

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD

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3  
4 CHIEF ADMINISTRATIVE OFFICER  
5 OF THE OCCUPATIONAL SAFETY AND  
6 HEALTH ADMINISTRATION, DIVISION  
7 OF INDUSTRIAL RELATIONS OF THE  
8 DEPARTMENT OF BUSINESS AND  
9 INDUSTRY,

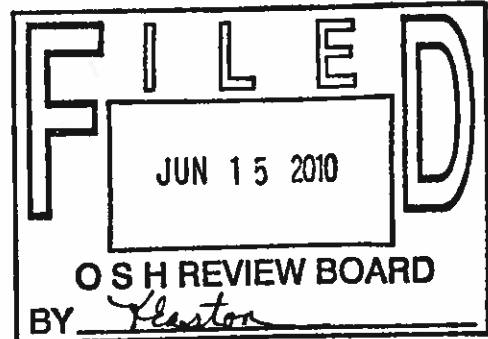
Docket No. LV 10-1378

Complainant,

vs.

10 TRIPLE J TRENCHING,

11 Respondent.



12  
13 DECISION

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**  
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 10<sup>th</sup> day of February  
16 2010 and continued to May 11, 2010, in furtherance of notice duly  
17 provided according to law, JOHN WILES, ESQ., counsel appearing on behalf  
18 of the **Chief Administrative Officer of the Occupational Safety and**  
19 **Health Enforcement Section, Division of Industrial Relations (OSHES),**  
20 and MALANI KOTCHKA, ESQ., appearing on behalf of respondent, **TRIPLE J**  
21 **TRENCHING;** the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds  
22 as follows:

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

25 The complaint filed by OSHES sets forth allegations of violations  
26 of Nevada Revised Statutes as referenced in Exhibit "A," attached  
27 thereto.

28 Citation 1, Item 1(a) charges a violation of 29 CFR 1926.21(b) (2).

1 The complainant alleges that the employer respondent failed to instruct  
2 each employee in the recognition and avoidance of unsafe conditions and  
3 the regulations applicable to the work environment. The violation was  
4 classified as "Serious". The proposed penalty for the alleged violation  
5 is Two Thousand Eight Hundred Dollars (\$2,800.00).

6 Citation 1, Item 1(b) charges a violation of 29 CFR 1926.651(c)(2).  
7 The complainant alleges there were no safe means of egress from a trench  
8 excavation as provided by the cited standard. The violation was  
9 classified as "Serious". The penalty was grouped with the penalty  
10 proposed at Citation 1, Item 1(a).

11 Citation 1, Item 2 charges a violation of 29 CFR 1926.652(a)(1).  
12 The complainant alleges that an employee in an excavation was not  
13 protected from cave-ins by an adequate protective system designed in  
14 accordance with the cited standard. The violation was classified as  
15 "Serious". A penalty was proposed in the amount of Two Thousand Eight  
16 Hundred Dollars (\$2,800.00).

17 Counsel for the complainant and respondent stipulated to the early  
18 presentation of respondent witness Mr. Ritchie Clifford, to accommodate  
19 hearing, travel and work schedules of the subject witness. Mr.  
20 Clifford, the superintendent of respondent, identified respondent's  
21 Exhibit A admitted in evidence as a company warning notice. Mr.  
22 Clifford testified that Mr. Mota, an employee of respondent, was  
23 photographed in an unprotected trench excavation as charged in Citation  
24 1. Mr. Mota was reprimanded through the company warning notice  
25 procedure for being in a trench without shoring on April 30, 2009. The  
26 warning notice was dated May 1, 2009. Mr. Clifford testified Mr. Mota  
27 admitted to him that he entered the excavation without permission or  
28 direction and did so in violation of company work rules.

1 Mr. Clifford testified that he conducted a meeting on May 1, 2009  
2 and employees Mota, Fong and Russell attended wherein he reviewed with  
3 the subject individuals the issue of entering unprotected excavations  
4 and advised they would be disciplined by days off or termination if any  
5 such conduct occurs. He testified that he specifically informed Mr.  
6 Mota that he would be disciplined with a more severe penalty of  
7 termination if his conduct was ever repeated.

