

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,

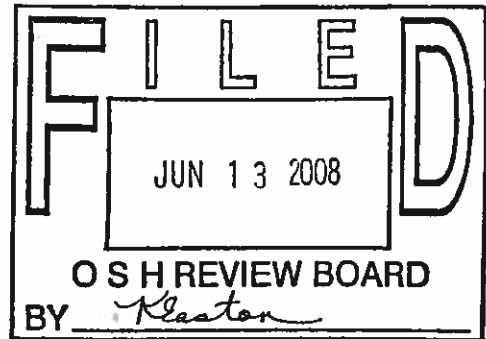
Docket No. RNO 08-1341

Complainant,

vs.

10 McCLONE CONSTRUCTION COMPANY,

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 13th day of February,
16 2008, in furtherance of notice duly provided according to law, MR. ROB
17 KIRKMAN, 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, McClone Construction
21 Company; 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. The violation in Citation 1, Item 1, referenced 29 CFR
28 1926.501(c)(3). The employer was charged with failing to protect

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1 employees from entering areas where overhead work was being performed
2 and debris stored as required in the cited fall protection standard.
3 OSHA alleged employees were exposed to falling objects because the
4 respondent employer did not barricade the hazard exposure area where an
5 overhead crane was operated, and failed to keep objects/debris away from
6 higher level building construction edges to prevent potential
7 displacement. The alleged violation in Citation 1 was classified as
8 "Serious" and a penalty was proposed in the amount of TWO THOUSAND FIVE
9 HUNDRED DOLLARS (\$2,500.00).

10 Counsel for the complainant, through Safety and Health
11 Representative (SHR) Garcia presented evidence and testimony as to the
12 violation and appropriateness of the proposed penalty. Mr. Garcia
13 testified that he conducted a comprehensive site inspection at the
14 Peppermill Hotel Casino new tower construction site in Reno, Nevada from
15 on March 14, 2007 through March 20, 2007. At the site he met with Mr.
16 Avignone and Mr. Smith, the superintendent and safety manager of
17 respondent. Mr. Avignone informed Mr. Garcia that respondent employees
18 were working on upper floors performing shoring work and also removing
19 concrete forms overhead with a crane. Mr. Garcia testified that he
20 initially saw no employees directly beneath the work area but determined
21 there were employees of various employers on the worksite as well as
22 those of respondent who were exposed to a "danger zone" because there
23 were no barricades to prevent employees from accessing the building
24 structure from areas under the overhead work subjecting them to
25 potential hazards from falling objects. The SHR testified he did not
26 observe nor was able to verify the use of any monitor or spotter
27 employees controlling the area, although Mr. Avignone informed him
28 spotters were utilized.

1 SHR Garcia determined there was exposure to a serious hazard
2 because of the potential for material falling from the overhead concrete
3 form movement and/or displacement of debris from the roof edge which
4 could kill or injure any employees below. He estimated there were more
5 than 200 employees working on the site and confirmed respondent employed
6 54 workers. He submitted copies of his investigation report accordingly.
7 Mr. Garcia personally observed and confirmed there were various
8 employees on the site who had access to the hazard during the
9 performance of work. Photographic exhibits depicted the site and
10 employees working below the area of a scrap pile. Mr. Garcia observed
11 piles of scrap on the fifth floor at the edge directly above an area
12 where employees were working and photographed. Mr. Garcia also observed
13 plywood sheets stored at the edge of the building on the 7th floor and
14 introduced photographic exhibits accordingly.

15 Counsel for the respondent conducted cross examination of SHR
16 Garcia. He inquired as to the commencement date of the inspection and
17 date of the photos depicting the conditions at the worksite to relate
18 same to the charging violation.

