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,

Complainant,

vs.

PACIFIC COAST STEEL,

Respondent.

_______________________________________/

Docket No. LV 10-1386

FILED
JUN 14 2010
O S H REVIEW BOARD
BY [signature]

D E C I S I O N

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of February 2010 and reconvened on May 12, 2010, 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. KEVIN D. BLAND, ESQ., appearing on behalf of Respondent, **Pacific Coast Steel**, 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.

Citation 1, Item 1 charges a "Serious" violation of 29 CFR

1926.21(b)(2). Complainant alleges that the respondent employer did not ensure employees were trained in accordance with the cited standard for the identified hazards involved at the job site. At a project located at the McCarran Airport in Las Vegas, Nevada employees were performing steel rebar work without training on the procedures required to safely complete the work task. The violation was classified as serious due to the potential for a serious injury or death. The proposed penalty for the Serious violation is in the amount of SEVEN THOUSAND DOLLARS ($7,000.00).

Citation 1, Item 2, charges a "Serious" violation of 29 CFR 1926.703(d)(1). The complainant alleges the employer did not ensure that a steel concrete form structure ("cage") was adequately supported in accordance with the requirements of the cited standard. At a project located at the McCarran Airport in Las Vegas, Nevada, employees were working inside a rebar cage installing U-bars when a failure of the structure occurred injuring employees. The violation was classified as serious due to the potential for serious injury or death. The proposed penalty for the Serious violation is in the amount of SEVEN THOUSAND DOLLARS ($7,000.00).

Counsel for the complainant and respondent presented opening statements.

Complainant counsel asserted that Citation 1, Item 1 requires that employees be trained in work safety for avoidance of hazards recognized in their particular industry. Counsel described the standard cited at Citation 1, Item 2, and the scope and application by referencing 29 CFR 1926.700. Counsel explained the cited standard to apply to various requirements for employee protection from the hazards associated with steel and masonry concrete operations. Counsel described the scope of the standard coverage in anticipation of opposition based upon "applicability" of the cited standard.

Counsel for the respondent presented opening statement and described expected evidence and testimony to establish defenses for "unpreventable employee misconduct" and "applicability" of the standard to the facts and evidence as to respectively Citation 1, Item 1 and Citation 1, Item 2. Counsel explained the general work being performed at the construction site prior to and during the accident.

Counsel for the Chief Administrative Officer presented testimony and documentary evidence with regard to the alleged violations. Safety and Health Representative (SHR) Tanisha Solano testified that she was conducting a comprehensive inspection at terminal 3 of the McCarran Airport facility in Las Vegas, Nevada when she received notification of an accident nearby. She was directed to conduct an investigation and inspection relating to the accident which resulted in the two citations subject of the complaint.

SHR Solano identified Exhibit 1 as her report, photographs and copies of documents obtained from respondent. The exhibit included pages 1-54 and was admitted without objection. The report included the inspector's findings and referenced employees injured as a result of the accident. Ms. Solano described the construction effort involving the building of caisson, rebar structures or "cages". The caissons were being built in a horizontal position for eventual insertion in the ground vertically to accommodate concrete for footings to support columns.

SHR Solano cited the respondent for a violation of 29 CFR 1926.21(b)(2) based upon her determination that employees were not trained with written procedures or special training prior to the commencement of work. She interviewed employees on site after the accident and testified that the employees engaged in assembling and tying the rebar made omissions in the engineered procedures which resulted in a failure and collapse. SHR Solano determined that "U-bars" were added after the rebar was installed contrary to the previous method utilized by the respondent on the site which was to add U-bars while setting what is identified as a "crush ring". She testified that all employees directly involved and interviewed stated they did not comply with the procedure required in the engineered drawings by following "steps" or proper sequence to safely erect the cage. She testified that the hazardous unsafe condition created by the employer was due to the lack of instructing employees in the special procedures to safely construct the cage. Employees were working inside of the cage while constructing same and should have been instructed specifically on the methodology and/or sequence involved in the particular procedures. The employer could have taken reasonable measures to avoid the hazard and resultant serious injuries. She described those measures to include meaningfully instructing the employees on the specific procedure, sequence and methodology. Ms. Solano testified that during her interviews she spoke to several individuals, including respondent employees, the safety director, two safety officers, the job foreman and superintendent. She inquired how the cage sequence should have occurred. Employee Miller drew a sketch of how he believed the construction process should have occurred. The sketch as admitted in evidence as part of Exhibit 2, pages 18-21. Pages 18 and 19 depict the sketch by respondent employee Miller showing the proper way to build the structure which would have avoided the hazard, collapse, injuries and citations.