8 Mr. Clifford identified respondent Exhibit B as a company video of  
9 trench safety training. He testified that employee Mota was required  
10 to attend a showing of the safety training video. He further testified  
11 that, as superintendent, he conducted safety meetings weekly on the job  
12 site.

13 Counsel for the Chief Administrative Officer presented testimony  
14 and evidence with regard to the alleged violations. Safety and Health  
15 Representative (SHR) Ms. Tanisha Solano testified that on or about April  
16 2009 she conducted an inspection of the respondent's construction work  
17 site in Las Vegas, Nevada. Exhibit 1, is the SHR narrative report,  
18 consisting of approximately 43 pages. Exhibit 2, comprises 18  
19 photographs. Upon arrival on the worksite, Ms. Solano introduced  
20 herself to Mr. Hector Fong, the company foreman, and asked to inspect  
21 the excavated trench. Upon walking to the end of the trench she  
22 observed respondent employee Mota in the trench at a depth greater than  
23 five feet as depicted at photographic Exhibit 2, page 11.

24 SHR Solano interviewed Mr. Mota after observing him in the trench.  
25 She testified that he informed her that he had received no training for  
26 work in the trench, although he had taken an OSHA 10 course himself in  
27 order to obtain more knowledge and information. Exhibit 1, pages 34 and  
28 35, were identified as the SHR notes of her conversation with Mr. Mota.

1 Page 38 of her report contains a statement from Mr. Mota furnished by  
2 the company.

3 Based upon observations, photographs and discussions with Mr. Mota,  
4 SHR Solano cited the respondent for a violation of 29 CFR 1926.21(b)(2)  
5 at Citation 1, Item 1(a). She testified that after interviewing  
6 employee Mota and requesting documentation from respondent that was not  
7 forthcoming, she believed the employee was not trained by the respondent  
8 in the recognition and avoidance of unsafe conditions applicable to his  
9 work environment in the excavated trench. Ms. Solano classified the  
10 violation as Serious based upon her opinion that without proper training  
11 an employee cannot recognize dangers from which to protect himself. She  
12 identified and described the hazards of working in an unprotected trench  
13 approximately 11 feet in depth.

14 At Citation 1, Item 1(b) referencing 29 CFR 1926.651(c)(2), Ms.  
15 Solano testified there were no safe means of egress for employee Mota  
16 from the trench excavation as proscribed by the standard. She testified  
17 that the employer must ensure that specified means of egress are  
18 available to an employee so as to require no more than 25 feet of  
19 lateral travel to exit. SHR Solano observed and described employee Mota  
20 working inside a trench excavation approximately 11 feet deep, 10 feet  
21 wide and 175 feet in length. There was an earthen ramp observed in the  
22 trench due to the graded slope toward the deepest point. The SHR  
23 testified Mr. Mota would have had to travel over 75 feet at hazardous  
24 depths before exiting the trench. The SHR observed a ladder on top of  
25 a concrete box near the end of the trench where the employee was  
26 observed working. She observed no proscribed means of egress in place  
27 for the employee to exit safely. When employee Mota was observed in the  
28 trench by the SHR and foreman Wong, the latter instructed Mr. Mota to

1 get out of the ditch by walking from same utilizing the dirt ramp  
2 created by the sloping. Ms. Solano estimated 75 feet of walking  
3 required to exit the trench. Based upon her estimate of the length of  
4 travel required to exit utilizing the ramp, she cited the respondent for  
5 the violation at Citation 1, Item 1(b), classified the violation as  
6 serious, and grouped the proposed penalty with Citation 1, Item 1(a).

7 SHR Solano testified as to Citation 1, Item 2 referencing 29 CFR  
8 1926.652(a)(1). She observed employee Mota was not protected from a  
9 cave-in hazard while in the excavation. She determined the soil  
10 material at the site was Type C and therefore unstable. Mr. Fong, who  
11 identified himself as the job designated "competent person" concurred  
12 in the Type C soil classification.

