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.

DESERT GLASS PRODUCTS, LLC,

Respondent.

_____/

Docket No. LV 11-1437

DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of October, 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. JONATHAN HANSEN, ESQ., appearing on behalf of Respondent, **Desert Glass Products, LLC**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

The complaint filed by the OSHA sets forth allegations of violation

of Nevada Revised Statutes as referenced in Exhibit "A", attached thereto.

Citation 1, Item 1, charges a violation of 29 CFR 1910.147(c)(4)(ii)(C). The complainant alleged that the employer respondent did not ensure that energy control procedures clearly and specifically outlined the steps for placement, review and transfer of lock out devices. The violation was classified as "failure to correct". The proposed penalty for the alleged violation is in the amount of THIRTY THOUSAND DOLLARS ($30,000.00).

Citation 1, Item 2, charges a violation of 29 CFR 1910.147(c)(7)(I). The complaint alleged that the employer respondent did not ensure that employees were trained and acquired the knowledge and skills required for safe use of lock out/tag out. The violation was classified as "failure to correct". The proposed penalty for the alleged violation is in the amount of THIRTY THOUSAND DOLLARS ($30,000.00).

Complainant and respondent counsel presented opening statements.

Counsel for the Chief Administrative Officer referenced the unusual aspects of the case due to the failure to correct classifications and substantial penalty assessments based upon NRS 618.655. Counsel explained that the penalties under the statutory reference permit a monetary fine at $7,000.00 per day, but noted OSHA assessed only $1,000.00 per day for thirty (30) days. Counsel represented the evidence will show the employer knew of the violative conditions and failed to correct them. The employer entered into a written settlement agreement to correct and abate the violative conditions but did not comply with its agreement. Counsel contended the law requires a system of deterrence for the failure to correct and abate serious conditions

of hazard exposure to protect employees and therefore the violations and substantial penalties should be confirmed by the board.

Counsel for respondent presented its opening statement. He asserted that no actual harm resulted to any respondent employees from the cited conditions or failure to correct same. He further contended there was no potential for hazard exposure based upon the employer's safety instructions, and the employer good history for safety. Further, the employer agreed to correct the conditions and believed the violations were abated. He asserted the evidence will show a new OSHA employee disrupted the settlement process by concluding the abatement plan was not good enough. Counsel stated the OSHA abatement terms were vague and ambiguous such that the respondent, notwithstanding its good faith effort, was unable to comply.

Counsel for the Chief Administrative Officer presented testimonial and documentary evidence with regard to the alleged violations. Mr. Al Heuther, an OSHA safety supervisor, identified Exhibits A and B admitted in evidence without objection. Exhibit A included OSHA inspection sheets, the citations, and the informal settlement agreement executed by the parties dated March 26, 2010. Exhibit B included the respondent lock out/tag out "LO/TO" procedures, training records and company safety manual. Mr. Heuther testified that when he received Exhibit B from the respondent, he advised the company safety representative the abatement procedures implemented did not comport with the law and settlement agreement of the parties. Mr. Heuther informed respondent safety manager Shourds that he needed to establish procedures in compliance with the standard requirements for all LO/TO related equipment. Mr. Heuther identified Exhibit A, page 23 through 26 as the informal settlement agreement executed by complainant and respondent. He

testified the employer failed to correct the cited violations as agreed, including requiring safety manager Shourds attend a training class as required in the settlement agreement. Mr. Heuther further testified that respondent employer also failed to comply with the settlement agreement and abate the violations to satisfy the LO/TO requirements for various and different types of machinery. He explained that the locks and tags must be ". . . put on and taken off in a very particular manner . . ." He testified at Citation 1, Item 1, referencing 29 CFR 1910.147 (c)(4)(ii)(C), that the serious violation initially assessed bore a penalty of $1,125.00 but was substantially increased because of the "failure to correct" classification based upon NRS 618.655.

Mr. Heuther identified Exhibit C admitted in evidence and noted the procedures in Exhibit C were satisfactory to some extent by a showing of supervisory control but failed to meet compliance as the standard also required **all employees** be trained and that training records or information supporting same submitted to OSHA.

At Citation 1, Item 2, referencing 29 CFR 1910.147(c)(7)(I), Mr. Heuther testified the respondent was charged for failing to assure that employees, including safety director Shourds, were trained and acquired the knowledge and skill required for the safe use of the LO/TO procedures. He identified Exhibit A, page 17 and read a letter from the employer respondent to OSHA dated March 5, 2010. The letter represented to OSHA that the violations initially subject of the inspection and citation had been corrected and the settlement agreement satisfied. However, based upon a lack of documentation to confirm the training and after a follow on inspection it was determined the violations had not been corrected nor the settlement agreement subject of compliance.

