
4 Lloyd, the deceased, as having attended the safety meetings identified
5 by Mr. Wilson.

6 On board questions, Mr. Wilson testified that he never personally
7 installed a radio transmitter on an energized panel and that he and the
8 deceased Lloyd previously installed exactly the same system together but
9 they did not work on the panel while it was energized. He further
10 testified that he receives weekly "tool box" safety meetings and had
11 attended safety work training.

12 Counsel for Complainant called Mr. Andrew Rogers as a witness. Mr.
13 Rogers identified himself as an employee of Respondent and the
14 supervisor of employees Lloyd and Wilson. He testified that he recalled
15 discussing with SHR Church certain aspects in the investigation but
16 denied ever having stated to the SHR what was contained in the SHR's
17 investigative report that the company does not maintain safety related
18 work practices. He said that the company does maintain safety
19 practices. He believed Mr. Church misinterpreted his comments because
20 the company safety practices may have been less than what comports with
21 those determined to be applicable by the SHR.

22 On board questions, witness Rogers testified that he could not
23 recall any job for the employer which requires work on a "hot"
24 (energized) electrical line. He also testified that he has implemented
25 disciplinary action and retraining for violations of work rules, but
26 none related to electrical work.

27 At the conclusion of Complainant's case, Respondent presented
28 witness testimony from Mr. Pete Rogers, the president of Respondent.

1 Mr. Rogers testified that safety training is provided to every employee
2 on a bi-monthly basis. He further testified that the deceased employee,
3 Mr. Lloyd, was trained by an owner of the company, worked extensively
4 in the field and for the Respondent over a period of 3-1/2 years. Mr.
5 Rogers testified that he could not understand why Mr. Lloyd did not de-
6 energize the line before working. He testified the company policy is
7 that all on-site hazards are assessed by employees in the field and they
8 are "admonished to exhaustion" to look for hazards in the field.

9 On board questioning Mr. Rogers testified that employee Nancy
10 Leavitt maintains the records of all safety meetings. He further
11 testified that the company provides test meters and all tools to
12 employees, but that sometimes employees prefer using their own
13 equipment. Finally Mr. Rogers testified that the Respondent has been
14 in business in Las Vegas since 1991.

15 At the conclusion of the hearing the Complainant and Respondent
16 presented closing arguments.

17 The Complainant argued that sworn testimony of the SHR was
18 credible, although in conflict with testimony of the witness employees
19 of Respondent relative to work practices of the Respondent. He argued
20 that while no one knows exactly how the death of Mr. Lloyd occurred, the
21 trainee, Mr. Wilson, had no training or safety experience in electrical
22 problem issues, yet he was sent on the job to assist with work in
23 proximity of electric circuits. He argued that the employees were also
24 doing other maintenance work but the radio repair manual was in the work
25 bag, not at the subject site. He further argued that the record and
26 testimony demonstrate that the employer did not know or understand his
27 obligations as to safety. Counsel emphasized that the most telling
28 example of the lack of workplace electrical safety is the lack of

1 insulated gloves being provided and not used by the employees (Wilson
2 and Lloyd) simply because they were not preferred. He also argued that
3 the Wilson testimony was that the employer did not inspect the employee
4 tools. Counsel further argued there was no evidence that the employee
5 complied with the standard. Counsel referenced the standard cited at
6 29 CFR 1910.333(a) which provided:

7 (a) General. Safety-related work practices shall be
8 employed to prevent electric shock or other
9 injuries resulting from either direct or indirect
10 electrical contacts, when work is performed near or
11 on equipment or circuits which are or may be
energized. The specific safety-related work
practices shall be consistent with the nature and
extent of the associated electrical hazards.

12 Counsel argued that the employer had an obligation to provide
13 equipment, tools, and practices to protect against electrical hazard and
14 that just having a safety program or equipment available is not enough
15 to evidence compliance.

16 The Respondent argued that the report of SHR Church regarding
17 safety practices being deficient was in direct conflict with testimony
18 of four witnesses employed by the Respondent. The employees testified
19 that they follow company work rules, do have training and that if
20 anything the deceased employee Lloyd violated company safety rule
21 practices to the extent of same constituting employee misconduct. The
22 deceased employee was experienced and he elected to work on an energized
23 system with pliers not sufficiently insulated.

24 The board in reviewing the evidence and testimony finds
25 insufficient facts and weight of competent evidence to demonstrate that
26 the employees of Respondent were exposed to the subject hazard and death
27 due to a failure on the part of the employer to comply with the **subject**
28 **standard cited** i.e. 29 CFR 1910.333(a).

1 The requirements of the cited standard are general in nature. The
2 evidence of Respondent's employees, together with the documents admitted
3 in evidence support compliance with the standard. The burden of proof
4 rests with OSHA under Nevada law (see NAC 618.788(1)). The sworn
5 testimony of the Respondent's witnesses was not impeached and appeared
6 to be credible. The documentary exhibits support compliance with the
7 elements of the standard.

