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.

PENHALL COMPANY,

Respondent.

_____/

Docket No. LV 10-1426

DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of July, 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. ROBERT D. PETERSON, ESQ., appearing on behalf of Respondent, **Penhall 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. The alleged violation in Citation 1, Item 1, referenced 29 CFR 1626.501(b)(1).

In Citation 1, Item 1, the employer was charged with failure to

ensure fall protection pursuant to the standard. A respondent employee was exposed to fall hazards of approximately 26 feet in height without appropriate protection measures in place while engaged in drilling core holes on a roof structure. The alleged violation was classified as "Serious" and a penalty proposed in the amount of One Hundred Twenty-Five Dollars ($125.00).

Counsel for the complainant, through Safety and Health Representative (SHR) Steve Medellin presented evidence and testimony in support of the violation and appropriateness of the penalty. Mr. Medellin testified he and supervising SHR Renato Magtoto inspected respondent's worksite in North Las Vegas, Nevada. While conducting the inspection together with a representative of the general contractor, Mr. Medellin noticed a scissor lift fully extended (in the air) but observed no employees attendance. SHR Medellin determined after continuing his investigation that the scissor lift was borrowed by respondent employee Mark Serna from another contractor to obtain access to the building roof to perform his assigned job task of core drilling for the eventual installation of venting fixtures. Mr. Serna informed SHR Medellin that he was dispatched to the site by his employer in order to perform a brief core drilling job task. There was no foreman assigned to the job, nor anyone acting as a "spotter". SHR Medellin referred to Exhibit 1 in evidence identified as his inspection report regarding the details of the investigation and eventual citation.

Photographic exhibits in evidence marked as Exhibit 2 depicted the worksite and particularly at pages 6 through 8 the roof structure. SHR Medellin testified he did not personally take the photographs of the roof area which were obtained by SHR Magtoto. Mr. Medellin testified respondent employee Serna was equipped with a safety harness and had

tied off to the scissor lift to reach the roof, but he found no evidence of tie-off or other fall protection measures in place when Mr. Serna worked on the roof. SHR Medellin testified he did not observe employee Serna actually working on the roof nor exposed near the roof edge but concluded from the scene, tools and apparent work effort there was insufficient fall protection in place to satisfy the requirements of 29 CFR 1926.501(b)(1). He calculated the proposed penalty in accordance with the operations manual and gave appropriate credits for severity and other factors all as provided for in the operations manual. He further testified that the employer could have discovered the violation with the exercise of reasonable diligence.

On cross-examination, SHR Medellin confirmed he did not enter the roof area himself nor observe respondent employee Serna working on the roof structure. He reconfirmed the pictures in Exhibit 2 depicting the roof worksite were taken by SHR Magtoto but that he personally took the other photos in Exhibit 2. He testified that neither he nor Mr. Magtoto measured the parapet wall structure at the roof edge nor the distance between the drilled core holes, tools, and the electrical cord and the roof edge wall. Mr. Medellin testified employee Serna informed him that he had prepared a job hazard analysis (JHA) and confirmed same was not offered in evidence. He responded to further counsel questioning stating he did not make reference to any plans or specifications regarding the distance of the drilled core holes from the roof edge but estimated the distance by reference to the photographs in evidence at Exhibit 2.

Upon conclusion of the complainant's case, respondent presented testimonial and photographic evidence in defense of the alleged violation.

Mr. Matthew Trumbo identified himself as a regional safety officer for respondent. Photographic Exhibits A and B were admitted in evidence after identification by Mr. Trumbo. Exhibit A depicted an eight (8) foot long wood "2x4" he utilized to establish the distance between the drilled core hole and the parapet wall at the roof edge. He testified the eight (8) foot length wood "2x4" in relation to the vent hole at Exhibit A demonstrated the aligned vent holes cut by Mr. Serna were at a distance greater than six (6) feet at approximately seven (7) feet from the roof edge wall. Exhibit B depicted a portion of the same eight (8) foot wood "2x4" along with his boot to establish the distance of the core holes from the roof edge wall at approximately seven (7) feet. Mr. Trumbo also testified that complainant's Exhibit 2, page 7 depicted the core drilling tool near the cut hole. He described the technique for operating the drill by ". . .(you) push the tip forward from an area between the knees . . . and drill between (your) feet . . ." The witness testified that standing over the tool and effectuating the hole cuts would place the employee more than six (6) feet from the roof edge wall.

On cross-examination, counsel inquired as to the distances of the water tank and other tools or components depicted in the photographic evidence from the roof edge wall. The witness estimated the water tank was approximately four (4) feet from the roof edge wall but testified it was not at the center of the work effort and could be accessed by an arm reach. He answered similarly with regard to a question referencing Exhibit 2, page 8 depicting an electrical cord which he estimated at within 3-1/2 to 4-1/2 feet from the roof edge wall. Mr. Trumbo answered additional questions testifying that because the roof edge included a "parapet wall" there was no "leading edge" so the work task of drilling

holes beyond six (6) feet from that edge, even though some tools were within a closer proximity, did not require any additional safety measures. He further testified the cited standard does not require a six (6) foot or any other specific safe working distance from a roof edge but only that employees be protected from fall hazards when working at hazardous heights.

