

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

4 CHIEF ADMINISTRATIVE OFFICER
5 OF THE OCCUPATIONAL SAFETY AND
6 HEALTH ENFORCEMENT SECTION,
7 DIVISION OF INDUSTRIAL RELATIONS
8 OF THE DEPARTMENT OF BUSINESS AND
9 INDUSTRY,

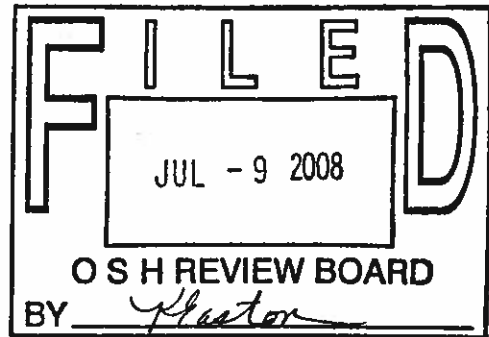
Docket No. LV 08-1345

Complainant,

vs.

10 PANELIZED STRUCTURES, INC.,

Respondent.



11
12
13 DECISION

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 11th day of June,
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. ROBERT
20 PETERSON, ESQ., appearing on behalf of Respondent, **Panelized Structures,**
21 **Inc.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as
22 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. The alleged violations in Citation 1, Item 1, referenced 29
28 CFR 1926.757(b)(4) and at Item 2, 29 CFR 760(d)(1).

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1 In Citation 1, Item 1, the employer was charged with failing to
2 properly support panels not attached to a structure before being
3 released by a forklift. The alleged violation in Item 1 was classified
4 as "Serious" and a penalty proposed in the amount of TWO THOUSAND FIVE
5 HUNDRED DOLLARS (\$2,500.00).

6 Citation 1, Item 2 referenced 29 CFR 1926.760(d)(1). The employer
7 was charged with failing to properly utilize personal fall arrest
8 systems to meet the criteria of the referenced standard, including
9 1926.502 (Appendix G to the subpart). The alleged violation in Citation
10 1, Item 2 was classified as "Serious" and a penalty was proposed in the
11 amount TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00).

12 Counsel for the complainant, through Safety and Health
13 Representative (SHR) Shane Buchanan presented evidence and testimony as
14 to the violations and appropriateness of the penalties. Mr. Buchanan
15 testified that he conducted an accident investigation at the Civic
16 Center Building D construction project located at 383 Civic Center Drive
17 in Las Vegas, Nevada. Complainant's Exhibit "1" included the
18 investigative report completed by Mr. Buchanan over the period from
19 January 11, 2008, the date of the accident, through February 22, 2008,
20 prior to issuance of the citation.

21 Mr. Buchanan testified that he initiated a safety inspection in
22 response to a reported accident and met with employer personnel at the
23 site. He specifically conferred with Mr. Ron Kozloski, the chief
24 operations officer of respondent who identified the injured employee,
25 the subject worksite and certain individuals as employees of respondent.
26 The SHR personally obtained photos to support the citation which were
27 admitted as Exhibit "2" containing 12 pages. Mr. Buchanan identified
28 the respondent Site Fall Protection Procedure Manual consisting of 15

1 pages, which was also admitted in evidence. Mr. Buchanan testified that
2 he observed employees placing panels on a structure for welding and
3 demonstrated the work effort through photographic exhibits at pages 2
4 and 3. Respondent employees were shown in the photos using proper fall
5 arrest systems. The SHR testified the employees depicted were "tied
6 off." From his interviews and observations, Mr. Buchanan also testified
7 that on January 11 an employee of Respondent suffered serious injuries
8 when the panel he was standing fell approximately 33 feet to the ground.
9 The panel was constructed on the ground and then lifted into place by
10 a forklift. The employee was required to weld the panel to a girder.

11 While the employee was welding and prior to securing the panel to the
12 joist, the forklift which had been supporting the panel was repositioned
13 to push the girder to overlap the joist. The unsecured panel dislodged
14 causing the employee and the panel to fall to the ground. Mr. Buchanan
15 testified that from his interviews at the site the employee who fell to
16 the ground was not tied off. He concluded the information to be
17 accurate, notwithstanding the employee having told him from his hospital
18 bed later during his investigation that he was tied off.

19 Mr. Buchanan testified that employees told him at the site during
20 his investigation that the forklift was used regularly to push panels
21 in place because they could not always obtain the correct overlap for
22 welding. They would tack the panel with nails to hold it in place while
23 it was being supported by the forklift. The lift would back away after
24 the nailing and then push the panel in order to place it in a correct
25 position for welding. The SHR testified that he did not believe the
26 process to be safe or in compliance with his determination of the
27 applicable standard referenced in 1926.757(b)(4).

