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NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

Docket No. LV 08-1350

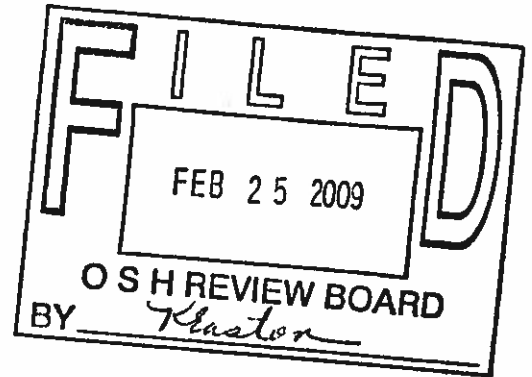
CHIEF ADMINISTRATIVE OFFICER
OF THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION, DIVISION
OF INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY,

Complainant,

vs.

NOORDA SHEET METAL COMPANY,

Respondent.



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 11th day of February, 2009, in furtherance of notice duly provided according to law, MR. JOHN WILES, ESQ., appearing on behalf of the Complainant, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (OSHA); and MR. GARRY HAYES, ESQ., and MEGAN MCHENRY, ESQ., co-counsel appearing on behalf of Respondent, **Noorda Sheet Metal Company**; 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. Prior to commencement of the hearing, counsel stipulated to the withdrawal of Citation 2, Item 1(a), Citation 2, Item 2(a), and Citation 2, Item 2(b).

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1 In Citation 1, Item 1, referencing 29 CFR 1926.1053(b)(1) the
2 employer was charged with failing to ensure appropriate use of a ladder
3 in accordance with the terms of the standard. The alleged violation in
4 Item 1 was classified as "Repeat/Serious" and a penalty proposed, in the
5 amount of THREE THOUSAND DOLLARS (\$3,000.00).

6 In Citation 2, Item 1(b), referencing 29 CFR 1926.502(d)(19) the
7 employer was charged with failing to ensure that employees were
8 appropriately fitted with fall arrest equipment as required by the terms
9 of the standard. The alleged violation in Item 1(b) was classified as
10 "Serious." The penalty was grouped with withdrawn citations.

11 Counsel for the complainant, through Safety and Health
12 Representative (SHR) Nicholas LaFronz presented evidence and testimony
13 as to the violations and appropriateness of the penalties.

14 Mr. LaFronz testified that on or about March 26, 2008 he commenced
15 a site inspection at the Windmill Market construction site in Las Vegas,
16 Nevada. He initially observed employees working on a domed roof
17 approximately 30 feet above ground without appropriate fall protection.

18 SHR LaFronz found employees identified as those of respondent using
19 an extension ladder which was not extended at least three feet above the
20 landing nor secured against displacement with a grab rail. Mr. LaFronz
21 testified that the standard referenced at Citation 1, Item 1, requires
22 side rails of extension ladders to be placed at least 36 inches above
23 the landing surface for stability and to avoid displacement. He
24 observed the spacing between each rung of the ladder and established the
25 extended length to be in violation of the standard. He testified that
26 a serious injury or death could reasonably result from a fall from the
27 verified working height.

28 SHR LaFronz testified that he utilized the operations manual to

1 calculate penalties after providing appropriate credits; but noted that
2 no good faith credit was included because the citation was classified
3 as a "Repeat". A previous violation for unsafe use of a ladder by the
4 respondent under the same standard was confirmed. Mr. LaFronz described
5 the potential for serious injury or death related to a fall from the
6 height of the work area.