19 Counsel for complainant on redirect examination of Mr. Garcia
20 established the dates of the inspection pursuant to his testimony and
21 the investigation report to have commenced on March 14, 2007 and
22 continued through March 20, 2007. On additional redirect, the SHR
23 testified that none of the employees in the photos in evidence were
24 respondent's employees but that he cited the respondent because of
25 hazard exposure to many employees who had access to the work areas
26 exposed. He further testified that based upon his observations and the
27 superintendent's responses to his investigation inquiries that
28 respondent created and controlled the overhead crane movement as well

1 as the storage of materials at the roof edge with full responsibility
2 and opportunity to have corrected same so as to protect employees from
3 hazard exposure below.

4 During board examination SHR Garcia testified there were no
5 physical barricades, barriers, or monitors to prevent him passing under
6 the crane structure while the forms were being moved overhead. He also
7 testified that no one told him to remain out of the area, warned him or
8 took other action to prevent his access to the ground area beneath what
9 he determined to be the described overhead hazards.

10 Respondent counsel presented evidence and testimony from Mr. Joseph
11 Avignone, the superintendent of respondent. Mr. Avignone testified that
12 he met with SHR Garcia on the site at the commencement of the inspection
13 and told him the company used a spotter to keep people out of the area
14 of overhead danger from falling material. He testified there were two
15 tower cranes utilized by respondent to move "tables" which he defined
16 as concrete forms. He also testified that he supervised his "flying
17 crew" with radios and communicated with other people on the ground.

18 On cross examination Mr. Avignone, could not initially recall the
19 names of the spotters he used on the job site. He further testified
20 that he "probably" told SHR Garcia that he utilized a spotter on the day
21 of the inspection. When challenged as to Mr. Garcia's testimony that
22 Mr. Avignone told him there were no spotters utilized on the subject
23 site until after March 14th, he answered that Mr. Garcia was wrong in
24 his recollection. When asked to identify the spotters he could recall
25 only one man's name, Jose Galicia (sp?).

26 On additional board questioning, Mr. Avignone testified that
27 falling material was discussed at safety meetings as the company was
28 aware of the potential hazards from movement or storage of overhead

1 materials on the worksite.

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

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

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

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

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

28 The board in reviewing the factual evidence and testimony finds
that the complainant met its burden of proof to establish the serious
violation alleged. The testimony of SHR Garcia and Mr. Avignone
confirmed that the respondent created and controlled the hazardous
conditions that could result from falling objects while performing its
work task of upper level shoring debris storage and overhead movement
of concrete forms. Photographic evidence depicted accumulations of
debris near the edges of the building structure which was created and/or
controlled by the respondent. The evidence also demonstrated that the
subject worksite was a multi-employer construction project which
involved 54 employees of respondent and a total approximating 200

1 employees of various employers. Employees on the job site worked in,
2 around, or under the hazardous conditions during employment and/or had
3 "access" to the "zone of danger." To reach the upper floors of the
4 building employees needed to approach the building structure and utilize
5 hoists to arrive at the upper floors. There were no physical
6 structures, red tape, nor warning devices, as required by the cited
7 standard, to constitute a barricade during the movement of the concrete
8 forms overhead or during the accumulation of debris at the edge of the
9 upper levels of construction.

10 The specific standard cited requires various protective measures
11 and the use of barricades, not the use of monitors or spotters. If
12 alternate compliance to the standard is relied upon, e.g. the use of
13 monitors/spotters instead of physical barricades then the burden of
14 proof shifts to the respondent to establish same. The respondent did
15 not assert the existence of physical barricades but relied totally on
16 alternate compliance with the standard through use of monitors/spotters.
17 Mr. Avignone could not demonstrate by a preponderance of credible or
18 competent evidence either any authority for, or the actual existence/use
19 of monitors/spotters at the worksite. Mr. Avignone's recollection was
20 equivocal at the time of hearing. He stated first that two or three
21 spotters were used, but could only recall what he believed was the name
22 of one individual. No other evidence by a preponderance was provided
23 to establish either authority for or the actual existence of
24 monitors/spotters to support alternate compliance by the respondent.
25 No company non-management employees, time cards, work records, nor the
26 monitors/spotters were offered by respondent to meet its burden of
27 proof.

