

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,

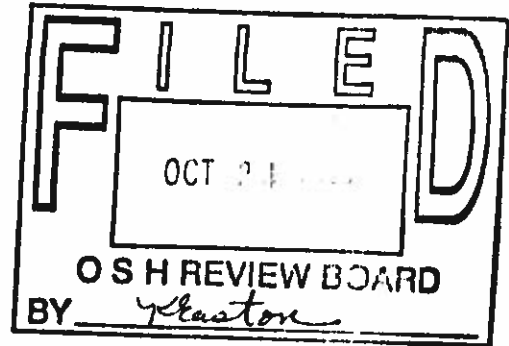
DOCKET NO. LV 08-1346

Complainant,

vs.

10 CIND-R-LITE-BLOCK COMPANY,

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 9th of July, 2008, in
16 furtherance of notice duly provided according to law, MR. JOHN WILES,
17 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. L.
20 CHRISTOPHER ROSE, ESQ. appearing on behalf of Respondent, Cind-R-Lite-
21 Block Company; the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD
22 finds 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 1, charges a violation of 29 CFR 1910.212(a)(1).

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1 The complainant alleges that the employer did not ensure protective
2 guarding to protect employees from nip points on machinery located at
3 its plant site. The violation was classified as a "Repeat Serious." The
4 penalty for the alleged violation was assessed at TWO THOUSAND FOUR
5 HUNDRED DOLLARS (\$2,400.00).

6 Citation 2, Item 1, charges a violation of 29 CFR
7 1910.147(c)(6)(i). The complainant alleges that the employer respondent
8 did not conduct a periodic inspection of the energy control procedure,
9 at least annually, to ensure compliance with the standard relating to
10 two machines as identified in the citation. There was no documentation
11 available at the time of the inspection. The violation was classified
12 as "Serious." A penalty was assessed in the amount of ONE THOUSAND TWO
13 HUNDRED DOLLARS (\$1,200.00).

14 Citation 2, Item 2a, charges a violation of 29 CFR 1910.147(c)(7)
15 (i)(A). The complainant alleges that the employer respondent did not
16 provide training documentation for machine operators as to
17 lockout/tagout procedures. The violation was classified as "Serious"
18 and a penalty assessed of TWO THOUSAND ONE HUNDRED DOLLARS (\$2,100.00).

19 Citation 2, Item 2b, charges a violation of 29 CFR 1910.147(c)(7)
20 (i)(B). The complainant alleges that the employer did not provide any
21 lockout/tagout training documentation for affected employees as to use
22 of energy and control procedure. The violation was classified as
23 "Serious" with a zero penalty assessed.

24 Citation 2, Item 2c, charges a violation of 29 CFR 1910.147(c)
25 (7)(iv). The complainant alleges that the employer did not certify that
26 employee training had been accomplished and maintained to a current
27 status. The violation was classified as "Serious" with a zero penalty
28 assessed.

1 Citation 2, Item 3, charges a violation of 29 CFR 1910.212(a) (3)
2 (ii). The complainant alleges that the employer did not ensure that a
3 guard was attached to a "chop saw" thereby exposing employees to the
4 hazards which would potentially occur at the point of operation. The
5 violation was classified as "Serious" and a penalty of NINE HUNDRED
6 DOLLARS (\$900.00) assessed.

7 Citation 2, Item 4, charges a violation of 29 CFR 1910.219(f) (3).
8 The complainant alleges that the employer did not ensure that sprocket
9 wheels and chains, which were less than seven feet above the floor area,
10 were enclosed as required by the standard. The violation was classified
11 as "Serious" and a penalty of ONE THOUSAND TWO HUNDRED DOLLARS
12 (\$1,200.00) assessed.

13 Citation 2, Item 5, charges a violation of 29 CFR 1910.305(b) (2)
14 (i). The complainant alleges that the employer did not ensure that a
15 power box was covered in accordance with the standard. The violation
16 was classified as "Serious" and a penalty of ONE THOUSAND FIVE HUNDRED
17 DOLLARS (\$1,500.00) assessed.

