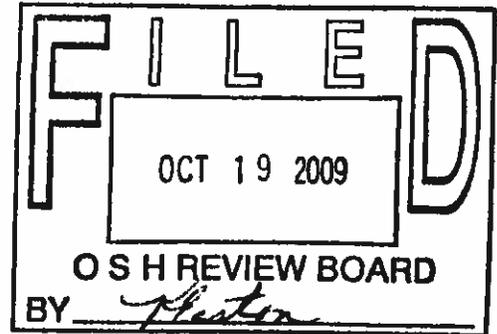


1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
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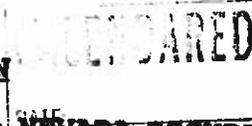
4 CHIEF ADMINISTRATIVE OFFICER OF
5 THE OCCUPATIONAL SAFETY AND
6 HEALTH ADMINISTRATION OF THE
7 DIVISION OF INDUSTRIAL RELATIONS
8 OF THE DEPARTMENT OF BUSINESS
9 AND INDUSTRY, STATE OF NEVADA,

Docket No. LV 10-1381



8 vs. Complainant,
9 VEGAS STEEL, INC.,
10 Respondent,
11

12 DECISION



13 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
14 **HEALTH REVIEW BOARD** at a hearing commenced on the 9th day of
15 September, 2009, in furtherance of notice duly provided according to
16 law, MR. JOHN WILES, ESQ., counsel appearing on behalf of the
17 Complainant, **Chief Administrative Officer of the Occupational Safety**
18 **and Health Administration, Division of Industrial Relations (OSHA);**
19 and MR. GREG TEGLIA, President, appearing on behalf of Respondent,
20 **Vegas Steel, Inc.;** the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
21 **BOARD** finds as follows:

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

24 The complaint filed by the OSHA sets forth allegations of
25 violation of Nevada Revised Statutes as referenced in Exhibit "A",
26 attached thereto.

27 In Citation 1, Item 1, referencing 29 CFR 1926.351(b)(4) the
28 employer was charged with failure to ensure that electrical cables in

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1 need of repair were not removed from use until provided with
2 appropriate protection. The alleged violation was classified as
3 "Serious" and "Repeat" with a penalty proposed in the amount of THREE
4 THOUSAND DOLLARS (\$3,000.00).

5 In Citation 2, Item 1, referencing 29 CFR 1926.405(g)(2)(iv) the
6 employer was charged with failing to ensure that flexible electrical
7 cords were connected to fittings for strain relief in accordance with
8 the standard. The alleged violation was classified as "Other" and
9 "Repeat" with a proposed penalty of ONE HUNDRED TWENTY DOLLARS
10 (\$120.00).

11 In Citation 3, Item 1, referencing 29 CFR 1926.453(b)(2)(iv) the
12 employer was charged with failing to ensure that employees stood
13 firmly on the floor of a boom lift basket and permitted employees to
14 sit on the edge of the basket while performing the work task. The
15 violation was classified as "Serious" and a penalty proposed in the
16 amount of FIVE HUNDRED TWENTY-FIVE DOLLARS (\$525.00).

17 Counsel for the complainant, through Safety and Health
18 Representative (SHR) Scott Matthews, presented evidence and testimony
19 as to the violations and appropriateness of the penalties. Mr.
20 Matthews testified that he conducted a comprehensive routine
21 inspection of the respondent's worksite at the Ceasar's Convention
22 Center project in Las Vegas, Nevada on or about June 16, 2009. The
23 SHR conducted his investigation and reported that he discovered three
24 instances of violation and discussed same with the respondent safety
25 director who accompanied him during the inspection with authority on
26 behalf of the respondent employer. The SHR identified his
27 investigative report and photographs which were identified
28 respectively as Exhibit "A" and "B" and admitted in evidence by

1 stipulation. He further identified Exhibit "C", the safety handbook
2 of respondent, which was also admitted in evidence by stipulation.

3 SHR Matthews discovered during his investigation that cables for
4 an arc welder in the Northwest casino level stairway area bore exposed
5 conductors. He interviewed a welder employee of respondent who
6 admitted he had utilized the machine on the previous day. Mr.
7 Matthews observed bare conductors which were unprotected and exposed
8 as specifically prohibited under 29 CFR 1926.351(b)(4). Mr. Matthews
9 identified and referenced photographs on pages 1 and 2 at Exhibit "B"
10 depicting bare copper wire exposed in the cables. He testified that
11 he observed the bare wires from approximately 15 feet away; the copper
12 being a shiny material was easily noticed. The size of the exposed
13 section of wire was estimated at approximately one inch. The SHR
14 testified that he confirmed through respondent safety representative,
15 Mr. Salazar, ownership of the wire and equipment by respondent and the
16 employment status of the interviewed employee. While inspecting the
17 welding machine connected to the cables in the company of Mr. Salazar,
18 Mr. Matthews observed that the machine was in an "on" position and the
19 electrical meter showed an 85 amp status. The SHR concluded the cited
20 standard to apply to the facts discovered. He determined employer
21 knowledge of the violative conditions existed because the safety
22 director advised him that he "walked by the machine daily," thereby
23 imputing knowledge to the employer. He classified the violation as
24 Serious due to a substantial probability of serious injury or death.