13 SHR Solano testified that during her inspection she requested  
14 information to establish employee training for work in excavations but  
15 nothing was forthcoming from the respondent. She identified page 38 of  
16 Exhibit 1 to be a statement provided by the respondent signed by  
17 employee Mota verifying his observation of the safety video, but could  
18 not recall when the statement was provided to her, i.e. during or after  
19 the inspection. She testified at Exhibit 2, page 18 that the "arrows"  
20 in the photograph depict tools in the excavation to establish depth. By  
21 referencing three shovels and estimating that a shovel handle is  
22 approximately five feet long, she determined the trench was over five  
23 feet deep. Ms. Solano testified she did not actually measure the trench  
24 with any tape or device. She testified that Mr. Fong told her the  
25 trench was approximately six feet deep where the shovels are shown in  
26 the photo. Ms. Solano testified that she did not feel it necessary to  
27 actually measure the depth of the trench and relied on the photos, her  
28 estimations and Mr. Fong's verbal response.

1 Counsel for respondent conducted cross-examination of SHR Solano.  
2 She testified on questioning that a ladder is required only if travel  
3 exposure for egress is subject to four feet or more if depth. On  
4 further cross- examination Ms. Solano testified that she did not use a  
5 tape for depth measurements but denied that most of the trench was  
6 shallow or at four foot in depth. Ms. Solano identified Exhibit 1, page  
7 28 as a fax cover to her dated May 28, 2009 for the documents she had  
8 requested from the respondent. Ms. Solano answered questions regarding  
9 photographic Exhibit 2, page 4, as to the appearance of the trench  
10 depth. She further testified she saw only one employee working in the  
11 excavation who was Mr. Mota identified in the photographic exhibit.

12 On further cross-examination Ms. Solano testified that foreman  
13 Hector Fong told her he had just removed shoring from the excavation  
14 prior to her arrival because it was the end of the work day. She  
15 identified the shoring observed at the site as that depicted in the  
16 photographic exhibit. Ms. Solano testified that despite Exhibit E, a  
17 fax dated 5/29/09 together with a certificate of liability insurance,  
18 she never received any documentation of tool box meetings. She  
19 responded that it would have made a difference had she originally  
20 received the documentation before arriving at a decision to cite  
21 respondent for the training violation.

22 At the conclusions of complainants case, the respondent presented  
23 testimony and evidence in defense of the citations.

24 Respondent questioned Mr. Hector Fong, the respondent foreman on  
25 the job site the day of the inspection. Mr. Fong identified Exhibit F,  
26 page 4 and described the shoring he had removed from the trench  
27 approximately 30 minutes before the end of the work day. Page 5 of  
28 Exhibit F depicts Mr. Mota in the same trench. Mr. Fong testified he

1 had shown both the English and Spanish versions of the video, Exhibit  
2 A, to employees.

3 On cross-examination Mr. Fong testified that he never saw Mr. Mota  
4 in the unprotected trench until both he and SHR Solano discovered him;  
5 but rather saw him on top of the concrete box while he (Fong) was  
6 finishing work in conjunction with Mr. Russell the equipment operator.  
7 He identified the SHR photographic Exhibit 2, page 3, depicting he and  
8 the backhoe operated Mr. Russell. He pointed to a white mark shown in  
9 the photo and testified it was Mr. Mota's hard hat appearing above the  
10 trench level. He testified that the photo confirmed Mr. Mota to be in  
11 the shallow end of the trench at the time the SHR was inspecting and  
12 photographing the worksite. He further testified he had personally  
13 observed Mr. Mota standing on top of the concrete box when he passed by  
14 it along the trench to meet with the SHR on her arrival. He further  
15 testified at Exhibit 1, page 4, that Ms. Solano explained the purpose  
16 of the inspection but when she asked if he wanted to deny entry he said  
17 nothing. He concluded his testimony responding that he did not know Mr.  
18 Mota was in the deep end of the trench until the SHR observed and  
19 photographed him there but added that he could have only entered the  
20 trench for a very brief amount of time based on his regular observations  
21 of Mr. Mota.