18 Citation 2, Item 6, charges a violation of 29 CFR 1910.305(g) (2)
19 (iii). The complainant alleges the employer did not ensure proper
20 strain relief was provided on flexible cords in violation of the
21 standard which requires flexible cords and cables be connected to
22 devices and fittings to prevent pull from being directly transmitted to
23 the joints or terminal screws. The violation was classified as
24 "Serious" and a penalty of ONE THOUSAND TWO HUNDRED DOLLARS (\$1,200.00)
25 assessed.

26 Citation 3, Item 1, charges a violation of 29 CFR 1910.1200(h) (1).
27 The complainant alleges that the employer did not ensure hazard
28 communication training was provided to all employees, whether permanent

1 or temporary. The violation was classified as "Other" and a zero
2 penalty proposed.

3 Citation 4, Item 1, charges a violation of Nevada Revised Statute
4 (NRS) 618.383(6). The complainant alleges that the employer did not
5 provide specialized training to its temporary employees working with
6 various items of machinery on the respondent's premises. No training
7 documentation was provided regarding any temporary employees. The
8 violation was classified as "Regulatory" and a penalty of SIX HUNDRED
9 DOLLARS (\$600.00) assessed.

10 Counsel for the Chief Administrative Officer moved to dismiss
11 Citation 1, Item 1 charging a violation of 29 CFR 1910.121(a)(1). The
12 alleged violation and the proposed penalty in the amount of TWO THOUSAND
13 FIVE HUNDRED DOLLARS (\$2,500.00) were dismissed.

14 Counsel for the complainant presented testimony and evidence with
15 regard to the remaining alleged violations through witness Safety and
16 Health Representative (SHR) Kimberly Heckman. The SHR testified that
17 commencing in January of 2008 she conducted an inspection of the
18 respondent's manufacturing facility located in Las Vegas, Nevada. She
19 met with Mr. Diamond, the plant manager, who accompanied her during the
20 inspection. The investigation report of the SHR was admitted in evidence
21 by stipulation as Exhibit "A." Ms. Heckman obtained photographs which
22 were admitted in evidence by stipulation as Exhibit "B." Documentary
23 evidence furnished by the respondent was identified as Exhibit "C" and
24 admitted in evidence by stipulation. Ms. Heckman continued her
25 testimony relating to each of the citations and identified documents and
26 photographic evidence accordingly.

27 At Citation 2, Item 1, the SHR stated that the subject violation
28 and all 29 CFR 1910.147 series violations from Citation 2, Item 1 and

1 including Item 1a, 2b and 2c, were based on there being no documents
2 provided by the employer to satisfy the requirements of the standard.
3 Ms. Heckman testified that the employer did not complete the reporting
4 information forms identify same with the appropriate machinery;
5 particularly lockout/tagout procedures were not provided during the
6 inspection. Ms. Heckman testified that the standard referenced at
7 Item 1 of Citation 2 required an inspection of energy control procedures
8 at least annually, but no documentation could be provided to her by the
9 employer to confirm the company had completed same.

10 At Citation 2, Item 2a, SHR Heckman testified that she did receive
11 a lockout/tagout report but found a violation because the report did not
12 demonstrate that an employee was specifically trained on a subject
13 machine; only that an employee was authorized to work on same. She
14 further testified that because of the deficient report and the potential
15 for serious injury, she classified same as serious and calculated the
16 penalty accordingly.

17 At Citation 2, Item 2b, Ms. Heckman testified that she cited a
18 violation based on lockout/tagout because no training documents were
19 provided in compliance with the standard.

20 At Citation 2, Item 2c, Ms. Heckman testified that no documents to
21 establish training were provided and specifically there was no
22 certification to confirm that training had been accomplished in
23 accordance with the standard.

24 Counsel for the complainant proceeded to present further testimony
25 and evidence from SHR Heckman with regard to Citation 2, Item 3, which
26 referenced 29 CFR 1910.212(a)(3)(iii). The SHR observed and examined
27 a "chop saw" with no guarding on the points of operation. Ms. Heckman
28 testified that she classified the violation as "Serious" because the

1 hazardous exposure to flying debris or a broken blade was substantial
2 and well recognized in the industry. She calculated the penalty based
3 upon her department guidelines considering the gravity and potential for
4 serious injury.