SHR Solano further testified that no employees were given hand drawings, sequencing steps or special procedure training based upon information she obtained from employee interviews and statements. She referenced page 26 to 32 of the Exhibit 2, including the statement and drawing of respondent employee Miller. She testified that if this drawing had been given to the employees the hazard and accident would have been avoided. The drawing and evidence at page 22 were admitted without objection to demonstrate what SHR Solano testified to be the correct way to construct the cage assembly.

SHR Solano testified the penalty assessed was appropriate because of the high severity and probability of serious injury or death. She testified the employer was aware of the hazards as employees Grismanausks, Miller and Roberts were all supervisory employees which imputed their awareness to the respondent to establish "knowledge".

SHR Solano continued her testimony in furtherance of Citation 1, Item 2, 29 CFR 1926.703(d)(1). She described the cage assembly which collapsed as being inadequately supported in violation of the cited standard. She further testified that the standard applies to the work underway because the work involved reinforcing steel and was within the scope of chapter of 29 CFR 1926.700 and the cited subsection.

Ms. Solano testified that all of her interviews demonstrated that the cage structure would ultimately be placed in a vertical position when in place and therefore the standard governing vertical structures was applicable to the facts of the violation. She testified with regard to Exhibit 1, page 18, a photograph of the partially completed cage. She pointed to the vertical and horizontal "U-bars" which were placed throughout the inside of the "crush ring". She described the problem as depicted and the hazard which caused or contributed to the accident as due to failure to follow the sequencing or steps in the assembly process such that the weight of the cage collapsed upon itself. She testified to a lack of employee training in the steps or sequencing required to safely complete the assembly, and also lack of support in the assembly itself due to the incorrect application of the steps performed by employees inside the cage. She testified that the combination of those failures constituted the essential bases for the violations and citations.

Ms. Solano testified that supervisory employee Miller was on the site the day of the accident; and superintendent Roberts and general foreman Grismanauskas were on the site daily. She further testified that when the general foreman was away supervisory employee Miller was designated as the individual in charge. She testified that in her opinion involvement by any one of the supervisory employee representatives satisfied issues of employer knowledge. She further testified the standard requires ". . . adequate support . . . to prevent collapse . . ." Knowledge as to the sequencing for U-bar assemblies to be placed before "loading" rebar was all within the knowledge of the respondent engineers, supervisory personnel and experienced employees which demonstrated the feasibility for a safe erection process.

Counsel for the respondent conducted cross-examination of SHR Solano. The SHR admitted there was no requirement in the standard for "written" instruction on hazard avoidance and not a violation as such. She testified the Miller drawing/sketch, Exhibit 2, page 3, depicted the correct method for erection.

Counsel inquired of SHR Solano as to whether she was provided evidence of general hazard recognition training for injured employees Perez and Rodriguez. SHR Solano responded affirmatively. Ms. Solano testified the cage structure involved in the collapse was to be ultimately erected vertically. She further testified that the respondent may not be the actual company to erect the cage vertically but the standard involving vertical assemblies was still applicable to the structure being built for eventual vertical use.

Mr. Jose Perez testified he is a bilingual journeyman ironworker and member of the local ironworkers union. (Pursuant to stipulation of counsel for complainant and respondent, respondent witness Perez was permitted to testify out of order at the time of presentation for complainant's case.) Mr. Perez testified he received respondent safety training, OSHA 10 rigging training and also safety training for rebar through his union apprenticeship program. He testified that he had been instructed on the identification of workplace hazards involved in cage construction, including measures to prevent roll or collapse. He testified he was trained by the respondent company before the accident. Mr. Perez further testified that he did not complete the U-bar assembly inside the cage before loading the rebar any different from the previous day and/or trained practice. He testified that cage U-bar configurations can be different. He described alternatives as a "wagon wheel" or "star" support system as opposed to a "tic-tac-toe" method. He testified that the various configurations require similar but different steps to construct the cage. He said the proper process was not followed, although he had been made aware of the special sequence method.