25 SHR Matthews testified that after finding the violative
26 conditions he consulted division records and noted the same violation
27 occurred at the subject job site approximately six months previous.
28 He therefore classified the current citation as both a "Serious" and

1 "Repeat" violation.

2 SHR Matthews testified that Exhibit "A" pages 12-13 established
3 evidence of a final order for the prior violation of the same standard
4 cited on January 28, 2009. Further testimony provided calculations
5 of the penalty, credits, and the monetary aspects based upon the
6 operations manual. Mr. Matthews testified that he allowed no credit
7 for the probability factors because he was given no evidence that
8 employees were either adequately informed of the cited hazard nor that
9 work rules as to safety on exposure access to the cited hazard were
10 effectively communicated.

11 Mr. Matthews testified with regard to Citation 2, Item 1
12 referencing 29 CFR 1926.405(g)(2)(iv). Flexible electrical cords were
13 discovered on the job site with four frayed wires at connection
14 points. In the Northwest casino stairway a 115 volt welding machine
15 was observed being utilized by a respondent employee while powered by
16 an extension cord with failed strain relief. An employee of
17 respondent was performing welding work on the stairwell and exposed
18 to potential injury. Mr. Matthews inquired of respondent safety
19 representative Salazar and confirmed employment status and ownership
20 of the equipment. Exhibit "B", pages 5, 7, 8, 9, 10, 11 and 12
21 depicted frayed cords subject of the citation and established the
22 violative conditions. Pages 5 and 6 of Exhibit "B" were specifically
23 subject of testimony.

24 Mr. Matthews classified the subject violation as "other" after
25 referencing division records. He determined that a previous
26 inspection of respondent resulted in an order of violation for the
27 same standard. He testified to page 21 of Exhibit "A" and introduced
28 evidence of the previous violation which occurred on January 28, 2009.

1 Mr. Matthews concluded that because the earlier violation was
2 classified as "Other", despite the exposure and potential for injury
3 that it was appropriate to classify the subject violation as "Other"
4 and "Repeat" and assess the penalty accordingly. Mr. Matthews
5 testified to page 22 of Exhibit "C", the employer handbook, which
6 specifically prohibited the use of frayed electrical cords. He stated
7 that he was not provided a copy of the handbook at the time of his
8 inspection. No additional credits were given due to both the repeat
9 status of the violation and lack of any evidence to demonstrate the
10 subject work rule was effectively communicated or effectively or
11 uniformly enforced in the workplace by the respondent.

12 Mr. Matthews continued his testimony and referenced Citation 3,
13 Item 1, 29 CFR 1926.453(b)(2)(iv). During his inspection and
14 investigation he found the employer failed to ensure that employees
15 stood firmly on the floor of the boom lift basket and in fact worked
16 while sitting on the guardrail edge of the equipment. He testified
17 as to photographs at Exhibit "B", pages 13, 14, 15 and 16 which
18 depicted an employee sitting on the outside of the basket with his
19 feet facing in the same direction. He stated that he confronted Mr.
20 Salazar, the safety director, during the inspection regarding the
21 violative conditions. The safety director responded that the employee
22 was "tied off" so he did not believe it was a violation. The SHR
23 determined that the referenced standard applied to the facts and the
24 subject employee was exposed to a fall hazard notwithstanding his
25 lanyard connection to the boom structure. He classified the violation
26 as "Serious" due to the potential for fall and serious injury or
27 death. The penalty was assessed based upon the operations manual.

28 Mr. Matthews also referenced Exhibit "C", page 8, the employer

1 safety handbook, pages 18 and 19. He testified that the safety
2 handbook was not provided to him during his inspection and he had no
3 opportunity to review same until the hearing. He testified in
4 furtherance of questioning from counsel that notwithstanding the
5 employer work rule in the handbook, he had been provided no facts or
6 evidence to demonstrate effective communication and/or uniform
7 enforcement of the work rule. On further questioning by division
8 counsel, SHR Matthews testified as to page 32, Exhibit "A" of his
9 investigative report, which reflected that Mr. Salazar informed him
10 the violating employee was given a day off without pay. However on
11 continued testimony, the SHR noted that notwithstanding the penalty
12 reported, there was no evidence of uniform enforcement and in fact the
13 punishment imposed did not comport with the handbook or safety manual.