Mr. Heuther referenced Exhibit B, page 1 and testified it did not

establish training for anyone other than the individual who executed the document and therefore confirmed a violation of the standard.

On cross-examination, Mr. Heuther testified the safety and health representative (SHR) who conducted the initial inspection is no longer employed by OSHA. He explained Exhibit B, page 3, as his hand notes indicating no receipt of documentation to establish that a training class had been attended in furtherance of the settlement agreement. At Exhibit E, page 4 he testified as to his note showing inadequate abatement and the need to do a follow up inspection. Counsel questioned the substantial proposed penalties and lack of any notification by OSHA for the potential increase of penalties under failure to correct classification being shown in the settlement documentation. Mr. Heuther testified the penalties are authorized by Nevada law. The witness further testified at Exhibit B, that the employer procedure for LO/TO was partially okay for **implementation** of lock out/tag out but lacked procedures on **removal** of the lock out/tag out to place the equipment back in service all as required under the standard. The witness testified that anyone who implements a "LO/TO" must be trained to remove same.

Counsel for complainant presented witness testimony from safety and health representative (SHR) Kimberlee Heckman who testified she performed the follow up inspection of the employer worksite under the directions of her supervisor. At the worksite she met Mr. Luke Pastulovic who she understood to be a maintenance employee of respondent. He told her he was developing an employee training program for the employer. She referenced Exhibit F, page 5 and testified from her closing notes there were no training records provided for the LO/TO program or procedures as required by the standards. Based upon her

investigation she cited the employer for a failure to correct the initial violations. Mrs. Heckman testified the penalty at $30,000.00 for each violation was determined in accordance with the operations manual but after reduction by her supervisor which resulted in a fine of only $1,000.00 per day for 30 days as opposed to $7,000.00 per day as authorized under Nevada law.

On cross-examination, Ms. Heckman testified that she cited the two (2) violations because the documents on LO/TO procedures did not meet requirements of the standard at Citation 1, Item 1. At Citation 1, Item 2, the training documentation provided was for only one person she believed to be an employee whereas the standard requires training for all employees.

Counsel for respondent presented its case in defense of the violations charged and penalties proposed. Mr. Kirk Vaught identified himself as the general manager of respondent. He testified the original cited violations of February 11, 2010 were settled through an informal settlement agreement executed by OSHA and he on behalf of the respondent. He testified that notwithstanding abatement, OSHA was not satisfied as to compliance with the settlement agreement so directed another SHR to perform a follow up inspection. He testified Ms. Heckman found the violations remained and cited the respondent on June 10, 2010. Mr. Vaught testified that none of his employees are not authorized to perform any repairs on any of the equipment on the premises. He identified Mr. Luke Pastulovic as an outside independent contractor, not an "employee", retained by respondent to perform equipment maintenance and repair. He said no company employees, including those who operate or monitor the machines, repair the equipment for the company, as it is all performed by the outside independent contractor. Mr. Vaught

responded to questions from counsel and testified Mr. Pastulovic to be an independent contractor and a maintenance engineer, paid a fee under contract rather than salary as an employee. He testified the equipment is very sophisticated ranging in value from $500,000.00 to $2,000,000.00. If there is any stoppage of the equipment, the supervisor is notified and the circuit breaker simply turned off. No one is allowed to inspect or repair the equipment except for Mr. Pastulovic the independent contractor with appropriate training and expertise. He testified that only a supervisor has authority to shut off a circuit breaker if a failure occurs. All employees are instructed to contact a supervisor if a machine breaks down. Mr. Vaught analogized the condition as similar to a company truck driver who, upon a breakdown, is not authorized to open the hood and attempt to repair same but rather must contact his supervisor who calls in the appropriate expertise to resolve the issue. He testified that each machine has a dedicated power source and that ". . . every machine has its own circuit breaker . . ." He confirmed Exhibit A, page 23 to be a copy of the executed informal settlement agreement which includes provisions for abatement. Mr. Vaught testified Exhibit A, page 26 to be a copy of his letter dated March 30th submitted to OSHA identifying the hazard communications program. He testified that he believed the terms of the settlement agreement had been satisfied and the violations abated. He stated that his former safety manager never informed him there was any problem after March 30.