7 During the course of inspection, Mr. LaFronz identified three
8 employees of respondent installing metal roofing material at the cap of
9 the dome structure. All wore full body harnesses but none were "tied
10 off." SHR LaFronz testified as to Citation 2, Item 1(b) referencing 29
11 CFR 1926.502(d)(17). One employee was observed with his lanyard
12 clipped back onto the harness D-ring; the other two stated the lanyards
13 were left in their tool pouches. The ledge at the base of the dome was
14 approximately 24 feet above ground level as confirmed to the SHR by the
15 general contractor's superintendent. Upon interviews by the SHR, the
16 subject employees exhibited a lack of adequate training in fall hazard
17 protection. They were also not knowledgeable as to the length
18 requirements of their lanyards nor appropriate fitting of the body
19 harnesses.

20 SHR LaFronz testified that none of the three employees subject of
21 the harness citation were "tied off" while working near the top of the
22 roof dome, however the body harnesses worn were not properly adjusted
23 nor fitted in accordance with the standard. He testified that the D-
24 ring was located in the mid to lower back and not at least near shoulder
25 height, as required by the standard. He explained his testimony and
26 rationale for the cited standard as including a potential for serious
27 injuries during an arrested fall due to the improper lanyard attachment
28 point on the harness.

1 Complainant's Exhibit A included the SHR report and photographic
2 exhibits depicting the violative conditions charged in Citation 2, Item
3 1(b). The exhibit was admitted in evidence by stipulation of the
4 parties.

5 On cross-examination, SHR LaFronz testified in response to
6 extensive questioning of counsel. He stated that the penalty
7 calculations were provided in compliance with the operations manual as
8 to Citation 1, except for the lack of good faith credit. He further
9 testified as to the proposed grouped penalty determination at Citation
10 2, Item 1(b) due to low gravity/probability ratings under the operations
11 manual guidelines for improperly adjusted harnesses. Mr. LaFronz found
12 employer knowledge of the violative conduct based upon constructive
13 notice. The employer assigned the workers to the subject site, a
14 supervisory employee(s) was in charge of the worksite, the company had
15 a long-established presence in the field, and there was a previous
16 confirmed violation of the ladder standard under similar use. Mr.
17 LaFronz compared the photographic and documentary exhibits in
18 complainant's Exhibit A to Exhibit 1 of respondent.

19 SHR LaFronz testified that he requested all evidence of safety and
20 training from respondent's safety manager at the time of the inspection
21 to determine the existence of training, a safety plan, and an
22 effectively communicated and uniformly enforced program. He found the
23 materials furnished by respondent and the employee responses to
24 questions deficient to satisfy employee training requirements.

25 Mr. LaFronz also testified that he considered the potential defense
26 of employee misconduct. He determined that same would not apply based
27 in part upon the lack of his being furnished the training materials
28 requested. He also found that the materials given to him at the time

1 of the inspection were inadequate as to both ladder use and harness
2 adjustment training.

3 Counsel for respondent presented evidence and testimony in defense
4 of Citations 1 and 2. Mr. Lamar Noorda, company president, reviewed the
5 respondent safety policies and practices. He testified as to the
6 company safety program and identified respondent's Exhibit 1 which had
7 been stipulated into evidence by counsel. He testified with regard to
8 the extensive materials contained in Exhibit 1 on proper use of ladders
9 and harnesses. Mr. Noorda also testified as to the company enforcement
10 program regarding employee safety violations. He stated that the
11 foreman on the previous ladder citation project had been terminated,
12 that the current violative employees had been "written up," sent home,
13 and/or suffered reductions in pay, all as documented in Exhibit 1. Mr.
14 Noorda testified there were anchor points for employee tie off located
15 inside the dome, however they were not observed by the SHR because he
16 did not climb to the top of the site and inspect same. He further
17 testified that while he recognized the standard requirements for
18 adjustment of the D-ring on the subject harness, he would continue to
19 look into same as there are differences in styles and fitting of
20 harnesses and it is his intention that the company be compliant with the
21 standards.

