NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY,

Complainant,

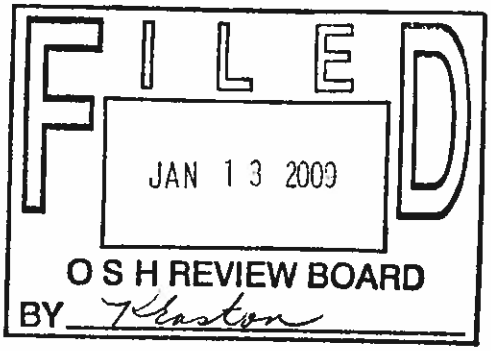
vs.

MARNELL CORRAO ASSOCIATES,

Respondent.

/

Docket No. LV 08-1349



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of December, 2008, in furtherance of notice duly provided according to law, MR. JOHN WILES, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations** (OSHA); and MR. CRAIG MURDY, ESQ., appearing on behalf of Respondent, **Marnell Corrao Associates**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

The complaint filed by the OSHA sets forth allegations of violation of Nevada Revised Statutes as referenced in Exhibit "A", attached thereto. The violation in Citation 1, Item 1, referenced 29 CFR 1926.703(a)(1). The employer was charged with failing to assure that

formwork was erected to be capable of supporting, without failure, all vertical and lateral loads that may reasonably be anticipated to be applied to the formwork. OSHA alleged that employees were exposed to hazard from falling formwork and concrete when a collapse occurred during a concrete pour. Employees sustained injuries due to the collapse from the falling formwork, concrete and related materials. The alleged violation in Citation 1, Item 1, was classified as "Serious" and a penalty proposed in the amount of SIX THOUSAND THREE HUNDRED DOLLARS ($6,300.00).

The employer was additionally charged with a regulatory violation of NAC 618.540(1)(b) at Citation 2, Item 1. OSHA alleged the employer failed to adequately identify, analyze and control hazardous conditions on the worksite related to methods or procedures for concrete pour activities. The regulatory violation at Citation 2, Item 1 was not contested by Respondent.

Counsel for the complainant through Safety and Health Representative (SHR) Nicholas LaFronz presented evidence and testimony as to the violation and appropriateness of the proposed penalty. Mr. LaFronz testified that he conducted an investigation which was initiated at the direction of his supervisors upon information that an accident occurred due to a collapse of concrete formwork at the M Resort construction site in Las Vegas, Nevada on December 21, 2007. Mr. LaFronz testified in furtherance of his accident report and identified photographs all made a part of Exhibit 1 which was stipulated in evidence. He testified from his inspection report that employees of Marnell Corrao Associates (MCA) were involved in a continuous concrete pour at the casino level at the M Resort site. The MCA Director of Safety was informed that a pre-built concrete form identified in the

plans as Table D, had collapsed during the concrete pouring operation and seven employees of MCA were injured as a result of the collapse. Mr. LaFronz testified that the formwork was designed and provided to MCA by Atlas Construction Supply, Inc. (Atlas). Employees of MCA were responsible for erecting and disassembling the equipment in furtherance of the Atlas drawings. The SHR continued to testify and describe the various components involved in the formwork as detailed in the drawings to depict and explain the responsibilities of Atlas as the design professional subcontractor and MCA as the cited contractor involved in the overall erection process. Mr. LaFronz specifically identified a "flyer" as a column mounted table consisting of a pre-built concrete form which is specifically designed and set in place for the pouring of concrete during the building construction procedure. Mr. LaFronz testified that he cited MCA as the general contractor for a violation notwithstanding information as to the actual design provided by Atlas because it would have been reasonable for MCA to further confer with Atlas given previous problems with the drawings and a lack of calculations for the concrete load available at the site for verification. Mr. LaFronz testified that even simple mathmetical calculations for the anticipated weight of the concrete should have warranted questions or concerns by the general contractor, MCA, rather than mere reliance on the expertise of the subcontractor Atlas, as responsible for the design.

Counsel for the respondent conducted cross-examination of SHR LaFronz. The SHR testified that Atlas is a qualified designer and agreed that MCA could rely on Atlas for its expertise and qualifications in designing equipment for concrete forms. He further testified that he had no problem with MCA's shoring erection work until after the

collapse when facts discovered during his investigation should have given MCA reasonable concern to verify the support capabilities of the formwork. Mr. LaFronz testified that it would have been reasonable for MCA to have gone back to Atlas and asked for more engineering and design similar to their having previously requested three separate modifications of Atlas design work based on MCA's concern with various aspects of the design. On further cross-examination Mr. LaFronz admitted that the form collapse was likely due to a mistake made by the subcontractor, Atlas; but notwithstanding same believed it was reasonable for Marnell to see a "red flag" needing, for example, additional supporting devices (handsets) and verification of the concrete load based on engineering calculations.