5 Citation 2, Item 4 referenced a violation of 29 CFR 1910.219(f) (3).
6 Sprocket wheels and chains were measured to determine the height above
7 the floor. After determining a deficiency, the SHR cited same as a
8 violation of the standard. She testified that the exposure to serious
9 injury or death was substantial and that a simple yellow chain barricade
10 was not sufficient to either keep people away from the hazard nor a form
11 of guarding recognized under occupational safety & health law.

12 Citation 2, Item 5 was depicted in photographic Exhibit 7 and
13 subject of testimony by SHR Heckman. The power box was not
14 appropriately covered in accordance with the cited standard. The
15 photograph identified as Exhibit "7" showed duct tape and a cloth "rag"
16 in contact with electrical components. The factual finding provided the
17 basis for the SHR citing a violation and classifying same as serious
18 with the potential for exposure to serious injury or even death. She
19 testified that there was extensive exposure potential to employees based
20 upon her investigation because seven operators are needed for machine
21 operations near the electrical box.

22 At Citation 2, Item 6, the SHR testified in reliance upon
23 photographic Exhibit "8" to demonstrate flexible electrical cords were
24 not equipped with strain relief. She testified as to the injuries that
25 could potentially occur and her basis for classifying the violation as
26 serious and calculating a penalty of \$1,200.00.

27 At Citation 3, Item 1, the SHR found no hazardous communication
28 training documents which she determined to be required by the standard

1 to prove training. Ms. Heckman testified that she was provided some
2 forms to address same but they were not complete and/or inclusive of the
3 required information to satisfy the standard. She classified the
4 violation as "Other" and assessed a zero penalty because her gravity
5 calculations relating to severity reflected a minimal potential for
6 serious injury or death based upon same being a "paper violation."

7 At Citation 4, Item 1, the SHR cited a violation of NRS 618.383(6).
8 During her inspection, she was unable to confirm that any temporary
9 employees were trained because there was no documentation available to
10 establish same. She calculated the penalties in accordance with her
11 enforcement manual guidelines at up to \$1,000.00 but reduced same to
12 \$600.00 based upon permitted reductions. She testified that she
13 requested a list classifying the permanent and temporary employees so
14 she could establish which ones occupied each respective status but
15 received no cooperation. Ms. Heckman testified that she did not speak
16 to any of the employees of respondent other than management because they
17 spoke no English.

18 Counsel for respondent conducted extensive cross-examination of SHR
19 Heckman with regard to each citation and sub-item subject of the
20 complaint. Counsel queried the SHR regarding her request for
21 documentation, keying on the aspect of her inability to converse with
22 any of the Mexican speaking employees, yet finding they were subject of
23 no training albeit based upon no formal request to management. Cross-
24 examination and responses ensued with regard to correspondence
25 referenced by Ms. Heckman to company safety representative Ms. Hernandez
26 requesting various documentary information. Counsel continued to cross-
27 examine Ms. Heckman as to the documents that were in fact produced
28 requiring answers to establish effective or substantial compliance with

1 the standards.

2 Counsel for respondent presented a defense which included witness
3 testimony and evidence with regard to the violations charged. Mr. Mark
4 Diamond testified that he is a company manager, met SHR Heckman on the
5 initial day of the inspection, and toured the plant site with her. He
6 testified that on the day of the inspection a substantial portion of the
7 plant machinery was "shut down" due to a slow down in the economy. He
8 further testified that substantial changes and/or maintenance were
9 underway on some of the plant machinery during the inspection. He told
10 the SHR that most of machinery was not operating and that the safety
11 officer of the company, Ms. Hernandez, was on leave. He testified that
12 he told Ms. Heckman that Ms. Hernandez would be the individual who could
13 locate and furnish much of the material related to certain aspects of
14 the investigation. He further testified on direct and later cross-
15 examination that lockout/tagout procedures are the policy of the company
16 but apply differently depending upon the machinery being serviced. He
17 stated that if machines were located in an area where the power would
18 have to be shut down for a substantial portion of the plant, as opposed
19 to padlocking a particular machine, special arrangements must be made.
20 He also testified that because maintenance was underway the day of the
21 inspection, when the SHR observed some conditions of the machinery to
22 be in violation of standards they were actually in a "shut down" mode
23 therefore there was no exposure to employees or violation.