22 The respondent presented additional witness testimony from Mr.  
23 Francisco Mota. He identified himself as the employee depicted in the  
24 trench at the time of the inspection. Exhibit H was identified as Mr.  
25 Mota's OSHA training card. At Exhibit G he testified as to his safety  
26 training described in the exhibit. He also testified that his height  
27 is 5' 6". He said the shoring depicted in the photo was in the trench  
28 until the end of the workday. Mr. Mota testified that ". . . no one

1 told me to go back into the trench". He said that Mr. Fong never told  
2 him to enter or work in the trench after the shoring was removed. When  
3 asked why he went into the trench, Mr. Mota stated that he went back to  
4 mark a string line for pipe and was only in the trench for "one minute".

5 Mr. Mota testified that Mr. Fong did not see him re-enter the  
6 trench, and that the excavation was mostly shallow. At Exhibit 2, page  
7 4, depicting the trench, Mr. Mota testified that he traveled about ten  
8 feet to exit the deepest part of the trench to get to the shallow part.  
9 He acknowledged that he received a warning identified as Exhibit A for  
10 going into the trench after the shoring was removed. He also testified  
11 as to Exhibit 1, page 29, records of 2005 and 2007 training.

12 Respondent presented testimony from witness Johnny Russell. He  
13 identified himself as the backhoe operator on the job site as depicted  
14 in the photographic evidence. He has 30 years of experience in the  
15 construction industry and attended many safety courses on excavation.  
16 He testified that he observed the safety video identified as Exhibit A  
17 about a dozen times along with others as well as approximately 24 videos  
18 on safety while employed by respondent. He identified Exhibit K as a  
19 safety program received when he was first hired by respondent long ago.  
20 He testified that he was re-hired by respondent more recently on  
21 February 27, 2009. He identified Exhibit L as his receipt of the  
22 respondent's safety program. He identified Exhibit M as the weekly  
23 safety meeting minutes of April 20, 2009. He testified that Exhibit M  
24 is the English version which he believes is the same as Exhibit 9 which  
25 is the Spanish version. Exhibit N is a hand-written safety meeting  
26 attendance statement signed by Mr. Russell.

27 Respondent presented further witness testimony from Ms. Freida  
28 Brown who identified herself as the respondent controller. She examined



1 the files for evidence of employee discipline and identified Exhibit R  
2 to confirm same. She identified Exhibit S as past safety warnings.  
3 Exhibit T comprised employee verifications for having viewed the video  
4 on trench safety.

5 At the conclusion of the presentation of testimony and evidence,  
6 counsel presented closing arguments.

7 Counsel for complainant argued that the burden of proof was met as  
8 to Citation 1, Item 1(a) because there was no showing of actual training  
9 of Mr. Mota timely provided to the SHR upon her request at the time of  
10 inspection. Counsel challenges the reliability of Mr. Mota's testimony  
11 as equivocal and different from what he told Ms. Solano.

12 Counsel further argued the burden of proof had been met based upon  
13 the SHR testimony regarding Citation 1, Item 1(b). She observed the  
14 trench length, depth and the extent of travel required for employee Mota  
15 to exit when ordered out by Mr. Fong.

16 Counsel argued as to Citation 1, Item 2, there was inadequate cave-  
17 in protection as established by the photographic evidence of Mr. Mota  
18 in the trench.

19 Respondent presented closing argument. She argued that Mr. Mota  
20 attended safety training meetings based upon the minutes in evidence and  
21 his sworn testimony to verify same. She referenced documents provided  
22 to the SHR, and a signed receipt to support the minutes and testimony.  
23 Counsel argued that evidence in the record demonstrates Mr. Mota  
24 observed the video on trench safety. Counsel referenced Mr. Mota having  
25 testified under oath that he had no instructions or authority to enter  
26 the unprotected trench area. The evidence shows that three days before  
27 the inspection at the weekly safety meeting the subject matter had been  
28 covered and Mr. Mota was in attendance. On the day of the inspection,