Counsel for complainant and respondent presented closing arguments.

Complainant counsel argued the cited standard requires "affirmative conduct" by an employer to prevent employees from falling over a roof edge, even where parapet wall exists if less than 39 inches high. He argued the equipment on the roof as depicted in Exhibit 2 demonstrated respondent employee Serna must have been nearer than seven (7) feet from the edge, notwithstanding the testimony and evidence reconstructing the work effort presented by respondent witness Trumbo. Counsel argued that distance alone is insufficient to protect employees from unprotected sides or edges of roofs referencing subpart M of the standards. He argued that employee Serna was working alone on the roof and sent to the job site without safety equipment sufficient to protect him from a fall hazard over the wall edge. Counsel concluded by arguing that while there were no actual tape measurements made by the SHR nor depicted in the photographs in evidence, a violation can be established through circumstantial evidence by showing there was insufficient safety equipment in place and a hazardous employee work effort inferred from the photo locations of the drilled holes and supporting materials.

Respondent counsel also presented closing argument. He asserted complainant did not satisfy the statutory burden of proof to establish a violation by a preponderance of evidence. He argued the respondent was charged with a significant serious violation and it is OSHA's

responsibility to legally prove the violative conduct rather than rely on assumptions. He asserted that charging respondent for exposing its employee to a fall hazard when he was engaged in core drilling work over seven (7) feet from a roof edge protected by a parapet wall could not reasonably be interpreted to constitute a violation. He argued the safety standard does not specify a safe working distance from a roof edge to trigger fall protection. Counsel asserted that both complainant and respondent accept a six (6) foot working distance from a roof edge as the recognized guide in the construction industry to determine the need for added fall protection. He also argued that a leading edge roof is far different from one protected by a parapet wall even if the wall does not reach a 39 inch height measurement. He further argued that OSHA's own modest proposed penalty portrays a lack of severity or any high degree of hazard exposure. He argued that a "JHA" had been completed by the employee as testified by the SHR, however questioned why it strangely was not entered in evidence. Counsel asserted the answer is because the employee described the job and how he was going to safely accomplish it and if in evidence would have demonstrated there was no fall hazard associated with the work effort. He further argued that employee Serna was only on the roof for approximately one-half (½) hour so there was no way a foreman or any employer representative could have foreseen violative conduct and required the employee, who was equipped with a harness, to tie off to something on the roof if he felt it was necessary. He asserted the statement taken by the SHR from employee Serna was hearsay and could not be solely relied upon to establish the ultimate fact of violation. Counsel concluded by arguing that there was no competent evidence to meet complainants burden of proof to establish as violation.

To find a violation of the cited standard, the board must consider the evidence and measure same against the established applicable law promulgated and developed under the Occupational Safety & Health Act.

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. N.A.C. 618.788(1).
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> All facts forming the basis of a complaint must be proved by a preponderance of the evidence. Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).
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> To prove a violation of a standard, the Secretary must establish (1) the applicability of the standard, (2) the existence of noncomplying conditions, (3) employee exposure or access, and (4) that the employer knew or with the exercise of reasonable diligence could have known of the violative condition. See Belger Cartage Service, Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); American Wrecking Corp. v. Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir. 2003).

A "serious" violation is established upon a preponderance of evidence in accordance with NRS 618.625(2) which provides in pertinent part:

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

The board finds insufficient evidence to support a finding of serious violation at Citation 1, Item 1, referencing 29 CFR 1926.501(b)(1). SHR Medellin testified he did not observe respondent employee Serna **exposed** to a fall hazard or working near the roof edge.

SHR Medellin did not enter the roof area to observe **non-complying conditions**. He did not tape measure distances between the roof edge wall and location of the specific work performed. There was insufficient evidence to infer a fall hazard based upon the construction industry guidelines for fall protection when working less than six (6) feet from the edge on a roof structure. The employer dispatched employee Serna with appropriate safety equipment to protect himself for the identified job task. Mr. Serna tied-off his safety harness to the scissor lift to access the roof structure to perform his work. There was testimony a JHA had been prepared but nothing submitted in evidence. There was no evidence of actual exposure to a fall hazard from the roof structure. The required element of employee exposure to prove a violation would have to be satisfied through a rule of "access to a hazard."