22 On cross-examination by complainant's counsel, Mr. Noorda admitted
23 that complainant's photographic Exhibit A page 21 depicted his employees
24 utilizing a ladder in violation of the standard cited at Citation 1,
25 Item 1. He testified that the employees were in violation of the
26 established company safety policy and that their actions constituted
27 employee misconduct for which his company should not be held
28 responsible. Mr. Noorda testified that his job foreman was on the

1 worksite during the morning of the inspection. A journeyman was in
2 charge as acting foreman when the foreman was not on the subject site
3 due to other responsibilities.

4 On continued cross-examination, Mr. Noorda admitted that the
5 photograph showing the harness adjustment on one of his employees at
6 complainant's Exhibit A page 45, when compared with respondent's Exhibit
7 1, page 87, depicted violation of the cited standard; but that different
8 styles of harness allow different applications of the D-ring fitting.
9 Mr. Noorda further testified that he realized the materials furnished
10 to the SHR as requested during the inspection process to support the
11 efficacy of his safety and training program were not inclusive of all
12 the materials provided in Exhibit 1 at the hearing. He attributed the
13 lack of same to excusable conduct by an inexperienced safety manager who
14 was not aware of the extent of materials required and simply did not
15 furnish same. On continued cross-examination, Mr. Noorda testified that
16 all the materials furnished in Exhibit 1 had been assembled by his
17 lawyers and did indeed comprise documentation in existence at the time
18 of the inspection.

19 On closing argument, counsel for complainant argued there was no
20 dispute as to the existence of violations based on satisfaction of the
21 burden of proof and admissions of Mr. Noorda. He argued that the burden
22 of proof upon respondent to prove an employee misconduct defense had not
23 been met under recognized occupational safety and health law. Counsel
24 also argued that the documents furnished in Exhibit 1 differed
25 substantially from those provided to the SHR during the inspection
26 process and demonstrated the respondent's safety program was deficient.
27 He argued that the elements necessary to establish a defense of employee
28 misconduct were not met because the safety program was inadequate and

1 that employee safety training for fall protection was not effectively
2 communicated nor uniformly enforced. He stated Mr. Noorda's testimony
3 that the company safety manager "didn't understand" the OSHA
4 requirements to be furnished in and of itself demonstrates both a lack
5 of a viable safety program and employer awareness of what is required
6 under applicable law. Counsel further argued there was no evidence in
7 the record of previous years uniform safety enforcement. The violative
8 conduct of the employees subject of the citations did not demonstrate
9 an effectively communicated safety program required by the standards.
10 He further argued that the ". . . mere termination of a couple of
11 employees . . ." is not enough; and that respondent should be held in
12 violation of the two cited standards and the proposed penalties
13 confirmed.

14 Respondent counsel presented closing argument. He conceded that
15 while a repeat ladder citation might be appropriately classified as
16 serious, the harness citation was of extremely low gravity and, if
17 violation found, penalties should be reduced based upon appropriate
18 calculations. He further argued the harness standards are ambiguous.
19 The testimony showed harness styles differ and therefore standards
20 controlling location of D-rings or attachment points are not susceptible
21 to fair application for enforcement. Counsel also argued the SHR did
22 not actually request all of the materials included in Exhibit 1 from the
23 safety manager; but that all documentation was available as established
24 by the sworn testimony of Mr. Noorda. Counsel further argued that the
25 defense of employee misconduct had been met and the respondent should
26 not be held responsible for violation of the standards cited.

27 The board in reviewing the facts and evidence presented must
28 reference the law applicable to the conditions at the worksite.

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

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

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

13 A respondent may rebut the evidence by showing:

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

19 A "serious" violation is established in accordance with NRS
20 618.625(2) which provides in pertinent part:

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

The defense of employee misconduct requires:

- 26 (1) The employer must **establish work rules** designated to
27 prevent the violation
- 28 (2) The employer must have **adequately communicated** these

1
2 rules to its employees

3 (3) The employer has taken steps to discover violations

4 (4) The employer has effectively enforced the rules when
5 violations have been discovered.