1 shoring and ladders were depicted at Exhibit 2, page 4, to support  
2 testimony that trench safety was in place while employees were working  
3 in the excavation. She referenced the photos which depict the shoring  
4 stacked at the deep end of the trench and related same to the testimony  
5 of Messrs. Mota, Fong and Russell that it had recently been removed as  
6 it was the end of the workday. She argued that Mr. Mota committed  
7 unpreventable employee misconduct by entering the trench but he was only  
8 there for a minute or two before being discovered and ordered out of the  
9 trench by the foreman, Mr. Fong. She referenced the law as to  
10 unpreventable employee misconduct and argued that it was impossible to  
11 stop an employee from going into a trench for a minute or two, even with  
12 the best of supervision. Counsel noted that the trench was sloping in  
13 nature as depicted by the photographs so exiting was easy to do safely  
14 within a few feet when Mr. Mota was ordered out by Mr. Fong.

15 Counsel referenced case law citing Occupational Safety and Health  
16 Review Commission (OSHRC) decisions relating to unpreventable employee  
17 misconduct and the lack of foreseeability by a respondent to be aware  
18 of brief violative action by employees. Counsel concluded by arguing  
19 there to be ample evidence in the record of safety meetings to establish  
20 the respondent maintained a training program. Testimony of all  
21 respondent employee witnesses confirmed same. Mr. Mota had received  
22 trench safety training and he testified under oath in support of same.

23 In reviewing the testimony, evidence, exhibits and arguments of  
24 counsel, the board is required to measure same against the elements to  
25 establish violations under Occupational Safety & Health Law based upon  
26 the statutory burden of proof and competence of evidence.

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

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

5 To establish a prima facie case, the Secretary  
6 (Chief Administrative Officer) must prove the  
7 existence of a violation, the exposure of  
8 employees, the reasonableness of the abatement  
9 period, and the appropriateness of the penalty.  
10 Bechtel Corporation, 2 OSHC 1336, 1974-1975 OSHD  
11 ¶18,906 (1974); Crescent Wharf & Warehouse Co., 1  
12 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).

13 A "serious" violation is established in accordance with NRS  
14 618.625(2) which provides in pertinent part:

15 . . . a serious violation exists in a place of  
16 employment if there is a substantial probability  
17 that death or serious physical harm could result  
18 from a condition which exists or from one or more  
19 practices, means, methods, operations or processes  
20 which have been adopted or are in use at that place  
21 of employment unless the employer did not and could  
22 not, with the exercise of reasonable diligence,  
23 know the presence of the violation.

24 The testimony and evidence confirmed Mr. Mota to be an employee of  
25 respondent and working in an unprotected excavation as depicted at  
26 Exhibit 2, page 11.

27 Citation 1, Item 1(a) referencing 29 CFR 1926.21(b)(2) specifically  
28 charges the employer with failure to instruct each employee, including  
29 Mr. Mota, in the recognition and avoidance of unsafe conditions  
30 applicable to the work environment. The sworn testimony of Messrs.  
31 Clifford, Mota, Fong, Russell, and Brown is that the employer maintains  
32 a safety program and instructs employees in the recognition of unsafe  
33 work conditions. Exhibits G, M and T comprise written evidence of  
34 safety meetings and establish that in addition to Mr. Mota, other  
35 employees attended safety meetings on the work performed. Further, Mr.  
36 Mota, the employee observed in the trench under violative conditions,  
37 testified that he had been trained, notwithstanding his reported

1 statement by the SHR at the time of the inspection. He testified he  
2 entered the trench of his own volition, without the knowledge of his  
3 foreman and in violation of work rules. He further testified he was in  
4 the trench for only a minute to accomplish a brief task.

5 Documentary evidence in the record established trench safety  
6 training of Mr. Mota and other employees which corroborated the weight  
7 of sworn testimony. The alleged violation that the employer did not  
8 instruct employees in the recognition to avoid unsafe conditions for the  
9 type of work performed by respondent, was not established by a  
10 preponderance of evidence.