Respondent Exhibit A was partially admitted to demonstrate the attendance record of Mr. Perez at a safety tailgate meeting.

Counsel for the complainant cross-examined Mr. Perez on portions of his testimony. Mr. Perez testified that either of the described U-bar assembly methods should have been okay to hold the assembly. He further testified that he ". . . didn't pay attention to hazards on the day of the accident . . . but that he did not take a shortcut . . . he was just trying to get the job done . . . ." He testified he has built cages for 20 years and was trained but on the day of the accident he simply did it differently. He further testified that he did not remember if Mr. Miller ever told him to put in the U-bars first on the day of the accident.

On re-direct examination, Mr. Perez testified that Mr. Miller was not his "boss" just another ironworker. He further testified that the foreman was only on the job in the morning and that neither the foreman nor Mr. Miller ever told him to skip any steps in the assembly procedure. On follow up questioning, Mr. Perez testified that he could have placed the U-bars according to the sequence and pattern he knew to be correct but he chose not to, although understood it was hazardous to effectuate the assembly differently.

Evidence and testimony were presented by Mr. Kenneth Miller, respondent employee. He testified that he is journeyman ironworker and the lead man on the job the day of the accident. He confirmed that the general foreman looked to him for responsibility in his absence. Mr. Miller testified that the crew on Tuesday, the day of the accident, was the same as Monday to his recollection, or otherwise made up of individuals experienced in cage construction. He testified that on the previous day the crew followed the sequencing steps as instructed but had no idea the step process in the U-bar work would not be followed on the second day, which was the day of the collapse.

Respondent presented its case after the conclusion and submission of the case by complainant.

Counsel presented clarifying Exhibits 1 and 2 and witness testimony from Mr. Sean Roberts. The witness identified himself as a three and one-half year employee of respondent, the general field superintendent and journeyman ironworker for 12 years. He further testified that he had completed a three year apprenticeship program, including safety training, through his local union. He worked on approximately 1,000 "cages" as an ironworker and was superintendent on the day of the accident. He further testified that neither Mr. Perez nor Mr. Miller were supervisors, explaining that neither are paid for that role; but they were experienced "lead" employees who knew the job tasks and relied upon by him to inform the crew as appropriate. He testified that the action occurred because the cage "racked" which means it ". . . rolled over on itself as opposed to collapsing upon itself . . ." He further testified that different hazards exist for **vertical** as opposed to **horizontal** structures. Mr. Roberts testified to conducting various and extensive safety meetings and stated he documented all of them.

On cross-examination Mr. Roberts testified he was on the site the day of the accident but not present at the actual time it occurred. He further testified as to the use of the term "vertical bars" and then described them as being fabricated in a horizontal position but ultimately subject of erection vertically. He testified he spoke to employees Perez and Miller a few days before the accident about the wagon wheel or star pattern versus the tic-tac-toe pattern and expected them to convey this information to other members of the crew. He further testified as to the drawing at page 31 of Exhibit 2. He stated that he saw the drawing after the accident when the OSHA representative was at the site but never gave the employees a similar drawing which related to the change of the interior bar configuration. He testified that he had explained the correct pattern to his employees. He confirmed that the sequence of fabrication is very important to avoid hazards. He further testified that he told two employees to convey his instruction for fabrication to the other employees. He believed they understood his instruction as Mr. Miller drew it correctly later for the OSHA inspector which became part of Exhibit 2. He further testified that both employees Perez and Miller were foreman qualified, and had dealt with this type of work before even though not paid on this job as supervisors.

On follow up board questioning Mr. Roberts testified that if the procedures he explained had been followed as instructed the caisson would not have "racked" (failed). He further testified that he did not go directly to the foreman and give specific instructions on the pattern changes nor personally instruct Mr. Perez. Due to demands at many other jobs and with only two foremen, he went directly to the lead men who were building the caissons and expected his instructions to be carried forward to the full crew.