28 Mr. Buchanan testified that he determined the resultant hazard from

1 utilizing the forklift support process to cause, and/or create the
2 potential for, serious injury or death. He recommended the proposed
3 penalty of \$2,500.00 as appropriate.

4 On cross examination Mr. Buchanan testified that no hoisting cables
5 were utilized in lifting the panels as referenced in the standard; but
6 rather use of the forklift and procedure outlined in respondent's
7 Exhibit "3" had been determined by respondent to be a safe and
8 recognized practice.

9 Counsel for complainant presented further testimony and evidence
10 through SHR Buchanan with regard to Citation 1, Item 2, 29 CFR
11 1926.760(d)(1). Mr. Buchanan testified in reference to his
12 investigative report at Exhibit "1" that an employee of respondent was
13 improperly using fall protection. The employee was utilizing a 14 foot
14 lanyard connected at foot level to an anchorage point 6 feet from the
15 edge of a suspended panel exposing the employee to a free fall of
16 approximately 12 feet. The SHR outlined the violative practice of using
17 a lanyard which was too long for the height of the fall exposing the
18 employee to the potential of serious injury or death. Photographic
19 evidence at Exhibit "3" at page 5, depicted the location of a cleat; and
20 also at pages 11 and 12, respectively the clip attachment and cleat.

21 On redirect testimony and cross examination Mr. Buchanan testified
22 that when he interviewed the injured employee at the hospital who said
23 he was tied off, he was in "bad shape" and Mr. Buchanan did not believe
24 he was capable of making an intelligible statement at the time.
25 Further, Mr. Buchanan testified that he was told during his
26 investigation by respondent's representative that the forklift was used
27 usually "three or four times per day to set panels . . .". The SHR
28 believed the panel was not "supported" when the forklift backed away to

1 push it in place on the occasion of the accident and that the
2 construction process, while accepted by the respondent, was not safe nor
3 in compliance with the standard.

4 Complainant counsel presented testimony and evidence from Mr. Ron
5 Kozloski, the chief operations officer of respondent. He testified that
6 his company developed the site fall protection procedure in its manual
7 identified in Exhibit "3" in conjunction with OSHA personnel and many
8 others in the industry. He testified that the procedures were
9 determined to be safe, and although new to the industry, better than
10 what he believed were no other appropriate guidelines. Mr. Kozloski
11 testified that the company policy stated in Exhibit "3" is that
12 employees are not allowed less than six feet from a leading edge unless
13 appropriately using the lanyards provided to them to arrest any fall.
14 He further testified that employees are instructed not to remove the
15 forklift before the panel is secured and that same is in fact company
16 policy.

17 During board examination, Mr. Kozloski testified that the standard
18 requires the forklift to hold and support the panel until it is
19 attached. He testified that it was his opinion that the accident
20 resulted because the forklift bumped the panel accidentally causing the
21 fall, even though it was supported and attached with nails, but not yet
22 welded in place. Mr. Kozloski further testified that it was not common
23 to nail panels then move them with the forklift but it happened in the
24 subject accident and does on occasion. He stated that a panel usually
25 holds when attached by tacking with nails to allow the forklift to back
26 off and ease the panel along. Mr. Kozloski testified that the standard
27 procedure is to use a "come along" not the forklift, but it is not a
28 violation of company policy to use the lift to accomplish the same

1 result.

2 The board in reviewing the facts and evidence presented determined
3 the focus for factual analysis under the term of the cited standard in
4 Item 1 as whether the panels were **attached to the structure at each**
5 **corner** before the hoisting cables are released. Because no hoisting
6 cables were utilized as specifically required by the standard, but
7 rather the alternate use of a forklift under respondent's safety plan
8 as described in Exhibit "3", the inquiry centered on the words
9 "support", "secured" and "attachment". The respondent believed that
10 tacking the panel in place with nails while it was being "supported" by
11 the forklift sufficiently "secured" the panel to satisfy the standard
12 thereby permitting the forklift to back away and then push the panel.
13 However complainant alleged there was no "attachment" within the meaning
14 of the standard which required attaching to occur at each corner before
15 the support was relieved. There was no dispute that the panel was not
16 "attached to the structure at each corner" before the support was
17 removed. The question was whether the temporary nailing was sufficient
18 to permit relief of the support to comply with safety requirements and
19 the specific standard.

20 The board concluded that nailing a panel of this size was not
21 "attachment to the structure at each corner" as contemplated by the
22 standard, nor was it effective. Moving a very large panel with a
23 forklift, after it had been nailed but before it had been welded,
24 created the hazard which resulted in the fall and injury of the subject
25 employee.

