

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,

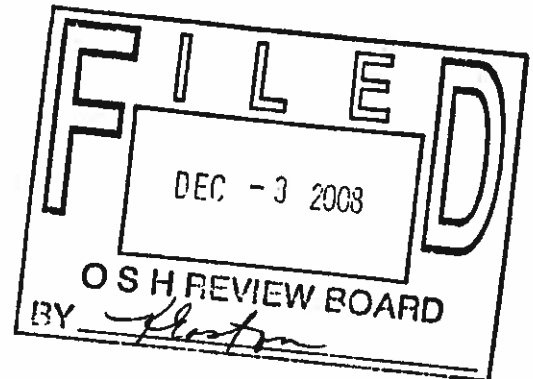
Docket No. LV 08-1352

Complainant,

vs.

10 UNION ERECTORS, LLC,

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 12th day of November
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. BRUCE
20 WILLOUGHBY, ESQ., appearing on behalf of Respondent, **Union Erectors,**
21 **LLC**; 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.

28 Counsel for the parties stipulated prior to the presentation of

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1 evidence and testimony that complainant withdraw Citation 1, Item 1(b),
2 2(b), 3(b), and 5 together with the associated proposed penalties in the
3 sum of THREE THOUSAND DOLLARS (\$3,000.00). The stipulation was approved
4 by order of the board.

5 The complaint referenced alleged violations of 29 CFR 1926.352, and
6 various subparts, as well as NRS 618.375(1) and NRS 618.383(1). All of
7 the violations were based upon an inspection at the Monte Carlo Resort
8 and Casino in Las Vegas, Nevada for failures to comply with fire
9 prevention.

10 Citation 1, Item 1(a) charges a violation of 29 CFR 1926.352(e).
11 The violation was classified as serious because respondent employees
12 were transported to the hospital and treated for smoke inhalation after
13 evacuation from the building roof area work site. The violation was
14 classified as serious due to the potential for serious injury or death
15 which could reasonably result. The proposed penalty for the serious
16 violation is in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS
17 (\$3,500.00).

18 Citation 1, Item 2(a) charges a serious violation of 29 CFR
19 1926.352(c). Complainant alleges that the respondent employer did not
20 ensure that torching operations in the presence of flammable compounds
21 did not create a hazard. The violation was classified as serious due
22 to the potential for serious injury or death which could reasonably
23 result. Employees were evacuated to the hospital and treated for smoke
24 inhalation. The proposed penalty for the serious violation is in the
25 amount of THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500.00).

26 Citation 1, Item 3(a) charges a serious violation of 29 CFR
27 1926.352(f). Complainant alleges that the responding employer failed
28 to comply with fire prevention precautions required by the standard to

1 protect areas below work being performed the same as that utilized above
2 the site of work. The violation was classified as serious due to the
3 potential for serious injury or death which could reasonably result.
4 Employees were evacuated to the hospital and treated for smoke
5 inhalation due to a fire that occurred at the work site. The proposed
6 penalty for the serious violation is in the amount of THREE THOUSAND
7 FIVE HUNDRED DOLLARS (\$3,500.00).

8 Citation 1, Item 4 charges a serious violation of 29 CFR
9 1926.352(b). Complainant alleges that the respondent employer failed
10 to ensure that positive means were taken to protect immovable fire
11 hazards in the surrounding work area in accordance with the standard.
12 The violation was classified as serious due to the potential for injury
13 or death which could reasonably result. Employees were evacuated to the
14 hospital and treated for smoke inhalation resultant from a fire that
15 occurred at the work site. The proposed penalty for the serious
16 violation is in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS
17 (\$3,500.00).

18 Citation 2, Item 1 charges a "regulatory" violation under Nevada
19 Revised Statute (NRS) 618.383(1). Complainant alleges that the
20 respondent employer failed to carry out the requirements of the written
21 workplace safety program by failing to move combustible materials a safe
22 distance or covering same with a fire retardant material. The violation
23 was classified as "regulatory" and a penalty proposed in the amount of
24 FIVE HUNDRED DOLLARS (\$500.00).