28 Respondent counsel further argued that the citation lacked

1 particularity. He stated that only three employees were exposed to the
2 incident in the photographic evidence but exposure did not coincide with
3 the date the investigation commenced. He further argued that an
4 employee is only exposed at a time of exposure and same is not
5 continuing or continuous.

6 The board concluded that hazard exposure to employees of respondent
7 and those of other employers occurred at the multi-employer construction
8 worksite based upon constructive exposure through "access" to hazardous
9 conditions in a "zone of danger".

10 A cited employer, when found to be in non-compliance with the
11 specific requirements of a cited standard, can defend by proving it
12 effectuated an alternative means of compliance with the specific
13 standard. However, the evidence presented creates no dispute as to the
14 facts relative to the respondent's movement of large heavy concrete
15 forms overhead of the ground level as well as the storage of material
16 near the edge of the upper building floors where many employees of
17 various employers were engaged in working and to which even respondent's
18 employees would have had "access" to approach the building to reach the
19 upper floors.

20 Where an employer at a multi-employer worksite **created** or
21 **controlled** the area of a hazard, it is subject of citation and finding
22 of a violation where its own employees were not exposed but only those
23 of other employers (see Brennen v. OSHRC (Underhill Construction Corp.,)
24 513 F.2d 1032 (2d Cir. 1975). Beatty Equipment Leasing v. Secretary of
25 Labor, 577 F.2d 534 (9th Cir. 1978)). In Beatty, the Ninth Circuit Court
26 ruled that a materialman on a multi-employer construction site is in
27 violation of the Occupational Safety and Health Act when the materialman
28 creates hazardous condition to which its own employees are not exposed.

1 The court further held ". . . we specifically adopted the court of
2 appeals decision in Brennen v. OSHRC, supra, page 3, to the extent that
3 it would impose liability on a subcontractor who **creates** a hazard or has
4 **control** over the condition on a multi-employer construction site even
5 though **only** employees of other subcontractors are exposed." (Emphasis
6 added) The court concluded that the evidence in Beatty did show a
7 violation because Beatty created the hazard at the multi-employer
8 construction site by erecting a scaffold and employees of other
9 subcontractors were exposed to the hazard. "Congress clearly intended
10 to require employers to eliminate all foreseeable and preventable
11 hazards." California Stevedore and Ballast Co. v. OSHRC, 517 F.2d 986,
12 988 (9th Cir. 1975). ". . . this policy can best be effectuated by
13 placing the responsibility for hazards on those who create them." Supra,
14 page 4.

15 Furthermore, even where an employer neither created the hazard nor
16 controlled the area of the hazard it may be subject of a citation and
17 finding of violation by OSHA. The complainant satisfies its burden of
18 proof in this regard by showing:

- 19 1. A specific standard applies;
- 20 2. Failure to comply with the standard; and
- 21 3. Employees of the cited employer had **access to the hazard**.
22 Anning-Johnson Co., 1975-1976 OSHD ¶ 20,690, at p. 24,779,
23 24,783. (emphasis added)

24 The employer establishes an affirmative defense by showing:

- 25 1. The employer neither created nor controlled the hazardous
26 condition; **and**
- 27 2. Either (a) its employees were protected by realistic measures
28 taken as an alternative to literal compliance; or (b) it did

1 not have notice of the hazardous conditions with reasonable
2 diligence. Id. The Fifth Circuit Court approved allocating
3 to the employer the burden of showing that it neither created
4 nor controlled the hazard, rather than making it part of the
5 complainant's case in chief. Central of Georgia Railroad Co.
6 v. OSHRC, 576 F.2d 620 (5th Cir. 1978).

7 In Grossman Steel & Aluminum Corp., 1975-1976 OSHD ¶ 20,691, p.
8 24,788, the Review Commission further refined Item 2(a) of the
9 employer's affirmative defense. The employer may satisfy this element
10 by making reasonable efforts to have the hazard abated, or by "taking
11 other steps as circumstances dictate to protect its employees." Id. at
12 24,791. For example, a subcontractor could notify the general contractor
13 and request the general contractor to correct the problem, persuade the
14 responsible subcontractor to correct the hazard, instruct its employees
15 to avoid the area, or undertake an alternative means of protection.