At the conclusion of the evidence and testimony both counsel presented closing arguments.

The Complainant argued that violation of the cited standard at Citation 1, Item 1, was proven through satisfaction of the burden of proof by a preponderance of evidence based on testimony and evidence that the employees were not trained for the ". . . particular assembly prior to the work task." He further argued that the standard at Citation 1, Item 2 is **applicable** as described in the overall scope at 29 CFR 1926.700 as same relates to the subparts for the type of work being performed. He argued the standard covers reinforcing steel and concrete construction for structures which are vertical notwithstanding assembly on the ground in a horizontal fashion. Counsel argued that just because something is constructed in a horizontal fashion but the eventual completed product is to be ultimately erected vertically, does not mean the cited standard is inapplicable to the facts and require dismissal of the violation. He argued that to do so would violate well established case law prohibiting standards to be interpreted to reach absurd results. Counsel further argued the plain meaning of the standard and reasonable interpretation accordingly.

Complainant counsel argued the accident could have been prevented by proper sequencing of the tie-off pattern if the employees had been made aware of same. He argued that a change was made in the sequencing, i.e. the tie-off pattern and the steps to be taken, but the change was not **adequately communicated** to the employees. He argued that the employer supervisory personnel, and therefore the employer by imputation, should have known the risk hazards and perhaps drawn a diagram or taken other steps to assure the proper pattern and sequencing. Counsel pointed to complainant Exhibit 3, page 18, the photographic evidence, depicting a view of the "tic-tac-toe" pattern and asked how, with adequate supervision to assure the effectuation of a methodology which was subject of change, could anyone miss seeing what is clearly the incorrect pattern. One is a "tic-tac-toe" design, the other a "star or wagon wheel" pattern and clearly observable from a distance to the plain eye.

Counsel argued the employer did not assure adequate support of the structure and did not communicate changed instructions adequately or appropriately for safety and compliance with the standards cited and that the violations should be upheld.

Counsel argued no defense of unpreventable employee misconduct is available under the established case law because the employer failed to "adequately communicate" the safe methodology to perform the work task. Further, the supervisory employees and therefore the respondent by implication did not take steps to discover the pattern which could be plainly observed as demonstrated in Exhibit 3, page 18.

Counsel argued as to Citation 1, Item 1, that the employer failed to ensure that employees were trained in the safe and proper method to complete the work task. Employer knowledge of the new method of construction was established. To not provide the working employees with the known particular information or specifically train them for the change constituted the violation. The employer representative merely told an employee what to do and left it at that. The employer action constituted a violation of training for a change of procedure developed by the respondent engineers. A simple special meeting, drawing review, or brief training session could have assured a safe method to complete the steel work.

The respondent presented closing argument and asserted the defenses of unpreventable employee misconduct and lack of cited standard applicability.

At Citation 1, Item 1 counsel argued that the requirements of the specific standard and the employer's duty did not require anything more than assurance of safety training in avoidance of risk hazards within the subject industry. Counsel argued the employer respondent had done everything it could have done. The accident occurred and employee Perez was seriously injured. Mr. Perez testified that he knew and understood what he was supposed to do but did not act accordingly. Counsel argued that employee Miller testified that he had been instructed in the cage construction, that he attended safety meetings and had ". . . lots of written training . . .". Just because there was no written diagram is not evidence of a failure of the respondent to train. Counsel argued that all employees were well trained, experienced, and knew what they were supposed to do; and the employee witnesses presented testimony accordingly. He said there was no requirement in the standard for a "written" instruction, and the superintendent's verbal instructions were sufficiently communicated to effectively train the responsible employees. He further argued that even if employees had received written instructions, there is no assurance they would have followed that any more than the verbal instructions.

At Citation 1, Item 2, respondent counsel argued that the standard does not apply to the facts and being inapplicable should be dismissed according to the governing law. He argued there are different hazards in dealing with vertical and horizontal structures. He further argued that because the respondent was cited for only a vertical violation, the complainant did not meet the burden of proof under the established law. He argued there was indeed an accident but employee carelessness occurred on the part of trained and experienced employees. The respondent should not be held to a higher degree of responsibility than the law requires. Counsel concluded with requesting that the board not blame the employer for employees making poor decisions on a single given day. The burden of proof is upon the complainant. The SHR was not clear in her testimony. It is absurd to take a standard that specifically applies to vertical work and apply it to horizontal conditions.