6 Evidence that the employer effectively communicated
7 and enforced safety policies to protect against the
8 hazard permits an inference that the employer
9 justifiably relied on its employees to comply with
10 the applicable safety rules and that violations of
11 these safety policies were not foreseeable or
12 preventable. Austin Bldg. Co. v. Occupational
13 Safety & Health Review Comm., 647 F.2d 1063, 1068
14 (10th Cir. 1981).

15 When an employer proves that it has effectively
16 communicated and enforced its safety policies,
17 serious citations are dismissed. See Secretary of
18 Labor v. Consolidated Edison Co., 13 O.S.H. Cas.
19 (BNA) 2107 (OSHRC Jan. 11, 1989); Secretary of
20 Labor v. General Crane Inc., 13 O.S.H. Cas. (BNA)
21 1608 (OSHRC Jan. 19, 1988); Secretary of Labor v.
22 Greer Architectural Prods. Inc., 14 O.S.H. Cas.
23 (BNA) 1200 (OSHRC July 3, 1989).

24 The board finds at Citation 1, Item 1, that complainant's burden
25 to prove the violation was met by the unrefuted sworn testimony of SHR
26 LaFronz, the photographic evidence at Exhibit A, and the admissions of
27 Mr. Noorda. Employees of respondent were observed and photographed
28 utilizing a ladder in violation of the standard. Mr. Noorda testified
that a company foreman and/or a designated journeyman acting foreman
were in charge on the site. ". . . (A) supervisor's knowledge of
deviations from standards . . . is properly imputed to the respondent
employer. . ." See Division of Occupational Safety and Health vs.
Pabco Gypsum, 105 Nev. 371, 775 P.2d 701 (1989). The applicability of
the standard, existence of noncomplying conditions, employee exposure
to recognized fall hazards, and employer knowledge (constructive)
confirms the violation. Employer knowledge, foreseeability, and lack
of safety enforcement by supervisory personnel prevents reliance upon

1 the defense of unpreventable employee misconduct to relieve respondent
2 of liability.

3 Evidence of conduct and responses of the interviewed employees, and
4 the presence of the foreman and/or acting foreman, demonstrate a lack
5 of adequately communicated and/or effectively enforced safety rules for
6 fall hazards. The record does not contain competent evidence to excuse
7 the employer from violation after satisfaction of the burden of proof
8 of violation by the complainant and a shift of the burden to respondent
9 to prove the defense of unpreventable employee misconduct. See *Jensen*
10 *Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson*
11 *Corp.*, 10 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

12 An employer has the affirmative duty to anticipate and protect
13 against **preventable** hazardous conduct by employees. *Leon Construction*
14 *Co.*, 3 OSHC 1979, 1975-1976 OSHD ¶ 20,387 (1976). Employee misbehavior,
15 standing alone, does not relieve an employer. Where the Secretary shows
16 the existence of violative conditions, an employer may defend by showing
17 that the employee's behavior was a deviation from a uniformly and
18 effectively enforced work rule, **of which deviation the employer had**
19 **neither actual nor constructive knowledge.** *A. J. McNulty & Co., Inc.*,
20 4 OSHC 1097, 1975-1976 OSHD ¶ 20,600 (1976). (emphasis added)

21 At Citation 1, Item 1, the board finds a violation of the cited
22 standard. The presence of supervisory employee(s) imputed knowledge of
23 the employee violative conduct to the employer. See *A. J. McNulty &*
24 *Co., Inc.*, 4 OSHC 1097, 1975-1976 OSHD ¶ 20,600 (1976); and *Division of*
25 *Occupational Safety and Health vs. Pabco Gypsum*, supra.