Respondent counsel presented evidence and testimony, principally through witness Steve Emerson, the onsite supervisor for MCA. Mr. Emerson testified that he walked the site with the designated Atlas representative Mr. Trudeau and raised various questions and issues to determine if everything seemed okay as to the formwork and shoring for the concrete pour. He testified that he discussed various aspects of the formwork with the Atlas representative and believed he could rely upon Atlas expertise based upon the answers provided.

On cross-examination, Mr. Emerson testified that it is a typical practice of MCA to rent shoring, procure design expertise and/or utilize a subcontractor to perform all the calculations and provide the equipment for concrete work. Economy and specialization warrants vesting the responsibility with Atlas or other companies involved in this particular area of the construction business. Mr. Emerson admitted that while discussing aspects of the formwork with Atlas representative Mr. Trudeau, none occurred in the actual bay that collapsed. He further

testified that he told the Atlas representative that there would be 12 inches, rather than the designed 9 inch, concrete slab resultant from the pour. The witness testified that the Mr. Trudeau stated there was ". . . no problem . . ." During continued cross-examination Mr. Emerson testified he did not rely fully upon the Atlas drawings. Three sets of Atlas drawings all differed which required MCA to previously request follow up work including focus on the spacing of support members and other errors in the drawings. The Table D drawings were designed to bear 9 inches and not 12 inches of concrete.

Counsel for complainant and respondent presented closing arguments.

Counsel for complainant argued that the subject case is governed by the multi-employer construction worksite doctrine and that MCA as the general contractor was responsible for exposing its employees to a hazard under the facts, evidence and testimony presented. Counsel argued that respondent should be held responsible unless its actions were determined by the board to be "reasonable" under the evidence submitted such to permit MCA reliance upon subcontractor Atlas and avoid any imposition of liability or responsibility under the standard. Counsel noted that Mr. Emerson testified MCA did not fully rely on Atlas drawings due to repeated previous errors; and that it was reasonable, once it was determined that 12 inches rather than 9 inches of concrete slab would result from the pour, that it should have again asked Atlas to reconsider or revise its drawings. Counsel argued that the testimony showed there were three sets of drawings, all different; and because MCA did not rely on the drawings on three occasions, they should have questioned them again given the dramatic difference between a 9 inch and a 12 inch concrete pour load. Counsel asserted that the decision in this matter, based on the governing legal precedent multi-employer

construction worksite doctrine must be ultimately driven by a test of reasonableness on the part of MCA. Counsel argued that MCA should have been alerted to the problems given the evidence that the layout furnished in the drawings was not followed, e.g. members were too closely spaced, the thickness of the concrete was greater than the design criteria by three inches, the weight calculations were not given, previous drawings were incorrect, and specifically Table D was designed to bear 9 inches not 12 inches of concrete. Counsel concluded by arguing that what MCA did wrong here was fail to act under the reasonableness test as a general contractor on a multi-employer construction site and therefore most appropriate to bear responsibility.

Respondent counsel argued that he agreed the legal test is one of reasonableness and that the OSHA standards do not create a condition of "strict liability". Counsel argued that it was reasonable for MCA to retain Atlas, a recognized expert, to perform all design work and furnish the formwork equipment based upon its recognized expertise. Counsel referenced and argued a federal review commission case which permits a general contractor to rely upon the expertise of a subcontractor and avoid liability under the standards in the instance of hazard exposure to employees. Secretary of Labor v. Sasser Elec. And Mfg. Co., 11 O.S.H. Cas. 2133, 1984 W.L. 34886 (1984). He argued that MCA had gone to Atlas on three occasions when field conditions changed. He asserted that the ANSI permits reliance upon a qualified designer and that Mr. LaFronz testified there was no question of Atlas qualifications in this regard. He further argued that Atlas, through its representative Mr. Trudeau who met on site with Mr. Emerson was made aware of the 12 inch rather than 9 inch concrete and that should have been sufficient notification. Counsel asserts that the crux of the

claim against MCA is that they should have gone to Atlas whenever any changes occurred, even though some of the changes created no harm in the formwork such as location of the handsets as testified by Mr. LaFronz. Counsel concluded his argument by asserting there was no evidence that the design was so deficient that MCA was required to go back to Atlas to satisfy a test of "reasonableness," and that MCA conduct was reasonable enough to avoid liability under the multi-employer construction worksite doctrine. He summarized by stating that general contractors should not "second guess" qualified designers under the law and that it was appropriate and reasonable for MCA to rely upon a qualified expert.