16 ". . . The test for determining an employee's
17 exposure to a hazard is whether it is "reasonably
18 predictable" that employees would be in the **zone of**
19 **danger** created by a non-complying condition.
20 Kokosing Construction Co., Inc., 17 BNA OSHC 1869,
21 1870 (No. 92-2596, 1996). To be "reasonably
22 predictable," there must be a showing that either
23 by operational necessity or otherwise, including
24 inadvertence, employees **have been or will be** in the
25 zone of danger. See Fabricated Metal Products,
26 Inc., 18 BNA OSHC 1072, 1074 (No. 93-1953, 1997)
27 See William Brothers Construction, Inc., 2001 OSHD
28 ¶ 32,350, at p. 49,622-49,623. Capform, Inc., 16
BNA OSHC 2040, 2041 (No. 91-1613, 1994).

24 Respondent did not meet its burden of proof to establish first the
25 use of "spotters" was sufficient to satisfy the standard as a realistic
26 alternate means of compliance nor that spotters were indeed in place.
27 Further, the facts and evidence did not demonstrate there was any
28 infeasibility or impossibility for literal compliance with the standard.

1 See Altor, Inc., et al., 2001 OSHD ¶ 32,526, at p. 50,541 involving a
2 serious violation of 29 CFR 1926.501(c)(1). The respondent employer in
3 Altor assigned an employee to go down to ground level and monitor the
4 area where overhead concrete form stripping was taking place. The
5 assigned employee was to watch for employees in the area and warn them
6 away from the areas where there was a danger of falling debris. No
7 barricades were erected to prevent employee access to the areas and
8 there was no protection afforded by a canopy as required by the
9 standard. In Altor, the use of a monitor to warn off employees was not
10 a sufficient alternate means of compliance to satisfy the requirements
11 of the standard.

12 Here, there was no preponderance of credible or competent evidence
13 to support the recognized elements of the affirmative defense.

14 The board also rejects the defense of lack of citation
15 particularity. Under long established occupational safety and health
16 law, the respondent must be apprised of the subject facts of the
17 situation at issue so that the proper corrective action can be taken
18 and/or respondent may contest. Each citation must describe in
19 particularity the nature of the violation, including a reference to the
20 provision of the action, standard, rule, regulation or other order
21 alleged to have been violated. **The purpose of particularity is to place**
22 **the cited employer on notice as to the nature of the alleged violation.**
23 A respondent is afforded fair notice for his defense if trial showed
24 lack of surprise at OSHA's position.

25 L.E. Myers Company, 3 OSHC 1026, 1974-1975 OSHD ¶
26 19,522 (1975); Union Camp Corporation, 1 OSHC 3248,
27 1973-1974 OSHD ¶ 16,871 (1973): The respondent must
28 be apprised of the subject facts of the situation
at issue so that the properly corrective action can
be taken and/or respondent may contest; mere
recitation of cited standards is inadequate.

1 Gannett Corp., 4 OSHC 1383, 1976-1977 OSHD ¶ 20,915
2 (1976); B.F. Goodrich Textile Products, 5 OSHC
3 1458, 1977-1978 OSHD ¶ 21,842 (1977): The purpose
4 of § 658(a) is "to place the cited employer on
5 notice as to the nature of the alleged violation.
6 Factors other than a citation's language, including
7 an employer's knowledge of his own facilities, may
8 serve to fulfill this function." See also, B.W.
9 Harrison Lumber Co., 4 OSHC 1091, 1975-1976 OSHD ¶
10 20,623, appeal filed, No. 76-2619 (5th Cir. June 14,
11 1976).

12 Based upon the above and foregoing, it is the decision of the
13 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of
14 Nevada Revised Statute did occur as to Citation 1, Item 1, 29 CFR
15 1926.501(c)(3). The violation charged is confirmed and the proposed
16 penalty in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00)
17 approved.

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

DATED: This 13th day of June 2008.

NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

By /s/
TOM B. WATTERS, Chairman