26 At Citation 2, Item 1(b), the board finds no violation of the cited
27 standard. The evidence of improper harness adjustment standing alone
28 does not provide a sufficient legally recognized basis for violation

1 under occupational safety and health law. While the tests of standard
2 applicability and existence of non-complying conditions may exist, there
3 was no competent evidence before the board of employee exposure to a
4 hazard or even the potential for same under the **cited standard**. No
5 employee was actually tied off to the improperly adjusted harness while
6 engaged in work. While somewhat anomalous here from the standpoint of
7 overall safety, to find a specific violation of the cited standard under
8 established law, there must be satisfaction of all elements. (*Belger,*
9 *Harvey, American, supra.*) There was no citation for exposure to a fall
10 hazard. Related citations were withdrawn. The evidence in the record,
11 depicts only an improperly fitted harness but not one in use as part of
12 a fall arrest system. Similar to situations of employees wearing
13 harnesses while performing work unrelated to a fall hazard, moving
14 around the project during breaks, for personal conveniences or other
15 activity, a loosely or improperly fit harness standing alone is not
16 sufficient to establish a violation. There was no citation for actual
17 use, by e.g. attachment to a lanyard, or other basis to find a violation
18 for employee exposure to a potential fall hazard due to the improperly
19 adjusted harness. The overall purpose of the harness is to be part of
20 a fall arrest system and provide an attachment point for a lanyard to
21 protect employees from exposure to serious injury or death while engaged
22 in a work task.

23 NRS 618.625(2) provides the basis for finding a "serious"
24 violation. The board concludes the facts and evidence in the record for
25 potential displacement of the ladder in Citation 1 demonstrate the
26 violation to be appropriately classified as serious. The proposed
27 penalty for a serious violation in the amount of \$3,000.00 in a repeat
28 classification could well be subject of an increase due to the gravity

1 of exposure. The board has the legal authority to increase or decrease
2 proposed penalties. See *Long Manufacturing Company, N.C., Inc. v.*
3 *OSHARC and Marshall*, 55 F.2d 903, 918 (8th Cir. 1977); and *Nevada*
4 *Director of Occupational Safety and Health v. Clayburn, Incorporated*,
5 Docket No. 84-280, Filed December 26, 1984, Nevada Occupational Safety
6 and Health Review Board. The review board may confirm a penalty as
7 assessed in the same amount imposed by the Chief Administrator or a
8 lesser or a greater amount. However the board finds the penalty, while
9 minor for the repeat classification of violation, sufficiently
10 reasonable to bring attention and notice to the respondent of the
11 serious nature of potential fall hazards particularly as the respondent
12 has long engaged in an industry where fall hazards are prevalent.

13 The board concludes that there was sufficient proof by a
14 preponderance of evidence to find a violation of the cited standard at
15 Citation 1, Item 1. The defense of unpreventable employee misconduct is
16 not available based upon constructive employer knowledge and
17 foreseeability of the violative conditions. The proposed penalty of
18 \$3,000 is reasonable and confirmed. The board further concludes there
19 was insufficient proof by a preponderance of evidence to find a
20 violation of the standard cited at Citation 2, Item 1(b) and any penalty
21 denied.

22 Based upon the above and foregoing, it is the decision of the
23 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of
24 Nevada Revised Statute did not occur as to Citation 1, Item 1, 29 CFR
25 1926.1053(b)(1). The proposed penalty in the amount of THREE THOUSAND
26 DOLLARS (\$3,000.00) is approved.

27 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**
28 **HEALTH REVIEW BOARD** that no violation of Nevada Revised Statute did

1 occur as to Citation 2, Item 1(b), 29 CFR 1926.502(d)(17).

2 The Board directs counsel for the complainant to submit proposed
3 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**
4 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel
5 within twenty (20) days from date of decision. After five (5) days time
6 for filing any objection, the final Findings of Fact and Conclusions of
7 Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND**
8 **HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings of
9 Fact and Conclusions of Law signed by the Chairman of the **NEVADA**
10 **OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final
11 Order of the **BOARD**.

12 DATED: This 25th day of February, 2009.

13 NEVADA OCCUPATIONAL SAFETY AND HEALTH
14 REVIEW BOARD

15 By /s/
16 JOHN SEYMOUR, Chairman