11 The weight of testimonial and documentary evidence was credible,  
12 unimpeached, and demonstrated the existence of employee excavation  
13 safety training. The burden of proof is upon the complainant to  
14 establish by a preponderance of evidence the lack of safety training.

15 While the board finds a lack of proof by a preponderance of  
16 evidence for violation of the cited specific standard, it is duly noted  
17 that the respondent training program satisfies only the bare essentials  
18 for an effective training program. The intent of the standard is to  
19 assure a meaningfully communicated and responsible safety training  
20 program which is effectively enforced by an employer. For Mr. Mota to  
21 equivocate as to his own training, and provide a statement to the SHR  
22 at the time of inspection but testify under oath to the contrary even  
23 though both are fluent in English and Spanish, all create serious  
24 questions with regard to the efficacy of the training provided by the  
25 respondent. The documents in evidence support existence of a safety  
26 program and training, however the respondent witnesses demonstrated a  
27 lack of meaningful appreciation of the company safety program and  
28 training. The specific cited standard as to training is difficult for

1 enforcement and appellate review. However, the fact that **training**  
2 **exists**, albeit minimal, through a documented and adequately communicated  
3 safety program, is sufficient under the subject standard to avoid a  
4 violation.

5 At Citation 1, Item 1(b) referencing 29 CFR 1926.651(c)(2),  
6 regarding a recognized means of egress from the trench excavation, the  
7 board cannot find by a preponderance of evidence that the burden of  
8 proof was met from the facts and evidence. The photos depict an  
9 apparent safe means of egress which Mr. Moto testified he followed when  
10 ordered to exit the trench after being observed by the SHR and Mr. Fong.  
11 The photographic evidence depicts Mr. Mota in the deepest end of the  
12 trench near the concrete box. Also depicted is a sloped dirt ramp which  
13 appeared to permit him to exit at a safe depth up to 5 foot within a 25  
14 foot lateral range. Mr. Fong and Mr. Mota testified the trench was  
15 shallow except at the end. A photograph taken by the SHR during her  
16 brief inspection, depict what appears to be Mr. Mota's hard hat above  
17 the trench. Mr. Mota testified he is 5'6" tall. The lack of any actual  
18 measurements, reliable photo depictions of length/depth of the trench  
19 or engineering drawings restricts the board finding satisfaction of the  
20 complainant's burden of proof due to a lack of competent evidence.  
21 Trench depth and length are critical elements in the standard to  
22 establish violations. The board cannot rely upon mere observations or  
23 estimations alone to find a violation of law based upon the  
24 complainant's burden of proof which requires a **preponderance of**  
25 **evidence**.

26 The photographic evidence depicts a ladder along with shoring near  
27 but outside the deepest portion of the trench. Mr. Mota testified he  
28 entered the deep end of the trench voluntarily and only momentarily to

1 accomplish a brief task. The sworn testimony and supporting photos  
2 demonstrate the worksite had been protected with shoring, a ladder and  
3 a ramp to permit safe egress. At the time of the inspection and  
4 photographs, the ladder and the shoring were out of the trench but three  
5 individuals testified under oath that the safety equipment had just been  
6 removed as it was the end of the workday. Without competent evidence  
7 to the contrary the earthen ramp portion of the trench shown in the  
8 photos, appears to have permitted Mr. Mota to do what he testified he  
9 did, i.e. travel less than 25 feet to reach a depth of approximately  
10 three or four feet to exit. Again the board cannot simply speculate on  
11 critical elements of violation or assume evidence to lawfully determine  
12 satisfaction of the burden of proof which Nevada law imposes upon the  
13 complainant.

14 At Citation 1, Item 2, 29 CFR 1926.652(a)(1) involving employee  
15 Mota in an excavation not protected from cave-ins by an adequate  
16 protective system in accordance with the standard, it is admitted by  
17 respondent and the photographic exhibit shows, that Mr. Mota was in an  
18 unprotected trench at the time of the inspection. However, substantial  
19 testimony and evidence, including that from Mr. Mota himself, supports  
20 the defense of unpreventable employee misconduct by a preponderance of  
21 evidence. The sworn testimony of Mr. Russell and Mr. Mota were of  
22 particular weight.