25 Counsel for the Chief Administrative Officer presented evidence and
26 testimony with regard to the alleged violations. Safety and health
27 representative (SHR) Tanisha Solano testified that she inspected the
28 work site of respondent at the Monte Carlo Resort and Casino located in

1 Las Vegas, Nevada on or about May 1, 2008. Ms. Solano was directed to
2 the work site by her employer due to the report of a fire occurring near
3 the roof area and injury to employees of respondent who had been
4 evacuated to a hospital and treated for smoke inhalation. The SHR
5 identified complainant's Exhibits 1, 2 and 3 which included the SHR
6 inspection report, employee statements, and photographs. Ms. Solano
7 testified that after she conducted her inspection and investigation she
8 issued the referenced citations based upon her observations, findings,
9 and conclusions. The SHR testified that employees of respondent were
10 installing a platform davit system (catwalk) that would encompass an
11 interior wall on the roof of the Monte Carlo Resort and Casino. The
12 employees were using various tools, including a "saws-all", angle
13 grinder, and oxygen-acetylene torch. The SHR concluded that a fire
14 started when slag material from the "hot work" operations landed on the
15 lower section of an adjacent wall and traveled to the exterior facade
16 and to several upper floors of the resort hotel and casino. Ms. Solano
17 testified that the standard cited at Item 1(a) requires an employee be
18 assigned to fire watch duty during operations which may create flame or
19 heat that may result in a fire. The SHR concluded that the employee
20 identified to be on fire watch was also doing other work in violation
21 of the specific requirements of the standard.

22 SHR Solano testified as to the alleged violation at Citation 1,
23 Item 2(a). She concluded from her investigation that acetylene torch
24 cutting was being carried out in the presence of flammable compounds.
25 Ms. Solano also testified that the employer should have directed its
26 employees to remove more of the insulation material before cutting a
27 hole in the metal so as to avoid exposure of the flammable material to
28 sparks. She testified that the employer could have also required the

1 use of fire blankets or a spark catching device to protect against
2 ignition.

3 The SHR testified as to Citation 1, Item 3(a) involving 29 CFR
4 1926.352(f). She concluded from her investigation that while employees
5 were cutting through the materials, no precautions were being taken on
6 the opposite side for fire prevention in accordance with the standard.
7 The employees were engaged in acetylene torch cutting on the "floor"
8 area but no one was stationed below nor other fire safety precautions
9 taken by the use of fire blankets or other preventative measures.
10 Sparks and/or slag could fall from the upper area to the lower and
11 result in the hazard of a fire.

12 Ms. Solano testified as to Citation 1, Item 4, referencing 29 CFR
13 1926.352(b). She concluded that the employer failed to ensure that
14 positive means were taken to protect immovable fire hazards from heat,
15 sparks and hot slag. She specifically identified styrofoam insulation
16 material as an immovable fire hazard which was part of the assembly
17 being removed while cutting the metal.

18 At Citation 2, Item 1, Ms. Solano testified there was a violation
19 of NRS 618.383(1) because the employer failed to carry out its own
20 written workplace safety program. She testified that combustible
21 materials under or near the burning operations were to be moved a safe
22 distance or covered with the fire retardant material.

23 Counsel for respondent conducted cross-examination of SHR Solano.
24 She testified that she was told by respondent foreman Pegenau that
25 employee Eisch had been assigned to fire watch. She also testified that
26 Mr. Eisch told her that he kept a water can with him and did not engage
27 in any other work while he was assigned to the fire duty. Ms. Solano
28 also testified that she was not aware that the surrounding approximate

1 eight-foot high wall areas were made of fire resistant wallboard. She
2 stated that she saw no burn or scorch marks on the roof below the
3 platform where the cutting penetrations were occurring. Ms. Solano
4 admitted that cutting the holes larger would not have created a safer
5 condition as she originally believed. On further cross-examination Ms.
6 Solano could not provide any answers as to what the employer might have
7 done in addition to that which occurred to prevent fire hazards other
8 than use of fire blankets around the holes, particularly in the area
9 beneath where penetrations were occurring which was subject of her
10 Citation 1, Item 3(a). Ms. Solano could identify no combustible
11 compounds or materials near the work area such as paints, corrosives,
12 or other "flammable material" as cited at Item 2(a). She testified that
13 the foam insulation was essentially that which she determined to be
14 flammable and subject of protection.