The board in reviewing the facts, documentation, testimony and other evidence must measure same against the established applicable law developed under the Occupational Safety & Health Act.

A serious violation can be shown under Nevada occupational safety and health law in accordance with Nevada Revised Statute (NRS) 618.625(2) which provides in pertinent part that:

> ...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 the place of employment unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation.

N.A.C. 618.788(1) provides:

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator.
>
> 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 OSHC ¶16,958 (1973).
>
> 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).

The sworn testimony of SHR Solano and the exhibits in evidence, establish a *prima facia* case of violation for Citation 1, Item 1. The evidence demonstrates that while the employer did provide general safety training to its employees who were also subject of overall training and experience through their union membership, particular facts occurred at the job site which changed procedure and created known hazards which could have been avoided. The changes in methodology, steps and/or sequencing of the erection process created a particularly hazardous condition and should have been **adequately, effectively and meaningfully** communicated to the exposed employees as part of respondent's safety training and assurance to compliance with company work rules.

The evidence demonstrates a *prima facia* case of violation at Citation 1, Item 2 for lack of assurance that the structure was adequately supported. Given the new changes to the pattern and sequencing, imposing a brief meaningful training session on the methodology developed by the engineers and management personnel would have prevented hazardous conduct by the employees and avoided the recognized risk of a collapse or failure of the cage structure.

Respondent counsel argued that if any violations are established, they should be subject to the defense of unpreventable employee misconduct. However, the federal courts and established OSHRC case law have provided that for an employer to prevail on the defense of unpreventable employee misconduct, the employer must prove and meet its burden of proof by a preponderance of evidence that due to a thorough and adequate safety program which is adequately communicated and effectively enforced, the conduct of its employees in violating the policy was unforeseeable or an isolated event.

> Evidence that the employer effectively communicated and enforced safety policies to protect against the hazard permits an inference that the employer justifiably relied on its employees to comply with the applicable safety rules and that violations of these safety policies were not **forseeable or preventable**. Austin Bldg. Co. v. Occupational Safety & Health Review Comm., 647 F.2d 1063, 1068 (10th Cir. 1981). (emphasis added)
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> When an employer proves that it has effectively communicated and enforced its safety policies, serious citations are dismissed. See Secretary of Labor v. Consoldated Edison Co., 13 O.S.H. Cas. (BNA) 2107 (OSHRC Jan. 11, 1989); Secretary of Labor v. General Crane Inc., 13 O.S.H. Cas. (BNA) 1608 (OSHRC Jan. 19, 1988); Secretary of Labor v. Greer Architectural Prods. Inc., 14 O.S.H. Cas. (BNA) 1200 (OSHRC July 3, 1989).

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

Mr. Roberts was an admitted supervisory employee of respondent. Employees Miller and Perez were "lead men" and effectively supervisory personnel, recognized by the other employees and superintendent Roberts as such. Actions of supervisory personnel are imputed to the respondent employer under occupational safety and health law. This well established precedent was confirmed by the Nevada Supreme Court which provided that "... a supervisor's knowledge of deviations from standard building practices is properly imputed to the respondent ..." See *Division of Occupational Safety and Health v. Pabco Gypsum*, 105 Nev. 371, 775 P.2d 701 (1989).

The burden of proof shifts to the respondent to establish the defense of unpreventable employee misconduct by a preponderance of evidence after the establishment of the *prima facia* case of violation. The elements required for the defense of unpreventable employee misconduct are:

(1) The employer had established work rules designated to prevent the violation

(2) The employer had adequately communicated these rules to its employees

(3) The employer had taken steps to discover violations

(4) The employer had effectively enforced the rules when

violations have been discovered.