On cross-examination by complainant's counsel, Mr. Vaught testified that Exhibit A, page 16 is the company LO/TO safety policy. He further testified that in his March 5 letter to OSHA he was referencing Exhibit B, pages 2 through 9, to establish compliance not Exhibit A, page 16,

the original company policy. He further testified there were verbal instructions to employees advising them that if the machinery failed they were to notify a supervisor. There were no written instructions confirming same.

Respondent counsel presented testimony from Mr. Luke Pastulovic who identified himself as an independent contractor and responsible for specialized maintenance, repair and advisory services to the respondent employer. He testified he is not an employee, has extensive LO/TO training and identified his signature on Exhibit B in evidence. He further testified that he informed the SHR he was **working** on the premises but never stated he was an **employee**. Mr. Pastulovic helped to develop the company safety program. He testified he could receive no help from "SCATS" nor any assistance from OSHA enforcement on what they specifically required to comply with the standards. He testified that he believed he was only required to develop and provide procedures for ". . . lock out/tag out in order to de-energize the equipment but not re-energize . . ."

On cross-examination Mr. Pastulovic testified that he assisted in developing the company equipment safety procedures but as a Canadian citizen not aware of US laws. He drafted pages 2 through 9 of Exhibit B. He further testified that he did not address "training" but only "procedures", because both apply only to him as he is the ". . . only person authorized to perform repairs . . ." He testified that none of respondent employees are exposed to the subject hazards to require the LO/TO procedures and training as cited. He testified the procedures were never intended to apply to any employees because the company safety policy permits only he to shut down equipment. He testified that if he is not on the premises, there is no tag out after a supervisor shuts the

circuit breaker.

Counsel for the complainant presented closing argument. Counsel asserted that Exhibit A, page 12, established an abatement date of March 16, 2010 and page 5, Exhibit A explained requirements for abatement. He argued that general manager Vaught wrote to OSHA on March 5 as referenced in Exhibit A, page 17, and falsely represented that everything had been completed in furtherance of the settlement agreement. Counsel noted the standard requires protection from dangerous equipment and compliance must be met under the standard which clearly did not occur. He argued that respondent should be held to the terms of the settlement agreement and representations of the company general manager. The violations were clearly established by the evidence and acknowledged in the settlement agreement which provided for abatement of the violations cited.

Counsel argued that the company chose to utilize the services of Mr. Pastulovic, a foreign citizen, unfamiliar with United States occupational safety and health law, trained in Canada, and by his own admission lacked knowledge in the applicable regulations. The company believed that it could satisfy the law by simply contracting with Mr. Pastulovic. He argued that the company submitted Exhibit B as to procedures which might have looked good on paper but there was no training on the procedures. Many employees in the area were exposed to the recognized hazard because no LO/TO procedures or training were in place. The respondent did not perform as agreed in the settlement agreement to correct and abate the cited conditions and therefore company employees were exposed to serious electrical dangers.

Counsel for complainant argued that the penalties are fair even though thirty times higher than initially assessed because the

respondent ignored the problems and falsely represented to OSHA on March 5th that everything had been abated/satisfied. They were even given extra time to resolve the matters but nothing was forthcoming. The penalties had already been reduced from the statutory maximum by the district manager and should be confirmed.

Respondent counsel presented closing argument. Counsel asserted respondent believed it had complied with the terms of the informal settlement agreement based upon information from the then safety manager. The general manager honestly wrote to OSHA representing everything had been completed. He asserted that there was no follow on letter or specific correspondence advising the respondent that what had been submitted was insufficient. He argued that SHR Heckman and OSHA supervisor Heuther disagreed in their testimony and were apparently as confused as the employer who thought it had complied until Ms. Heckman showed up in June and advised of the lack of compliance with the standards and issued citations. Counsel argued Exhibit C, page 2, demonstrates the company did what was required by notifying employees to contact their supervisor if there was any problem with the equipment. Counsel concluded by asserting that no standard requires **written** training, the respondent did in fact verbally train and Exhibit C demonstrated the company procedures.

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

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. (See NAC 618.788(1).
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> 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 OSHD ¶16,958 (1973).

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 respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;

2. The situation was in compliance; or lack of access to a hazard. See, Anning-Johnson Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

The admitted evidence, including Exhibit A, page 23, the informal settlement agreement, establishes violations of the cited standards. The respondent executed the settlement agreement and provided correspondence from its general manager that the violations had been abated. The follow up inspection demonstrated the violations continued without abatement and/or compliance with the settlement agreement. There is no alternative but to confirm violations of the standards under the facts and governing law. The standard was **applicable** to the facts in evidence, **non-complying conditions** were established and admitted by reference to the signed informal settlement agreement which required abatement of violations, **employee exposure** through access to hazardous conditions was demonstrated by a lack of employee training, and the **employer knew** of the violative conditions by signing the informal settlement agreement. **The subject standards are intended to protect**

employees by training them to be aware of and avoid recognized hazards in the workplace. Based upon the facts and law, the violations must be confirmed.