15 Counsel for complainant introduced testimony from respondent
16 employees Pegenau and Eisch.

17 Mr. Pegenau testified that he was the foreman at the job site and
18 designated Mr. Eisch as the fire watch as required by the standard. He
19 stated Mr. Eisch was assigned no other duties during "hot work." He
20 testified that whenever cutting or operations that could create heat or
21 flame were underway, Mr. Eisch carried an approximate three gallon
22 pressurized water can to satisfy the requirements of the standard. Mr.
23 Pegenau testified with regard to stipulated respondent Exhibits A, 1-5.
24 He testified that foam insulation is a flammable material but it usually
25 smolders and melts rather than ignite during contact with flame. He
26 stated that he directed the holes be cut as they were to avoid the
27 hazard of a fall-through by employees and expense in removing a greater
28 section than the job required. He stated that there was a fire

1 extinguisher(s) and pressurized water can readily available on the work
2 site. The dry chemical fire extinguisher was located a ladder climb
3 from the hot working area. The pressurized water can was directly at
4 the specific site of work in the hands of employee Eisch.

5 On cross-examination Mr. Pegenau testified there were no flammable
6 materials in the area; and the adjacent wall was made of a fire
7 retardant substance. There were no paints, corrosives, flammable
8 compounds or dust in the area. There were eight-foot high fire
9 retardant walls to prevent sparks from flying anywhere. He further
10 testified there were no movable flammable materials on the site with the
11 exception of the foam insulation portion of the decking which he
12 directed be cut back far enough to avoid contact with the torch and
13 grinder. He testified that the three gallon pressurized water can was
14 sufficient to handle any smoldering of the insulation and if the
15 employees needed additional fire suppression they could utilize the
16 ladder to obtain the dry chemical fire extinguisher. He testified that
17 in his opinion, after thirty-years in the business, no added fire
18 prevention was needed. There was only one man at a time cutting or
19 grinding, and employee Eisch soaked the area around the cut to wet the
20 insulation and retard the potential for sparks igniting the material.
21 Mr. Eisch directly observed the hot work operations while the cuts were
22 being performed.

23 Witness Michael Eisch testified that he is an employee of
24 respondent and the individual designated on fire watch at the time of
25 the inspection. He described his duties to soak the area before cutting
26 and to douse any smoldering that might occur during the cutting
27 operations. He said he saw no sparks or slag fall onto the roof below
28 during the operations. He testified that no one was stationed on the

1 roof below because he could observe the area from his position above.
2 He saw no spark, scorch or burn marks on the roof below.

3 On cross-examination, witness Eisch testified that he did all he
4 was required to do under occupational safety and health law. There were
5 no flammable materials on the entire platform in the area of work except
6 for the foam insulation portion of the decking being removed. It was
7 addressed by wetting the insulation area, cutting and then watering down
8 anything that may be smoldering.

9 Respondent presented testimony from Mr. Pegenau on direct
10 examination. He testified that the material behind the stucco walls was
11 non-flammable wallboard, no slag or sparks fell to the roof below, he
12 personally observed the entire operation and saw nothing that would
13 require additional fire preventative efforts. He further testified that
14 the 16-gauge decking material being cut could not hold heat long enough
15 to keep sparks alive; nor was there resultant slag material of the type
16 one could expect if cutting through heavier gauge metal. He further
17 testified that he believed the roof to be fire retardant because he saw
18 spent firework shells all over the roof but saw no evidence of burning
19 or scorching. Mr. Pegenau testified that he was unaware of any "spark
20 catcher" device as referenced in the employee materials furnished by
21 respondent. He also testified he and his crew complied with all aspects
22 of the employer safety program excepting utilization of a spark catcher
23 because he was unaware of such a device other than fire retardant
24 blankets.