14 On cross-examination, SHR Matthews testified as to Citation 1,
15 Item 1. He confirmed that he did find the welding machine in
16 operation by a welder employee at the time of the inspection. However
17 he reaffirmed his earlier testimony that the machine was indeed in the
18 "on" position with 85 amps showing on the meter. He responded to
19 questioning as to employee exposure to the hazard by testifying that
20 employees working in the area could **access** the hazard and possibly
21 ground themselves which could result in potential serious injury or
22 death due to electrocution.

23 On further cross-examination, Mr. Matthews testified as to
24 Citation 3, Item 1. He admitted the violating employee in the boom
25 basket was "tied off" but that same was not an accepted or recognized
26 alternate means of compliance with the standard under occupational
27 safety and health enforcement guidelines. He further testified as to
28 his opinion that the lanyard attached to the boom lift basket could

1 create an even greater hazard to the employee who on potential fall
2 could spin and injury himself while dangling from the safety line.

3 After conclusion of complainant's case, respondent informed the
4 board that he would present no evidence or testimony but limit his
5 defensive position to both his opening statement and closing argument.

6 Closing argument was presented by counsel for the complainant.
7 He argued there was no available defense for **employee misconduct**
8 because there was no evidence of an **effectively communicated** or
9 **uniformly enforced** safety program. He further argued that because
10 respondent placed no employee under oath on the witness stand, all of
11 the sworn testimony from the SHR was uncontroverted and must be
12 accepted fully to establish the complainant's burden of proof. He
13 argued that the evidence in the record subject of sworn testimony
14 established the repeat status of the violations cited based upon the
15 documentary evidence of previous final orders in Exhibit "A". Counsel
16 additionally argued there was no requirement to demonstrate or prove
17 that welding was underway at Citation 1 to constitute hazard exposure.
18 The complainant need only establish that employees of respondent were
19 working in the area and had **access** to the hazard to comply with the
20 controlling case law for violation under the Occupational Safety and
21 Health Act. He stated that exposure is "constructive under current
22 law based upon access." Counsel further argued that the employer had
23 **knowledge** of the violative conditions to establish the legal elements
24 for finding a **serious** violation based upon the presence of the
25 respondent safety director on site daily. The testimony as to
26 statements made by the safety director to the SHR were uncontroverted.
27 Knowledge by a management employee is imputed to the employer under
28 established occupational safety and health law. Counsel further argued

1 that merely having a safety handbook is not enough. Safety and work
2 rules must be uniformly enforced and meaningfully communicated. Here
3 the respondent chose to present no sworn evidence or testimony to
4 support a viable safety program of work rules, therefore there was no
5 availability of the defense under established case law. Counsel
6 asserted the violating employee at Citation 3, Item 1 was merely given
7 a day off without pay which did not comport with the safety handbook
8 setting forth penalties for the work rule enforcement program.

9 Respondent presented closing argument. Mr. Teglia stated that
10 he had been in business ten years with one million man hours and no
11 serious injuries on any of his work sites. He argued that while he
12 was not asking for sympathy, he did seek appreciation of the factual
13 conditions on the subject complex construction site, his reliance upon
14 union trained highly skilled employees, who had possession of the
15 company employee safety handbook controlling the subject violations.

16 Respondent argued as to Citation 1 that the arc welder "lead" had
17 likely been "run over" given the photographic depiction of the slit
18 in the cable, that the floor was concrete and therefore not capable
19 of conducting electricity to cause serious injury or death and the
20 proposed penalties were excessive. He concluded his argument by
21 stating that with 10,000 feet of cable leads on the construction site,
22 the inspector could find only one "nick" and that same should be taken
23 into consideration for mitigation of the violation and penalties.

24 The board in reviewing the facts and evidence presented must
25 accept the uncontroverted sworn testimony of the SHR which
26 corroborated the documentary and photographic evidence contained in
27 Exhibits "A" and "B". At Citation 1, Item 1, the board finds the
28 existence of non-complying conditions in the exposed arc welding

1 machine cable wire, the applicability of the cited standard to the
2 factual conditions, and that the employer knew or with the exercise
3 of reasonable diligence could have known of the violative conditions.
4 The board further finds exposure to employees through **access** to the
5 hazard based upon the sworn testimony and photographs depicting the
6 work site. The unrefuted testimony established that the welding
7 machine was in an "on" position and the violation appropriately
8 classified as **Serious** given an 85 amp meter reading which established
9 enough electrical current to cause death of serious injury. The
10 "Repeat" status of the violation was established based upon
11 documentary evidence of a previous final order at Exhibit "A".