Established occupational safety and health law does not permit an employer to "contract away" its obligation to assure safety in the workplace through compliance with applicable safety standards.

> Bayside Pipe Coaters, Inc., 2 OSHC 1206, 1974-1975 OSHD ¶ 18,677 (1974); Frohlick Crane Service, 2 OSHC 1011, 1973-1974 OSHD ¶ 18,079 (1974), aff'd, Frohlick Crane Serv., Inc. v. Occupational S. & H. R.C., 521 F.2d 628 (10th Cir. 1975): An employer cannot **contract away** his responsibility under the Act where the economic realities of the circumstances of employment establish the responsibility for safety is his. (emphasis added)

The board further finds facts in evidence which demonstrate the proposed penalties to be subject to mitigation. OSHA is authorized under NRS 618.655 to assess penalties for a failure to correct/abate up to $7,000.00 per day. The statute was reasonably applied through its district manager relying upon guidance in the operations manual to reduce the penalties to $1,000.00 a day for a maximum of 30 days. However, the spirit and intent of occupational safety and health law must be balanced with conditions in the workplace and level of potential hazard exposure. The board finds from the testimony, documentation and evidence that there was no employer history of OSHA violations nor evidence of a callous disregard of the law governing safety and health in its workplace. There were no injuries resulting from the cited violative conditions. While the **potential** for exposure to hazardous conditions is the governing criteria, there was substantial evidence that company policy and practice was that no employees or operators of the equipment were permitted to work on any equipment subject of a failure. Employee "access" to hazardous conditions in an electrical

panel was very unlikely in that only a supervisor was allowed to even shut down a circuit breaker. Testimony showed some degree of verbal safety instruction to warn employees that no one was to shut down or effectuate repairs on any equipment, but rather contact a supervisor. The evidence supports an inference of a limited level of potential exposure to electrical hazards controlled by LO/TO procedures and training.

The OSHA enforcement section is not charged with education or training of employers to assure they comply with the law. Respondent could have done far more even in the asserted distressed economic times to better understand the applicable occupational safety and health standards. However, there is evidence to support an inference that the former safety manager charged with compliance responsibilities failed to adequately inform the respondent of its obligations. While the foregoing is not a defense to the violations, it does demonstrate the respondent did employ a safety representative employee who was charged with assuring compliance as to both occupational safety and health law and the informal settlement agreement.

It appears that had the employer been proactive toward safety, even in what the general manager described as very difficult economic times and a reduction in the work force, it could have reasonably resolved the conditions cited at far less dollar cost than exposing itself to the extremes of failure to abate and correct penalties. The employer should understand that assessment of penalties is part of the deterrence methodology established under occupational safety and health law to induce employee protection in the workplace. While the board is reluctant to erode appropriate enforcement action which included a very reasonable settlement agreement, and fair consideration extended by all

of the OSHA personnel including particularly the district manager ultimately responsible for assessing and adjusting penalties, the mitigating factors in this distressed economic climate warrant a reduction in the total penalties proposed to $10,175.00. The reduced penalties, while substantially less than that proposed, are determined sufficient to warn and deter repeated action by the employer while being fair and reasonable based upon the evidence in mitigation.

> See Long Manufacturing Company, N.C., Inc. v. OSHARC and Marshall, 55 F.2d 903, 918 (8th Cir. 1977); and Nevada Director of Occupational Safety and Health v. Clayburn, Incorporated, Docket No. 84-280, Filed December 26, 1984, Nevada Occupational Safety and Health Review Board. The review board may confirm a penalty as assessed in the same amount imposed by the Chief Administrator or a lesser or a greater amount.

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 1910.147(c)(4)(ii)(C) and Citation 1, Item 2, 29 CFR 1910.147(c)(7)(I). The classifications of the violations as "Failure to Correct" are confirmed. The total penalties are adjusted, reduced and approved in the amount of TEN THOUSAND ONE HUNDRED SEVENTY-FIVE DOLLARS ($10,175.00) in total for both violations.

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 18th day of November, 2010.

NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

By /s/
TIM JONES, CHAIRMAN