25 At the conclusion of the hearing the complainant and respondent
26 presented closing arguments.

27 The complainant argued that the employees failed to carry out the
28 employer written safety program due to their lack of knowledge of a

1 spark catcher. He further argued that the employee designated on fire
2 watch had other duties, and that the styrofoam insulation was sufficient
3 evidence of the presence of flammable compounds. He argued that if the
4 hole had been cut larger to peel back more of the foam insulation, the
5 metal cutting would have been a greater distance from the insulation and
6 avoided close contact with the flammable material.

7 Respondent argued that the initial burden of proof upon the
8 complainant is to establish the roof was flammable for any of the
9 standards to apply to the area below. He further argued that all the
10 employees were on fire watch, however Mr. Eisch was specifically so
11 designated. He argued that Mr. Eisch testified under oath that it was
12 his job to be a fire watch and that he utilized the pressurized water
13 can to wet the cutting areas and douse any smoldering that occurred.
14 Mr. Eisch and Mr. Pegenau both testified Mr. Eisch did no other work
15 while hot work was underway. There was no evidence to rebut the
16 testimony of Mr. Eisch or Mr. Pegenau with regard to the fire watch
17 operations. Counsel further argued that the only flammable material
18 that the SHR could identify on cross-examination was the styrofoam which
19 was being partially removed but the employer complied with all
20 applicable fire safety requirements. He argued that photographic
21 exhibits showed that the foam insulation was cut larger than the metal
22 hole to allow metal cutting to occur at a sufficient reasonable distance
23 from the foam. Counsel referenced the SHR's inability to identify any
24 combustible or flammable materials to support citation for violation of
25 the standard where she referenced same with the exception of the
26 styrofoam which was appropriately protected by the respondent employees.

27 The board in reviewing the evidence and testimony finds
28 insufficient facts and competent evidence to establish that the

1 employees of respondent were exposed to the identified hazards due to
2 a failure on the part of the employer to comply with the standards cited
3 in Citation 1, Item 1(a), Citation 1, Item 2(a), Citation 1, Item 4 and
4 Citation 2, Item 1. However the board found sufficient competent
5 evidence to demonstrate the employees of respondent were exposed to the
6 identified hazards due to a failure on the part of the employer to
7 assure compliance with 29 CFR 1926.352(f), referenced at Citation 1,
8 Item 3(a).

9 At Citation 1, Item 1(a), the unrefuted evidence, based upon the
10 sworn testimony of employee Eisch and employee foreman Pegenau, was that
11 Mr. Eisch was specifically designated as the employee to perform fire
12 watch operations. He may have had other duties when no "hot work" was
13 underway that is not regulated by the standard. The burden of proof
14 rests with the complainant under Nevada law (see NAC 618.788(1)). The
15 sworn testimony of the respondent's witnesses was not impeached and
16 appeared credible.

17 At Citation 1, Item 2(a), there is no evidence of any flammable
18 compounds, or materials subject of fire protection at the work site
19 other than the styrofoam insulation component of the decking identified
20 by the SHR and other witnesses. The wetting of the insulation material
21 prior to and during cutting operations satisfied the cited fire
22 prevention standard with regard to protection from identified fire
23 hazards through reasonable means as recognized under occupational safety
24 and health law. Utilization of the three gallon pressurized water can
25 and the testimony describing training, duties and operations, together
26 with the lack of any other flammable materials being identified by the
27 SHR, permits no other finding by the board.