24 Ms. Hernandez testified that she is an eight year employee of the
25 company and its safety officer. She testified that safety committee
26 meetings are conducted weekly, included temporary as well as permanent
27 employees, and that a respondent employee is fluent in Spanish who
28 assists her with explaining certain technical data. Ms. Hernandez

1 further testified with regard to difficulties in communication between
2 she and SHR Heckman and particularly as to any requests for
3 documentation and compliance materials. Ms. Hernandez denied ever
4 having received a written request from Ms. Heckman. Direct and cross-
5 examination continued with regard to the written request and the
6 substance and form of same. The dispute involved extended testimony.

7 Ms. Hernandez identified and testified as to respondents admitted
8 exhibits and materials, including particularly Exhibits 105, 126, 127,
9 113 and 114 of the documentation.

10 Mr. Selman, the general manager of the respondent, testified that
11 he manages the respondent training program. He reviewed evidentiary
12 materials which he testified were furnished to the complainant. Mr.
13 Selman further testified with regard to documentary evidence in rebuttal
14 to the testimony of SHR Heckman and the allegations of violation. He
15 specifically identified and discussed Exhibits 114, 115, 116, 117, and
16 118. Further testimony and examination involved Exhibit 122 and the
17 violations charged under NRS 618.383(6). Mr. Selman testified that
18 there is only a legal requirement that temporary employees be "trained"
19 and not that certain specific documentation be furnished with regard to
20 same.

21 In reviewing the testimonial evidence, exhibits, and arguments of
22 counsel, the board is initially required to measure same against the
23 elements to establish violations under Occupational Safety & Health Law
24 based upon the statutory burden of proof and competence of evidence.

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

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

1 ¶16,958 (1973).

2 To prove a violation of a standard, the Secretary
3 must establish (1) the applicability of the
4 standard, (2) the existence of noncomplying
5 conditions, (3) employee exposure or access, and
6 (4) that the employer knew or with the exercise of
7 reasonable diligence could have known of the
8 violative condition. See Belger Cartage Service,
9 Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
10 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
11 Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
12 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
13 (No. 76-1408, 1979); American Wrecking Corp. v.
14 Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.
15 2003).

16 A respondent may rebut allegations by showing:

- 17 1. That the standard was inapplicable to the
18 situation at issue;
- 19 2. That the situation was in compliance; or lack
20 of access to a hazard. See, Anning-Johnson
21 Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690
22 (1976).

23 At Citation 2, Item 1, the board found that Exhibit 113 established
24 effective compliance with the standard.

25 At Citation 2, Item 2a, the board found that whether Ms. Hernandez
26 fully understood all or certain aspects of training materials was not
27 the issue but rather whether employees "received training." Exhibit 114
28 demonstrates the employees received training which corroborates the
29 sworn testimony of Ms. Hernandez.

30 At Citation 2, Item 2b, documentary Exhibit 114 demonstrates that
31 energy control procedure training was completed and it corroborates the
32 sworn testimony of Ms. Hernandez. The exhibit reflects compliance.
33 There was insufficient proof by complainant to support a violation.

34 At Citation 2, Item 2c, the board found there to be no
35 certification of training required. The trained employees names and
36 dates were established in accordance with the sworn testimony which

1 confirms sufficient compliance to avoid violation.

2 At Citation 2, Item 3, the board found there was no guard affixed
3 to the chop saw as clearly required by standard. Further, respondent's
4 representative admitted that no guard was attached to the saw on the day
5 of the inspection. The facts, the photographic evidence, the testimony
6 demonstrate same beyond any preponderance of evidence to support a
7 violation under the complainant's burden of proof. Certainly, employees
8 at the plant had "access" to the hazardous condition.