26 At Citation 1, Item 2, the board found there was insufficient
27 evidence and testimony to establish a violation because there was no
28 ability to determine the length of the fall. The employees were

1 provided 14 foot lanyards for use at the site. It was incumbent upon
2 the employees who were trained in the operations and standards to attach
3 lanyards to an anchor point or cleat, provided by the employer, at such
4 a length to arrest any potential fall. Because the locations of the
5 employees on the structure varied as work was underway, the anchor point
6 and the attachment of the lanyard became critical to determine the
7 potential length of the fall and thus the adjustment to the length of
8 the lanyard. No testimony nor photographic evidence produced sufficient
9 proof for the board to reach a factual determination to find a
10 violation.

11 In all proceedings commenced by the filing of a
12 notice of contest, the burden of proof rests with
the Administrator. N.A.C. 618.788(1).

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

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

21 A "serious" violation is established in accordance with NRS
618.625(2) which provides in pertinent part:

22 . . . a serious violation exists in a place of
23 employment if there is a substantial probability
24 that death or serious physical harm could result
25 from a condition which exists or from one or more
26 practices, means, methods, operations or processes
which have been adopted or are in use at that place
of employment unless the employer did not and could
not, with the exercise of reasonable diligence,
know the presence of the violation.

27 The board concludes that at Citation 1, Item 1, the employer failed
28 to satisfy the requirements of 29 CFR 1926.757(b) (4). The preassembled

1 panels were not attached to the structure at each corner before the
2 forklift backed away within the meaning of the standard. Temporary
3 nailing was not sufficient under the standard. The standard was
4 applicable in accordance with 1926.750, Subpart R, describing the scope
5 of work. The job tasks being performed are within the standard
6 definition to satisfy applicability.

7 The board concludes there to have been no violation as set forth
8 in 29 CFR 1926.760(d)(1). No competent evidence was presented by a
9 preponderance to meet the burden of proof to demonstrate the existence
10 of a violation.

11 Based upon the above and foregoing, it is the decision of the
12 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of
13 Nevada Revised Statute did occur as to Citation 1, Item 1, 29 CFR
14 1926.757(b)(4). The violation charged is confirmed and the proposed
15 penalty in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00)
16 approved.

17 It is further decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
18 **REVIEW BOARD** that no violation of Nevada Revised Statute did occur as
19 to Citation 1, Item 2, 29 CFR 1926.760(d)(1). The proposed penalty in
20 the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00) is denied.

21 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
22 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION**
23 **OF INDUSTRIAL RELATIONS**, to submit proposed Findings of Fact and
24 Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
25 **BOARD** and serve copies on opposing counsel within twenty (20) days from
26 date of decision. After five (5) days time for filing any objection,
27 the final Findings of Fact and Conclusions of Law shall be submitted to
28 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing

CALENDARED
DATE: 7-14-00

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

4 DATED: This 9th day of July, 2008.

5 NEVADA OCCUPATIONAL SAFETY AND HEALTH
6 REVIEW BOARD

7 By /s/
8 JOHN SEYMOUR, Chairman

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH

2 REVIEW BOARD

3 CHIEF ADMINISTRATIVE OFFICER
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7 OF THE DEPARTMENT OF BUSINESS AND
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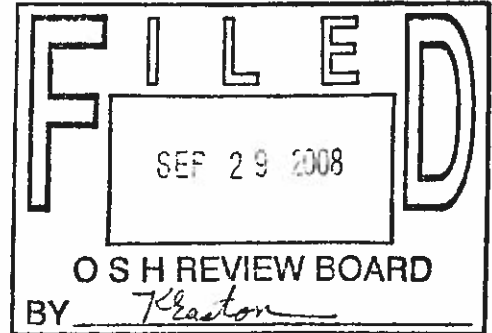
DOCKET NO. LV 08-1345

Complainant,

9 vs.

PANELIZED STRUCTURES, INC.,

Respondent.



11 _____ /
12 NOTICE OF ERRATA

13 ON THE 19th day of September, 2008, NEVADA OCCUPATIONAL SAFETY
14 AND HEALTH REVIEW BOARD (BOARD), entered the Findings of Fact,
15 Conclusions of Law and Final Order in the subject captioned matter.
16 The Order contained a typographical error on page 8, as follows:

17 "The penalty of \$2,500.00 for the violation set forth
18 in Citation 1, Item 1 is confirmed. Citation 2, Item
19 2 is denied."

20 The portion of the Order which contained the error is amended
21 through this Errata and corrected to provide at page 8 the
22 following:

23 ". . . Citation 1, Item 2 is denied."

24 In all other respects the final Order entered by the BOARD is
25 confirmed.

26 DATED this 29th day of SEPTEMBER, 2008.

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28 LEGAL COUNSEL

NEVADA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD

By: _____ /s/

JOHN SEYMOUR, CHAIRMAN