28 At Citation 1, Item 4, the testimony and evidence does not support

1 a violation. A portion of the foam insulation was being removed. The
2 remaining insulation was wetted by employee Eisch. The immovable
3 insulation in the area surrounding the cutting was protected through the
4 wetting operations described in the sworn testimony. The evidence
5 showed that positive means were taken to protect the immovable hazard
6 (remaining insulation) from exposure to flame.

7 At Citation 2, Item 1, there appears to be no basis for violation
8 of NRS 618.383(1) by referencing a lack of compliance with respondent's
9 own safety program. While the questioning over the identification of
10 a "fire catcher" was curious, employees Eisch and Pegenau testified
11 under oath that they sprayed the area subject of work with a fire
12 retardant material (water), which met the standard requirements for fire
13 safety. See Exhibit 1, page 26. The standard provides:

14 "Flammables and Combustibles.

15 . Combustible material must be kept away from
16 steam lines, radiators, heaters, and hot
17 process service lines. Combustible material
18 under or near welding and burning operations
19 must be moved a safe distance away, **or covered
with the fire retardant material. Where this
is not possible,** all sparks and slag must be
contained in an approved spark catcher."

20 The testimony of respondent's employee established that the area
21 near the cutting and torching was sprayed down with water, particularly
22 the styrofoam, prior to the operation and then to douse any ignition
23 that may have occurred.

24 The board found a violation of Citation 1, Item 3(a), 1926.352(f)
25 based upon the specific requirements of the standard. Safety prevention
26 should occur by taking "similar precautions" below the work as that
27 implemented above. At the very least a fire watch person should have
28 been designated below and/or fire retardant blankets placed on the

1 flooring area immediately below the cutting operations. The potential
2 for a spark falling and blowing to another area, or slag being carried
3 by the wind can be reasonably anticipated and subject of prevention
4 under the standard. Simple added employee observation was both
5 reasonable and economically feasible.

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

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

10 To prove a violation of a standard, the Secretary
11 must establish (1) the applicability of the
12 standard, (2) the existence of noncomplying
13 conditions, (3) employee exposure or access, and
14 (4) that the employer knew or with the exercise of
15 reasonable diligence could have known of the
16 violative condition. See Belger Cartage Service,
Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
17 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
18 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
19 (No. 76-1408, 1979); American Wrecking Corp. v.
Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.
2003).

18 A respondent may rebut allegations by showing:

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

23 A "serious" violation is established in accordance with NRS
24 618.625(2) which provides in pertinent part:

25 . . . a serious violation exists in a place of
26 employment if there is a substantial probability
27 that death or serious physical harm could result
28 from a condition which exists or from one or more
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

1 not, with the exercise of reasonable diligence,
2 know the presence of the violation.

3 Based upon the above and foregoing, it is the decision of the
4 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation of
5 Nevada Revised Statutes did occur as to Citation 1, Item 1(a), 29 CFR
6 1926.352(e); Citation 1, Item 2(a), 29 CFR 1926.352(c); Citation 1, Item
7 4, 29 CFR 1926.352(b) and Citation 2, Item 1, NRS 618.383(1), and the
8 proposed penalties denied. However the board finds a violation of
9 Nevada Revised Statutes as to Citation 1, Item 3(a), 29 CFR 1926.352(f)
10 and the proposed penalty of THREE THOUSAND FIVE HUNDRED DOLLARS
11 (\$3,500.00) is confirmed.

12 The Board directs counsel for the Respondent to submit proposed
13 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**
14 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel
15 within twenty (20) days from date of decision. After five (5) days time
16 for filing any objection, the final Findings of Fact and Conclusions of
17 Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND**
18 **HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings of
19 Fact and Conclusions of Law signed by the Chairman of the **NEVADA**
20 **OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final
21 Order of the **BOARD**.

22 DATED: This 3rd day of December 2008.

23 NEVADA OCCUPATIONAL SAFETY AND HEALTH
24 REVIEW BOARD

25 By /s/
26 JOHN SEYMOUR, Chairman