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NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

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

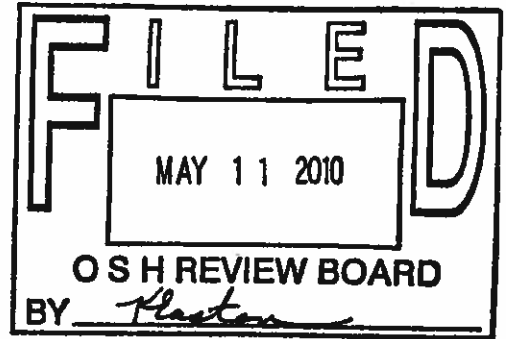
Docket No. LV 10-1392

Complainant,

vs.

THE ORIGINAL ROOFING COMPANY, LLC,

Respondent.



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of March 2010, in furtherance of notice duly provided according to law, JOHN WILES, ESQ., counsel appearing on behalf of the **Chief Administrative Officer of the Occupational Safety and Health Enforcement Section, Division of Industrial Relations (OSHES)**, and MR. MICHAEL GONZALEZ, Safety Representative, appearing on behalf of respondent, **THE ORIGINAL ROOFING COMPANY, LLC**; 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 OSHES sets forth allegations of a violation of Nevada Revised Statutes as referenced in Exhibit "A," attached thereto.

Citation 1, Item 1 charges a violation of 29 CFR 1926.307(c)(2)(i).

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1 The complainant alleged that the employer respondent failed to protect
2 employees from a rotating horizontal shaft without guard protection.
3 The violation was classified as "Serious". The proposed penalty for the
4 alleged violation is in the amount of ONE THOUSAND ONE HUNDRED TWENTY
5 FIVE (\$1,125.00).

6 Counsel for the Chief Administrative Officer presented testimony
7 and evidence with regard to the alleged violation. Safety and Health
8 Representative (SHR) Mr. Greg Winn testified that on or about August 20,
9 2009 he inspected the worksite of respondent on West Cheyenne Avenue in
10 North Las Vegas, Nevada. The respondent was engaged in roofing/flashing
11 work. SHR Winn observed steam emanating from a motorized "roofing
12 kettle." On closer inspection he observed a horizontal rotating shaft
13 without a guard affixed and noted the potential for employee exposure
14 to the hazardous conditions. He testified as to Exhibit "A" in
15 evidence, and particularly photographs at pages 9, 10 and 11 which
16 depicted the exposed unguarded rotating shaft and related chain
17 assembly. He stated the respondent safety representative at the site
18 advised the shaft should indeed be guarded but could not produce or
19 confirm there was any guard available for the machine. Mr. Winn
20 testified the "kettle had been fired up" and operational at the time of
21 his inspection in the early morning.

22 SHR Winn testified he spoke to Mr. Jimenez who identified himself
23 as the employee of respondent in charge of operating the roofing kettle
24 and related equipment. He testified that he conversed with Mr. Jimenez
25 in English and was informed by him that he started the pump on the day
26 of the inspection at approximately 8:20 a.m. after starting the heating
27 element at approximately 6:30 a.m. Mr. Winn further testified as to
28 page 14 of Exhibit 1. He identified the document as a portion of his

1 investigative report which included the written statement of respondent
2 employee Jimenez at the time of the inspection. He responded upon
3 questioning from counsel that Mr. Jimenez signed the report after
4 writing in his own hand that he "started pump about 8:20 a.m., found it
5 did not work, turned pump off and called to have another one brought
6 out."

7 SHR Winn referenced photographic Exhibit 1, page 10 which he
8 testified as demonstrating the unguarded shaft. He described the
9 hazards that could occur when the pump is running without a guard. The
10 hazards included catching of clothing or hands which may come in contact
11 with the rotating shaft. He again referenced the written statement of
12 Mr. Jimenez in evidence and confirmed Mr. Jimenez' verbal
13 representations to him admitting that he (Jimenez) started the pump
14 portion of the unit in the morning without any guard in place nor while
15 wearing any protective eye wear or gloves. Mr. Winn testified that he
16 classified the violation as "Serious" due to the probability of
17 substantial injury to bones, eyes, hands and other body parts. He
18 responded to counsel questions regarding the penalty calculations and
19 referenced page 9 of his report, which included the bases for arriving
20 at the final proposed penalty after giving due credits for the company's
21 small size, good faith, cooperation, and prompt delivery of guard to the
22 worksite. He referenced page 15 which confirmed the unit was taken out
23 of service and his reasons for further reduction of the total penalty
24 assessment accordingly.

25 SHR Winn testified that the employer knew or should have discovered
26 the violation with reasonable diligence. He stated the kettle should
27 have never been brought to the job site without a guard in place.
28 Further, that although the company maintained a safety representative

1 for the project, Mr. Jimenez started the pump without a guard in place
2 which exposed him to the described hazards. He further testified that
3 the lack of guarding was clearly visible from even six feet away and
4 therefore reasonable employer diligence should have resolved the issue
5 before exposure.