The board in reviewing the facts, evidence and testimony presented relies upon the approximate 30 years of legal precedent developed by the federal courts identified as the multi-employer construction worksite doctrine. The established case law supports the legal enforcement authority and discretion of OSHA to apply the multi-employer construction worksite doctrine at construction sites as recognized previously by this board in its decisions in McClone Construction Company, Docket No. RNO 08-1341, and Reliable Steel Incorporated, Docket No. LV 08-1347.

OSHA authority to apply the multi-employer construction worksite doctrine under the Act has been repeatedly affirmed with respect to at least three classes of employers: **exposing** employers, see, e.g., Bratton Corp., 6 BNA OSHC 1327, 1978 CCH OSHD ¶ 22,504 (No. 12255, 1978), aff'd, 590 F.2d 273 (8th Cir. 1979); Grossman Steel, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976); Anning-Johnson, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (No. 3694, 1976) (consolidated); **creating** employers, see, e.g. Beatty Equip. Leasing, Inc., 4 BNA OSHC 1211, 1975-

76 CCH OSHD ¶ 20,694 (No. 3901, 1976), aff'd, 577 F.2d 534 (9th Cir. 1978); and, **controlling** employers (usually general contractors), see Knutson Constr. Co., 4 BNA OSHC 1759, 1976-77 CCH OSHD ¶ 21,185 (No. 765, 1976), aff'd, 566 F.2d 596 (8th Cir. 1977).

Authority under the multi-employer construction worksite doctrine is supported by the broad purpose of the Occupational Safety and Health Act - "to assure so far as possible every working man and woman in the nation safe and healthful working conditions." See Pitt-Des Moines, 168 F.3d at 983; Knutson, 566 F.2d at 600 n.7; Teal, 728 F.2d at 803; Beatty, 577 F.2d at 537; Brennan v. OSHRC (Underhill Constr. Co., 513 F.2d 1032, 1038 (2d Cir. 1975) (Underhill). An additional purpose of the Act is to encourage the reduction of hazards to employees "at their places of employment" indicating the Act's focus on **making places of employment** safe from work related hazards. See Pitt-Des Moines, 168 F.3d at 983; Underhill, 513 F.2d at 1038. "Once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works in its workplace." See Pitts-Des Moines, 168 F.3d at 983 (quoting Teal, 728 F.2d at 805 (emphasis added)).

The federal review commission and the courts have confirmed enforcement authority under the Act to hold a general contractor liable under the multi-employer construction worksite doctrine "for violations that it could **reasonably** have been expected to prevent or abate by reason of its own supervisory capacity," because of the general contractor's unique position of control over the construction site and authority to obtain abatement. See Grossman Steel, 4 BNA OSHC at 1188, 1975-76 CCH OSHD at p. 24,791 (emphasis added). Three circuits have specifically applied the doctrine to cases involving such **controlling**

employers. See Universal Constr. Co. v. OSHRC, 182 F.3d 726, 727-32 (10th Cir. 1999) (Universal); R.P. Carbone Constr. Co. v. OSHRC, 166 F.3d 815, 817-19 (6th Cir. 1998) (Carbone); Knutson, 566 F.2d at 597-98 (8th Cir. 1977).

The unique position of the general contractor whose main function is to supervise the work of subcontractors gives it the **control** to ensure hazard abatement. See Knutson, 566 F.2d at 599 (general contractors have "the responsibility and the means to assure that other contractors fulfill their obligations with respect to employee safety where those obligations affect the construction worksite"); Universal 182 F.3d at 730 (as a practical matter, general contractor may be the only on-site person with authority to compel OSHA compliance); Carbone, 166 F.3d at 818 (6th Cir. 1998) (it is presumed that a general contractor has enough control over subcontractors to require that they comply with OSHA standards).

It is important to emphasize, however, that the general contractor's liability under the doctrine is not without limits. See McDevitt, 19 BNA OSHC at 1109 n.3, 2000 CCH OSHD at p. 48,779 n.3 (Rogers, Commissioner, noting the liability of a general contractor is based on a **reasonableness** standard and is "far from strict liability"). See Knutson, 566 F.2d at 601 (general contractor's duty depends on what measures are commensurate with its degree of supervisory capacity.)