> Under Occupational Safety and Health Law, there need be no showing of **actual** exposure in favor of a rule of **access** based upon reasonable predictability - (1) the **zone of danger** to be determined by the hazard; (2) **access** to mean that employees either while in the course of assigned duties, personal comfort activities on the job, or while in the normal course of ingress-egress will be, are, or have been in the zone of danger; and (3) the **employer knew** or could have known of its employees' presence so it could have warned the employees or prevented them from entering the zone of danger. Gilles & Cotting, Inc., 3 OSHC 2002, 1975-1976 OSHD ¶ 20,448 (1976); Cornell & Company, Inc., 5 OSHC 1736, 1977-1978 OSHD ¶ 22,095 (1977); Brennan v. OSAHRC and Alesea Lumber Co., 511 F.2d 1139 (9th Cir. 1975); General Electric Company v. OSAHRC and Usery, 540 F.2d 67, 69 (2d Cir. 1976). (emphasis added)

There was insufficient evidence to establish exposure or access to a **zone of danger** by mere identification of the drilled core holes. The actual distance of the work to the roof edge was not measured by the SHR. Respondent presented photographic evidence and testimony to show

the distance from the roof edge wall to be approximately seven (7) feet and therefore a work safety area greater than the minimum six (6) foot industry guideline. Locations of an extension cord and water tank closer to the roof edge permit a reasonable inference that same could have been accessed by hand without dangerous proximity to the edge. No need for access to a "zone of danger" was established.

Employer **knowledge** cannot be inferred from the evidence. How could the employer reasonably expect the employee performing a simple half (½) hour task for another contractor at the worksite and equipped with a safety harness would not protect himself and attach to some point on the roof structure similar to what he did on the scissor lift if indeed there was any reasonable potential for exposure to a serious fall hazard.

> An employer cannot in all circumstances be held to the strict standard of being an absolute guarantor or insurer that his employees will observe all the Secretary's standards at all times. An isolated brief violation of a standard by an employee which is unknown to the employer and is contrary to both the employer's instructions and a company work rule which the employer has uniformly enforced does not necessarily constitute a violation of [the specific duty clause] by the employer. *Id.*, 1 O.S.H.C. at 1046.
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> ". . . employers are not liable under the Act for an individual single act of an employee which an employer cannot prevent." *Id.*, 3 O.S.H.C. at 1982. The OSHRC has repeatedly held that "employers, however, have an affirmative duty to protect against preventable hazards and preventable hazardous conduct by employees. *Id.* See also, Brock v. L.E. Meyers CO., 818 F.2d 1270 (6th Cir.), *cert. denied* 484 U.S. 989 (1987).

The board finds insufficient facts in evidence to establish non-complying conditions and exposure. There is no preponderance of evidence to satisfy complainants threshold statutory burden of proof of a violation. NAC 618.788(1).

> To **prove** a violation of a standard, the Secretary **must establish** (1) the applicability of the standard, (2) the existence of noncomplying conditions, (3) employee exposure or access, and (4) that the employer knew or with the exercise of reasonable diligence could have known of the violative condition. American Wrecking Corp v. Secretary of Labor, Ibid. page 7.

Here, while a fall hazard might be inferred from the evidence and the standard applicable, there is neither sufficient evidence of non-complying conditions, actual or constructive employee exposure **(access** to a "zone of danger"), nor that the employer knew, or with the exercise of reasonable diligence could have known, of violative conduct or conditions.

Serious violation(s) requires competent evidence and proof to be sustained. See, NRS 618.625(2), Ibid. page 7.

The board is confronted with a need to extrapolate a violation without required factual data or essential elements subject of proof under occupational safety and health law for determination of compliance or violation.

> Regardless, it as the Secretary's burden in this case to establish the requisite measurements, and this she has failed to do. The Secretary's obligation to demonstrate the alleged violation by a preponderance of the reliable evidence of record requires more than estimates, assumptions and inferences, especially where, as here, the standard incorporates specific distances as an integral part of its requirements. As I stated in an earlier decision, in which a trenching citation was vacated because the CO had not made the requisite measurements with respect to two different trench boxes at the site, "[t]he Secretary's reliance on mere conjecture is insufficient to prove a violation . . . [findings must be based on] 'the kind of evidence on which responsible persons are accustomed to rely in serious affairs.'" William B. Hopke Co., Inc., 1982 OSAHRC LEXIS 302 *15, 10 BNA OSHC 1479 (No. 81-206, 1982) (ALJ) (citations omitted).

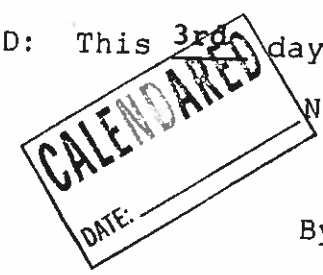
The statement provided to the SHR by employee Serna constituted hearsay and while admissible in administrative proceedings, cannot be relied upon solely to establish the ultimate element of violation.

> State, Dep't of Motor Vehicles & Public Safety v. Kiffe, 101 Nev. 729, 709 P.2d 1017 (1985), cited, Nevada Employment Security Dep't v. Hilton Hotels Corp., 102 Nev. 606, at 609, 729 P.2d 497 (1986).

Based upon the above and foregoing, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation of Nevada Revised Statute did occur as to Citation 1, Item 1, 29 CFR 1926.501(b)(1). The violation is dismissed and the proposed penalty denied.

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

DATED: This 3rd day of August, 2010.



NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
TIM JONES, Chairman