See *Jensen Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10 OHSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

> These cases make clear the existence of an employer's defense for the unforeseeable disobedience of an employee who violates the specific duty clause. However, the disobedience defense will fail if the employer does not effectively communicate and conscientiously enforce the safety program at all times. Even when a safety program is thoroughly and properly conceived, lax administration renders it ineffective. P. Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 110-111 (1st Cir. 1997). Although the mere occurrence of a safety violation does not establish ineffective enforcement, Secretary of Labor v. Raytheon Constructors Inc., 19 O.S.H.C. 1311, 1314 (2000) the employer must show that it took adequate steps to discover violations of its work rules and an effective system to detect unsafe conditions control. Secretary of Labor v. Fishel Co., 18 O.S.H.C. 1530, 1531 (1998). Failure to follow through and to require employees to abide by safety standards should be evidence that disciplinary action against disobedient employees progressed to levels of punishment designed to provide deterrence. *Id.* See also, Secretary of Labor v. A&W Construction Services, Inc., 19 O.S.H.C. 1659, 1664 (2001); Secretary of Labor v. Raytheon Constructors Inc., 19 O.S.H.C. 1311, 1314 (2000). A disciplinary program consisting solely of verbal warnings is insufficient. Secretary of Labor v. Reynolds Inc., 19 O.S.H.C. 1653, 1657 (2001); Secretary of Labor v. Dayton Hudson Corp., 19 O.S.H.C. 1045, 1046 (2000). Similarly, disciplinary action that occurs long after the violation was committed may be found ineffective.

In furtherance of the tests and recognized case law, while the respondent employer did establish general work rules designed to prevent the violation and maintain a safety program, it failed to effectively inform employees of recent work changes to avoid violation. Respondent did not **adequately communicate** changes in work practice to its employees for safely carrying out the job. Further the employer did not take steps to **discover the violations** which were easily observable through any supervisory representative even passing by the construction work which would have clearly demonstrated utilization of the incorrect tying pattern different from that determined by the company engineers and supervisory personnel. The defense of unpreventable employee misconduct must fail because the violation and accident were readily forseeable and reasonably preventable. Neither adequately communicated nor meaningfully enforced work rules were effectuated. For something as serious as the hazard to which the employees were exposed, there should have been particular work task job training as part of the safety training communicated to employees wherein a change from the previous days process occurred. Had that change been adequately communicated and enforced, there is reasonable probability that no accident or injuries would have occurred. The employer knew or should have known of the risks/hazards and effectively communicated training for same. Knowledge is imputed to the respondent employer through the supervisory personnel.

At Citation 1, Item 2, the board finds the arguments regarding inapplicability of the standard would result in an absurd interpretation of the cited standard. Respondent's position that no vertical structure was involved here because the work process took place in a horizontal position, would defy the plain meaning of the scope and intent of 29 CFR 1926.700 and the subparts. A fundamental canon of statutory interpretation commonly known as the "plain meaning rule" holds that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms. *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1916) (citations omitted). *Rodgers v. Rodgers*, 110 Nev. 1370, 1373, 887 P.2d 269, 271 (1994) (words in statute should be given their plain meaning unless spirit of act is violated.) *Sheriff v. Encoe,* 110 Nev. 1317, 1319, 885 P.2d 596 (1994) (proper construction of statute is legal question rather than factual question). *Neal v. Griepentrog,* 108 Nev. 660, 664, 837 P.2d 432, 434 (1992) (words in statute should be given their plain meaning unless this violates spirit of act). The recognized hazard of a vertical cage structure being assembled horizontally considering the potential for rolling, racking or collapsing must be that for which the standard is intended to apply and thus control to assure the safety of employees in the work place.

The board finds that the complainant met the required burden of proof by a preponderance of evidence to establish violations of the cited standards. The respondent did not rebut the evidence of violation to establish defenses of unpreventable employee misconduct or the inapplicability of the cited standard.

Based upon the above and foregoing, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that violations of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR 1926.21(b)(2), and Citation 1, Item 2, 29 CFR 1926.703(d)(1). The violations were appropriately classified as serious and the proposed penalties of SEVEN THOUSAND DOLLARS ($7,000.00) for each violation for a total of FOURTEEN THOUSAND DOLLARS ($14,000.00) are reasonable and confirmed.

The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION, 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 by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

DATED: This 14th day of June 2010.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
TIM JONES, Chairman