23 The board finds the complainant did not meet the burden of proof  
24 by a preponderance of evidence to support violations at Citation 1, Item  
25 1(a) and Item 1(b).

26 The board further finds that while complainant satisfied its burden  
27 of proof at Citation 1, Item 2, the respondent met its burden of proof  
28 to rebut and avoid a finding of violation through the recognized defense

1 of unpreventable employee misconduct. The burden of proof rests with  
2 OSHA under Nevada law (NAC 618.798(1)); but after establishing same, the  
3 burden shifts to the respondent to prove any recognized defenses. See  
4 *Jensen Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord,  
5 *Marson Corp.*, 10 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

6 The elements required for the defense of unpreventable employee  
7 misconduct are:

- 8 (1) The employer must establish work rules designated to  
9 prevent the violation
- 10 (2) The employer must adequately communicate these rules to  
11 its employees
- 12 (3) The employer must take steps to discover violations
- 13 (4) The employer must effectively enforce the rules when  
14 violations have been discovered.

15 1. In the subject case, the testimony of ~~five~~ (5) witnesses,  
16 under oath, must be given reasonable weight and credibility unless  
17 impeached. The company representatives all testified with regard to an  
18 **existant safety program and work rules** to satisfy the first requirement  
19 of the defense. Documentary evidence was admitted to corroborate the  
20 sworn testimony of the company representatives and demonstrated work  
21 rules and a safety program.

22 2. The employer **adequately communicated** these rules to its  
23 employees as demonstrated by the safety meeting minutes and again the  
24 sworn testimony of five (5) witnesses, including Mr. Mota, at the time  
25 of the hearing. While the identified safety program and even the  
26 communication were minimal and barely meet a satisfactory level, there  
27 was sufficient testimony and evidence corroborated by the documentation  
28 that the respondent employer "adequately" communicated the rules to its  
employees, both verbally and in written English and Spanish.

1           3.    The employer took **steps to discover violations**. Respondent  
2 employees Fong and Russell testified as to their experience in the  
3 field, supervision and general observations of employee Mota at the  
4 worksite. Employee Mota is an experienced union trained workman. The  
5 employer could not reasonably foresee a few minutes of misconduct on the  
6 part of employee Mota in returning to the deep portion of the trench,  
7 as he testified, to accomplish a simple task for "one minute". No  
8 employer can absolutely assure or police every moment of an employee's  
9 workday to guarantee compliance. The established case law has long  
10 recognized the required element of "foreseeability". Mr. Mota's  
11 admitted momentary action to return to the trench at the end of the day  
12 was isolated and not foreseeable.

13           4.    The employer **effectively enforced work rules** when violations  
14 were discovered. Again, the testimony of five (5) credible unimpeached  
15 witnesses and the documentation in evidence demonstrated notices of  
16 warning and discipline. While this portion of the respondent safety  
17 program, like others, was barely sufficient by comparable standards to  
18 accomplish the intended result, it is just enough under the recognized  
19 law to demonstrate enforcement.

20                   Evidence that the employer effectively communicated  
21 enforced safety policies to protect against the  
22 hazard permits an inference that the employer  
23 justifiably relied on its employees to comply with  
24 the applicable safety rules and that violations of  
25 these safety policies were not foreseeable or  
26 preventable. Austin Bldg. Co. v. Occupational  
27 Safety & Health Review Comm., 647 F.2d 1063, 1068  
28 (10<sup>th</sup> Cir. 1981). When an employer proves that it  
has effectively communicated and enforced its  
safety policies, serious citations are dismissed.  
See Secretary of Labor v. Consolidated 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).



1 National Realty and Construction Co., Inc. v.  
2 OSHRC, 489 F.2d 1257 (D.C. Cir. 1973), is the  
3 fountainhead case repeatedly cited to relieve  
4 employers responsibility for the allegedly  
5 disobedient and negligent act of employees which  
6 violate specific standards promulgated under the  
7 Act, and sets forth the principal which has been  
8 confirmed in an extensive line of OSHC cases and  
9 reconfirmed in Secretary of Labor v. A. Hansen  
10 Masonry, 19 O.S.H.C. 1041, 1042 (2000).