The board in reviewing the factual evidence and testimony finds that the complainant met its burden of proof to establish the serious violation alleged in Citation 1, Item 1. The testimony of SHR LaFronz and Mr. Emerson confirm that the respondent created and controlled the hazardous conditions which could and did result from falling objects while performing its work task of pouring concrete into the concrete

forms. The unrefuted evidence demonstrated the subject worksite was indeed a multi-employer construction worksite and, accordingly, governed by the longstanding applicable federal court case law previously herein referenced. There was no question as to exposure of respondent employees as well as other employees who had access to the "zone of danger." "Congress clearly intended to require employers to eliminate all foreseeable and preventable hazards." California Stevedore and Ballast Co. v. OSHRC, 517 F.2d 986, 988 (9th Cir. 1975). ". . . this policy can best be effectuated by placing the responsibility for hazards on those who create them." Supra, page 4.

The facts and evidence establish no clear cause for the collapse of the formwork designed by Atlas and subject of placement and utilization by respondent MCA. This board does not create or subscribe to a rule of strict liability, but must recognize the long-standing legal case precedent with regard to multi-employer construction worksite safety. MCA was both a "controlling and an exposing employer." See Knutson Construction, supra and Grossman Steel. Both counsel agree that the crux of this decision is based upon a test of reasonableness. MCA was not careless or negligent in its reliance upon the expertise of Atlas, however in applying a test of reasonableness, the errors in the drawings on the part of Atlas occurring on three occasions, the lack of full reliance by MCA upon Atlas due to, at least in part these failures, the drawing mistakes showing Table D to bear a 9 inch rather than 12 inch concrete load, other errors regarding the spacing of members and/or weight calculations, either erroneous or deficient, all should have driven MCA, an experienced general contractor, well respected in the industry, to recognize the "red flag(s)" and pursue further verification or additional drawings if for no other reason than the substantial

increase to the drawing design formwork to bear 9 inches rather than 12 inches of concrete load. Respondent had "notice" of a hazardous or potentially hazardous conditions based upon the information exchanged by Mr. Emerson with Mr. Trudeau of Atlas.

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. See N.A.C. 618.788(1).
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> All facts forming the basis of a complaint must be proved by a preponderance of the evidence. See Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).
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> To establish a prima facie case, the Secretary (Chief Administrative Officer) must prove the existence of a violation, the exposure of employees, the reasonableness of the abatement period, and the appropriateness of the penalty. See Bechtel Corporation, 2 OSHC 1336, 1974-1975 OSHD ¶18,906 (1974); Crescent Wharf & Warehouse Co., 1 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).

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

> . . . a serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result 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 not, with the exercise of reasonable diligence, know the presence of the violation.

An employer may satisfy an affirmative defense by making reasonable efforts to have the hazard abated, or **by taking other steps as circumstances dictate to protect its employees.**

> ". . . The test for determining an employee's exposure to a hazard is whether it is "reasonably predictable" that employees would be in the **zone of danger** created by a non-complying condition. Kokosing Construction Co., Inc., 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). To be "reasonably predictable," there must be a showing that either by operational necessity or otherwise, including inadvertence, employees **have been or will be** in the

zone of danger. See Fabricated Metal Products, Inc., 18 BNA OSHC 1072, 1074 (No. 93-1953, 1997) See William Brothers Construction, Inc., 2001 OSHD ¶ 32,350, at p. 49,622-49,623. Capform, Inc., 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994)."

The board concludes from a preponderance of credible competent evidence that the complainant met the burden of proof to establish a violation at Citation 1, Item 1 under the multi-employer construction worksite doctrine and the evidence in the record.

Based upon the above and foregoing, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR 1926.703(a)(1). The serious violation is confirmed and the proposed penalty in the amount of SIX THOUSAND THREE HUNDRED DOLLARS ($6,300.00) approved.

It is the further decision of the Nevada Occupational Safety and Health Review Board that a violation of Nevada Administrative Code 618.540(1)(b) did occur as to Citation 2, Item 1. The regulatory violation is confirmed and the proposed penalty of SEVEN HUNDRED FIFTY DOLLARS ($750.00) approved.

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

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by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

DATED: This 13th day of January 2009.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JOHN SEYMOUR, Chairman