12 At Citation 2, Item 1, the board again has no alternative but to
13 accept the unrefuted testimony of SHR Matthews. The testimony,
14 documentary and photographic evidence clearly demonstrate electrical
15 cables with frayed wires. The sworn testimony established that the
16 electrical extension cords were the property of respondent. The
17 testimony further was uncontroverted that employees of respondent had
18 legally defined **access** to the hazardous conditions. The board noted
19 the assessed penalty to be low and the classification of "Other"
20 questionable given the potential for serious injury or death, but
21 defers to the citing authority election of "Repeat" status for the
22 subject violation accordingly.

23 At Citation 3, Item 1, the board is required to accept the
24 uncontroverted sworn testimony of SHR Matthews. The photographic
25 evidence at Exhibit "B" clearly demonstrated an employee of respondent
26 in violation of the specific standard cited. There was no evidence
27 to establish that the "tie-off" was a **recognized alternate means of**
28 **compliance** under occupational safety and health law. There was no

1 sworn testimony offered by respondent from an expert or experienced
2 employee in the industry that "tie-off" as elected by a violating
3 employee could qualify as an alternate means of compliance.

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

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

9 To prove a violation of a standard, the Secretary
10 must establish (1) the applicability of the
11 standard, (2) the existence of noncomplying
12 conditions, (3) employee exposure or access, and
13 (4) that the employer knew or with the exercise
14 of reasonable diligence could have known of the
15 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
14 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
15 (D.C. Cir. 2003).

16 A respondent may rebut allegations by showing:

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

21 A "serious" violation is established in accordance with NRS
22 618.625(2) which provides in pertinent part:

23 . . . a serious violation exists in a place of
24 employment if there is a substantial probability
25 that death or serious physical harm could result
26 from a condition which exists or from one or more
27 practices, means, methods, operations or
28 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.

1 A violation is considered a repeat violation:

2 If, at the time of the alleged repeat violation,
3 there was a Commission final order against the
4 employer for a substantially similar violation.
5 Potlatch Corp., 7 BNA OSHC 1061, 1063 (no. 16183,
6 1979). A prima facie case of substantial
7 similarity is established by a showing that the
8 prior and present violations were for failure to
9 comply with the same standard. Superior Electric
10 Company, 17 BNA OSHC 1635, 1638 (No. 91-1597,
11 1996). Robert B. Reich, Secretary of Labor,
12 United States Department of Labor v. D.M. Sabia
13 Company and Occupational Safety and Health Review
14 Committee, 90 F.3d 854 (1996); Caterpillar, Inc.
15 v. Alexis M. Herman, Secretary of Labor, and
16 Occupational Safety and Health Administration,
17 Respondents and United Auto Workers, Local 974,
18 Intervenors, 154 F.3d 400 (1998).

19 Knowledge of a supervisory employee is imputed to the respondent
20 to establish the element of "knowledge":

21 Administrator of the Division of Occupational
22 Safety and Health v. Pabco Gypsum, 105 Nev. 371,
23 372, 775 P.2d 701 (1989).

24 The board findings of fact do not reach the necessity to analyze
25 the defense of unpreventable employee misconduct. The record contains
26 sufficient evidence to prove the violations based upon the burden of
27 proof established by the Complainant. See Jensen Construction Co.,
28 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, Marson Corp., 10 OSHC
2128, 1980 OSHC 1045 ¶24,174 (1980). However, the board notes here,
because of the opening statement and closing argument of respondent,
the controlling law to assert and prove the defense of employee
misconduct. The elements required for the defense of employee
misconduct are:

- 25 (1) The employer must establish work rules
26 designated to prevent the violation
- 27 (2) The employer **adequately communicated** these
28 rules to its employees
- (3) The employer has taken steps to discover

1 violations

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

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

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

23 The board finds the facts subject of evidence and testimony
24 support the complaint by a preponderance of the evidence.

25 The board concludes there were violations of Nevada occupational
26 safety and health law established by a preponderance of evidence to
27 confirm violations of the cited standards, that the legal burden of
28 proof has been met, and that the defense of unpreventable employee
misconduct cannot be asserted. The cited standards apply to the
factual conditions at the worksite. Employee exposure was established
by **access or direct exposure**. The employer knew or constructively
with the exercise of reasonable diligence could have known of the
violative conditions from the respondent's safety director presence
on the worksite who had knowledge of the violative conditions. The
violation classifications are confirmed to be serious based upon the
evidence and testimony. The repeat status is established in
furtherance of the stipulated evidence at Exhibit "A" containing final