11 An employer cannot in all circumstances be held to  
12 the strict standard of being an absolute guarantor  
13 or insurer that his employees will observe all the  
14 Secretary's standards at all times. An isolated  
15 brief violation of a standard by an employee which  
16 is unknown to the employer and is contrary to both  
17 the employer's instructions and a company work rule  
18 which the employer has uniformly enforced does not  
19 necessarily constitute a violation of [the specific  
20 duty clause] by the employer. *Id.*, 1 O.S.H.C. at  
21 1046.

22 It is further noted that "employers are not liable  
23 under the Act for an individual single act of an  
24 employee which an employer cannot prevent." *Id.*,  
25 3 O.S.H.C. at 1982. The OSHRG has repeatedly held  
26 that "employers, however, have an affirmative duty  
27 to protect against preventable hazards and  
28 preventable hazardous conduct by employees. *Id.*  
See also, Brock v. L.E. Meyers CO., 818 F.2d 1270  
(6<sup>th</sup> Cir.), cert. denied 484 U.S. 989 (1987).

29 The controlling cases make clear the existence of  
30 an employer's defense for the unforeseeable  
31 disobedience of an employee who violates the  
32 specific duty clause. However, the disobedience  
33 defense will fail if the employer does not  
34 effectively communicate and conscientiously enforce  
35 the safety program at all times. Even when a  
36 safety program is thorough and properly conceived,  
37 lax administration renders it ineffective. P.  
38 Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 110-  
39 111 (1<sup>st</sup> Cir. 1997). Although the mere occurrence  
40 of a safety violation does not establish  
41 ineffective enforcement, Secretary of Labor v.  
42 Raytheon Constructors Inc., 19 O.S.H.C. 1311, 1314  
43 (2000) the employer must show that it took adequate  
44 steps to discover violations of its work rules and  
45 an effective system to detect unsafe conditions  
46 control. Secretary of Labor v. Fishel Co., 18  
47 O.S.H.C. 1530, 1531 (1998). Failure to follow  
48 through and to require employees to abide by safety  
standards should be evidence that disciplinary  
action against disobedient employees progressed to

1 levels of punishment designed to provide  
2 deterrence. *Id.* See also, Secretary of Labor v.  
3 A&W Construction Services, Inc., 19 O.S.H.C. 1659,  
4 1664 (2001); Secretary of Labor v. Raytheon  
5 Constructors Inc., 19 O.S.H.C. 1311, 1314 (2000).  
6 A disciplinary program consisting solely of verbal  
7 warnings is insufficient. Secretary of Labor v.  
8 Reynolds Inc., 19 O.S.H.C. 1653, 1657 (2001);  
9 Secretary of Labor v. Dayton Hudson Corp., 19  
10 O.S.H.C. 1045, 1046 (2000). Similarly, disciplinary  
11 action that occurs long after the violation was  
12 committed may be found ineffective.

13 Based upon the above and foregoing, the board concludes, as a  
14 matter of fact and law, that no violations occurred and the proposed  
15 penalties are denied.

16 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
17 **REVIEW BOARD** that no violation of Nevada Revised Statutes did occur as  
18 to Citation 1, Item 1(a), 29 CFR 1926.21(b)(2), Citation 1, Item 1(b),  
19 29 CFR 1926.651(c)(2), Citation 1, Item 2, 29 CFR 652(a)(1). The  
20 proposed penalties are denied.

21 The Board directs counsel for the respondent to submit proposed  
22 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**  
23 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel  
24 within twenty (20) days from date of decision. After five (5) days time  
25 for filing any objection, the final Findings of Fact and Conclusions of  
26 Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
27 **REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and  
28 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 15th day of June, 2010.

NEVADA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW BOARD

/s/

TIM JONES, CHAIRMAN