6 Counsel for the complainant called Mr. Nestor Jimenez as a witness.
7 Mr. Jimenez requested the assistance of a Spanish speaking interpreter
8 during examination. Counsel inquired as to whether Mr. Jimenez spoke
9 to SHR Winn in English during the inspection to describe how the kettle
10 was used. Mr. Jimenez responded affirmatively to both inquiries. He
11 identified his signature at Exhibit 1, page 14 on the statement given
12 to the SHR. Mr. Jimenez testified in response to questioning that he
13 started the heater element on the date of inspection at approximately
14 6:00 a.m., but did not tell SHR Winn that he started the pump at
15 approximately 8:20 a.m. Mr. Jimenez contradicted his written statement
16 at page 14, Exhibit 1 and denied starting the pump which exposed the
17 unguarded rotating shaft.

18 On cross-examination by respondent safety representative Mr.
19 Rodriguez, Mr. Jimenez testified that he ". . . never turned on the
20 pump." When asked why he turned on the heat if he was not going to
21 utilize the pump, Mr. Jimenez stated that he was going to heat the
22 material and change the hot material from the kettle with the unguarded
23 pump to another to be brought out to the worksite. He further testified
24 that the unit was equipped with a guard but it had been removed on the
25 day of the inspection and was at the jobsite. He concluded response to
26 cross-examination by testifying there was no transfer pipe on the
27 jobsite to permit pumping of the material from the kettle to the roof.
28 He explained that this should show there was no reason to start the pump

1 because there was no piping with which to transport the material from
2 the kettle to the roof.

3 Counsel for respondent did not call any witnesses during the
4 defense because counsel for the complainant had called Mr. Jimenez, the
5 respondent employee as a hostile witness. Accordingly, both counsel
6 presented closing argument.

7 Complainant counsel argued that the case before the board was a
8 simple "he said vs. he said" and that the matter centered on witness
9 credibility and the burden of proof. Mr. Wiles argued that SHR Winn
10 testified under oath that he had interviewed and conversed with Mr.
11 Jimenez in English. Mr. Jimenez was able while on the witness stand to
12 read his statement, which was written in English and signed by him
13 admitting that he "started pump about 8:20 a.m. found it did not work
14 . . ." Counsel argued that now Mr. Jimenez and respondent would have
15 the board believe that he (Jimenez) was confused as to what he wrote and
16 what he told the SHR at the time of the inspection based upon a language
17 barrier as opposed to his translated testimony before the board.

18 Respondent representative Mr. Rodriguez argued there was no need
19 to focus on credibility of the witnesses but rather the facts at the
20 worksite. He referred the board to the fact there was no piping from
21 the kettle to the roof and therefore no reason to start the pump because
22 no material could be transported from the kettle. He argued that the
23 facts demonstrated more accurately what occurred at the worksite in
24 furtherance of Mr. Jimenez' testimony that he did not start the pump,
25 notwithstanding what Mr. Winn testified was said or the written report
26 signed by Mr. Jimenez.

27 In reviewing the testimony, exhibits, and arguments of counsel, the
28 board is required to measure same against the elements to establish

1 violations under Occupational Safety & Health Law based upon the
2 statutory burden of proof and competence of evidence.

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

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

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

18 A respondent may rebut allegations by showing:

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

23 The sworn testimony of SHR Winn was credible and corroborated by
24 the written documentary evidence. Exhibit 1, page 14 contained the
25 written statement of Mr. Jimenez that he in fact started the pump motor
26 at approximately 8:20 a.m. The photographic evidence at page 10
27 demonstrated the rotary shaft on the machine to be unguarded. No guard
28 assembly or component was located by the respondent Jimenez nor the
safety representative Gonzales at the jobsite to support the inference
that one existed for the machine but had been temporarily removed.

Mr. Jimenez testified and Mr. Gonzales argued that the lack of

1 piping from the kettle to the roof corroborated Mr. Jimenez testimony
2 at the time of the hearing in support of there being no need to start
3 the pump due to a lack of any means to transport heated material to the
4 roof. However Mr. Jimenez also testified and Mr. Gonzales argued that
5 the materials in the heated kettle were to be transferred from the
6 kettle to another to be brought to the jobsite. There was no
7 explanation as to how the material would have been pumped from the
8 unguarded kettle to another nor any evidence to corroborate Mr. Jimenez'
9 testimony that a guard was originally on the machine at the jobsite but
10 later removed.

11 The sworn testimony of the SHR is corroborated by the statement
12 written and signed by Mr. Jimenez at the time of inspection. The
13 photographic evidence supports the testimony of the SHR of the violative
14 conditions at the jobsite at the time of the inspection. The weight of
15 evidence establishes a violation by a preponderance.

16 Based upon the above and foregoing, the board concludes that, as
17 a matter of fact and law, the violation occurred and the proposed
18 penalty in the amount of ONE THOUSAND ONE HUNDRED TWENTY-FIVE DOLLARS
19 (\$1,125.00) is reasonable and appropriate.

20 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
21 **REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as
22 to Citation 1, Item 1, 29 CFR 1926.307(c)(2)(i). The violation charged
23 is confirmed and the proposed penalty in the amount of ONE THOUSAND ONE
24 HUNDRED TWENTY-FIVE DOLLARS (\$1,125.00) is approved.

25 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
26 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION,**
27 **DIVISION OF INDUSTRIAL RELATIONS,** to submit proposed Findings of Fact
28 and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**

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

8 DATED 11th day of May, 2010.

9 NEVADA OCCUPATIONAL SAFETY AND HEALTH
10 REVIEW BOARD

11 /s/
12 TIM JONES, CHAIRMAN

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