9 At Citation 2, Item 4, the sprocket wheels and chains were not
10 sufficiently enclosed to restrict others from the subject machine work
11 area. Exposure to a hazard can be established constructively through
12 "access" to the hazard. The yellow chain utilized by respondent was not
13 a recognized "barricade" but did reflect some reasonable effort toward
14 alternate compliance. The chain did establish a warning to employees.
15 The machine operator clearly had access to the machine, however the
16 point of operation was on the other side of the equipment preventing his
17 exposure to the hazard during operation. The facts demonstrated a
18 dispute with regard to the concept of "guarding by location vs. guarding
19 by parts" while exposure to hazard is the issue, and while a mere chain
20 is not a recommended barricade, there was insufficient evidence to
21 establish employee exposure or access to a potential hazard on the day
22 of the inspection when the equipment was not operating. However, the
23 evidence and testimony did not show any other guarding available. More
24 substantial protection is technically required under the standard and
25 a more effective barricade appropriate, however to find constructive
26 exposure for a serious violation when the machinery was not in operation
27 and under conditions without more facts is not possible under the
28 evidence and testimony presented. The board finds violative conditions,

1 but must reduce same to non-serious and adjust the penalty accordingly.

2 At Citation 2, Item 5, the photographic evidence and testimony of
3 not only the SHR but Mr. Diamond demonstrated a violation at the
4 electrical power box by a clear preponderance of evidence. The
5 potential for serious injury or death was considerable.

6 At Citation 2, Item 6, the photographic exhibit depicting frayed
7 strained electric cords and the SHR testimony supported the facts to
8 find a violation.

9 At Citation 3, Item 1, Exhibit 122 demonstrated through an
10 attendance roster that training had been provided. The exhibit and
11 sworn testimony were enough to rebut the SHR testimony and constitute
12 substantial compliance with the standard. The SHR cited the respondent
13 for not providing "any training" but ~~some~~ training was evidenced in
14 accordance with the exhibits in evidence and the sworn witness
15 testimony. Exhibit 121 further evidences some training was provided and
16 therefore effective compliance with the standard such that no violation
17 could be found.

18 Citation 4, Item 1, charged a regulatory violation of Nevada
19 Revised Statute 618.383(6). The statutory reference does not require
20 specific documentation for temporary training. However, Exhibit 114
21 establishes that there was training for temporaries as listed on the
22 roster. There was no citation for ~~not~~ providing training, rather same
23 related to a lack of documentation for same. The SHR obtained employee
24 statements during or after the initial inspection. Sworn testimony of
25 witnesses Hernandez and Selman, together with the admitted exhibits,
26 provided enough evidence of compliance such that there could be no
27 finding of a violation.

28 Based upon the above and foregoing, the board concludes that, as

1 a matter of fact and law, certain violations occurred and the proposed
2 penalties appropriate to confirm the citations hereinafter set forth;
3 however other violations are dismissed and related penalties denied
4 where complainant did not meet its burden of proof or the allegations
5 were rebutted by competent evidence and therefore same were dismissed.

6 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
7 **REVIEW BOARD** that violations of Nevada Revised Statutes did occur as to
8 Citation 2, Item 3, 29 CFR 1910.212(a)(3)(ii), and the penalty of NINE
9 HUNDRED DOLLARS (\$900.00) affirmed; Citation 2, Item 4, 29 CFR
10 1910.305(b)(2)(i), however the violation was reduced to a non-serious
11 violation and the penalty reduced to ZERO (\$0.00); Citation 2, Item 5,
12 29 CFR 1910.219(f)(3), and the penalty of ONE THOUSAND FIVE HUNDRED
13 DOLLARS (\$1,500.00) affirmed; Citation 2, Item 6, 29 CFR
14 1910.305(g)(2)(iii) and the penalty of ONE THOUSAND TWO HUNDRED DOLLARS
15 (\$1,200.00) affirmed.

16 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**
17 **HEALTH REVIEW BOARD** that no violations of Nevada Revised Statutes did
18 occur as to Citation 2, Item 1, 29 CFR 1910.147(c)(6)(i); Citation 2,
19 Item 2a, 29 CFR 1910.147(c)(7)(i)(A); Citation 2, Item 2b, 29 CFR
20 1910.147(c)(7)(i)(B); Citation 2, Item 2c, 29 CFR 1910.147(c)(7)(iv);
21 Citation 3, Item 1, 29 CFR 1910.1200(h)(1); Citation 4, Item 1, NRS
22 618.383(6). The related penalties assessed are denied.

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

CALENDARED
DATE _____ *[Signature]*

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

6 DATED: This 24th day of October, 2008.

7 NEVADA OCCUPATIONAL SAFETY AND HEALTH
8 REVIEW BOARD

9 /s/
10 _____
11 JOHN SEYMOUR, CHAIRMAN