8 While the board does not reach the necessity to analyze the defense
9 of unpreventable employee misconduct, it would appear to be viable which
10 would excuse the employer even had the initial burden of proof been
11 established by the Complainant to shift the burden to Respondent as to
12 the defense. See *Jensen Construction Co.*, 7 OSHC 1477, 1979 OSHD
13 ¶23,664 (1979). Accord, *Marson Corp.*, 10 OSHC 2128, 1980 OSHC 1045
14 ¶24,174 (1980). The elements required for the defense of employee
15 misconduct are:

- 16 (1) The employer must establish work rules designated to
17 prevent the violation
- 18 (2) The employer has adequately communicated these rules to
19 its employees
- 20 (3) The employer has taken steps to discover violations
- 21 (4) The employer has effectively enforced the rules when
22 violations have been discovered.

23 1. In the subject case, the testimony of four witnesses, under
24 oath, must be given reasonable weight and credibility. That testimony
25 establishes there were work rules designed to prevent the violation.
26 The company is not an electrical company per se and engages only in
27 secondary electrical repair work which does not require a licensed
28 electrician. The subject repair work was on a 110 volt panel. These
facts support the witness testimony as to the extent of the work rules

1 and training provided.

2 2. The employer has adequately communicated these rules to its
3 employees. Again, while the identified safety program and communication
4 does not appear to be the best, there was sufficient testimony and
5 evidence from four witnesses, that safety meetings and other training
6 occurred. The admitted documents of meeting attendance must also be
7 considered as evidence of communication.

8 3. The employer has taken steps to discover violations.
9 Respondent sent Mr. Lloyd a very experienced designated employee to
10 perform the work, albeit with a helper who had little or no experience.
11 The work task was reviewed with the two employees by the supervisor.
12 The employer provided tools at the request of employees. The
13 experienced lead employee, Mr. Lloyd, elected on his own to work on an
14 energized system. Mr. Lloyd had performed the exact same work four to
15 five times during the year. The foregoing facts all militate toward
16 satisfaction of the test.

17 4. The employer has effectively enforced the rules when
18 violations have been discovered. Again, while the evidence was limited
19 in this regard, supervisor Rogers testified that he had implemented
20 discipline, although none as to electrical, apparently because none had
21 occurred in this company which is not directly engaged in electrical
22 work.

23 Evidence that the employer effectively communicated
24 enforced safety policies to protect against the
25 hazard permits an inference that the employer
26 justifiably relied on its employees to comply with
27 the applicable safety rules and that violations of
28 these safety policies were not foreseeable or
preventable. Austin Bldg. Co. v. Occupational
Safety & Health Review Comm., 647 F.2d 1063, 1068
(10th Cir. 1981). When an employer proves that it
has effectively communicated and enforced its
safety policies, serious citations are dismissed.

1 See Secretary of Labor v. Consolidated Edison Co.,
2 13 O.S.H. Cas. (BNA) 2107 (OSHRC Jan. 11, 1989);
3 Secretary of Labor v. General Crane Inc., 13 O.S.H.
4 Cas. (BNA) 1608 (OSHRC Jan. 19, 1988); Secretary of
5 Labor v. Greer Architectural Prods. Inc., 14 O.S.H.
6 Cas. (BNA) 1200 (OSHRC July 3, 1989).

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

9 All facts forming the basis of a complaint must be
10 proved by a preponderance of the evidence. See
11 Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD
12 ¶16,958 (1973).

13 To establish a prima facie case, the Secretary
14 (Chief Administrative Officer) must prove the
15 **existence of a violation,** the exposure of
16 employees, the reasonableness of the abatement
17 period, and the appropriateness of the penalty.
18 See Bechtel Corporation, 2 OSHC 1336, 1974-1975
19 OSHD ¶18,906 (1974); Crescent Wharf & Warehouse
20 Co., 1 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).
21 (Emphasis added.)

22 The board finds that Complainant did not meet the required burden
23 of proof to establish a violation of the cited standard.

24 Notwithstanding the board not being required to reach the defense
25 of unpreventable employee misconduct same would appear to lie even had
26 the Complainant met its burden of proof.

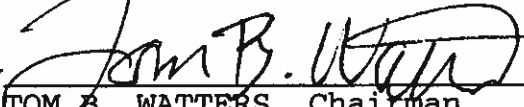
27 Based upon the above and foregoing, it is the decision of the
28 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation of
29 Nevada Revised Statutes did occur as to Citation 1, Item 2(a), 29 CFR
30 1910.333(a). The violation charged is hereby dismissed and the proposed
31 penalty of ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500.00) is denied.

32 The Board directs counsel for the Respondent to submit proposed
33 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**
34 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel
35 within twenty (20) days from date of decision. After five (5) days time

1 for filing any objection, the final Findings of Fact and Conclusions of
2 Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND**
3 **HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings of
4 Fact and Conclusions of Law signed by the Chairman of the **NEVADA**
5 **OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final
6 Order of the **BOARD**.

7 DATED: This 5th day of February 2008.

8 NEVADA OCCUPATIONAL SAFETY AND HEALTH
9 REVIEW BOARD

10 By 
11 TOM B. WATTERS, Chairman