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.

WINDOW MASTERS, INC.,

Respondent.

_____/

Docket No. LV 11-1458

D E C I S I O N

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 8th day of December 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. BRIAN RETKE, company president, appearing on behalf of Respondent, **Window Masters, Inc.**, the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

Jurisdiction in this matter has been conferred in accordance with Chapter 618 of Nevada Revised Statutes.

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

Citation 1, Item 1 charged a "Serious" violation of Nevada Revised Statute 618.375(1). Complainant alleged respondent violated the cited

Nevada Revised Statute commonly known as the "General Duty Clause" in failing to furnish employment and a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees. OSHA alleged respondent employees engaged in window washing work without attachment of safety lines to two (2) independent anchor points, and utilized a 44 inch rather than a 24 inch lanyard. The violation was classified as Serious due to the high probability for serious injury or death. The proposed penalty for the serious violation is in the amount of TWO THOUSAND EIGHT HUNDRED DOLLARS ($2,800.00).

The parties stipulated to the admissibility of Exhibits A through F and Exhibits 1 through 10.

Counsel for the Chief Administrative Officer presented testimony and documentary evidence with regard to the alleged violations.

Safety and Health Supervisory Representative (SHR) Nicholas LaFronz identified the complainant exhibits and described the conditions found at the worksite by the SHR who conducted the inspection. Mr. LaFronz testified the General Duty Clause was cited because no specific enforcement standard has been adopted in the Code of Federal Regulations (CFR) for the window washing industry. The ANSI standard identified as I-14 at Exhibit F is a "consensus standard", and while advisory considered applicable for the industry and accepted by the employer respondent in its site plan. He testified no employees were actually observed working at the time of the initial inspection. A demonstration of the work effort was provided by respondent to the inspecting SHR. The safety system utilized is depicted in photographs identified in Exhibit B. Mr. LaFronz testified respondent employees demonstrated the rope descent system actually utilized while engaged in window washing work

at a high-rise building tower located in Las Vegas, Nevada. Safety line attachment points were depicted at Exhibit B which showed two metal "loops" connected to a "davit arm". He testified the two loops on the single arm were non-compliant attachment points as they were not **independent** and therefore did not constitute a safe fall protection system for the subject work as described in the ANSI standard I-14. He also testified photographic Exhibit B depicted at pages 5 and 6 a violation of the anchor point standard requirements as described in Exhibit A page 5 of the investigative report because ". . . the working line and life line were attached to the same anchor point . . . and the standard requires separate anchor points . . ." He further testified the davit arm was rated for only 1,000 lbs. rather than 5,000 lbs.

The safety lanyard utilized by respondent employees was 44 inches long instead of 24 inches as required under the I-14 ANSI standard. Respondent employees attached to the front ring of the safety harness and utilized a 44 inch line. Mr. LaFronz referenced Exhibit F at page 13 which described the required length and attachment point for the lanyard; and at page 20 the load limit safety factors. The SHR testified that photographic Exhibit B, page 4, depicted no independent anchor points. Page 3 demonstrated a "trolley" on the davit arm connected to loops on both (2) anchor points. The loops were not independent because should the arm of the davit or trolley fail with both anchor points connected to the same assembly, the lack of independence would provide no satisfactory safety line attachment for an employee. Mr. LaFronz testified that because the window washing work was high above ground, there was an increased probability of death in the event of a failure of the safety system. The serious classification and penalty were established after assessing gravity, probability and

confirming employer knowledge based upon respondent's written site plan.

On cross-examination by respondent representative, SHR LaFronz testified as to Exhibit 1. He identified the exhibit as a copy of CFR 1910.66 pertaining to personal fall arrest systems but stated it was not applicable to the facts as it governed protection for suspended safety platforms not individuals. He testified that no specific enforcement standard existed in the CFRs for individuals engaged in window washing maintenance work as the reason for citing the general duty clause. He testified that Exhibit 1 provided for a protective weight of 5,000 lbs. or a system "designed" to provide appropriate protection for working from a safety platform. He further testified the I-14 ANSI standard also permitted a lanyard "...designed for the length of fall... based on conditions at the work place ...". He testified that the height of the potential fall at the subject worksite would have been far greater than the 44 inch lanyard utilized by the respondent employees.

Mr. LaFronz testified at respondent's stipulated Exhibit 2, identified as the engineers "blueprint" of the designed attachment point and admitted the described system would be compliant with the 29 CFR 1910 personal fall protection systems for platforms. He testified that under 29 CFR 1910 each anchor point on the davit arm would be secure points of attachment and the two anchor points (loops) were separate from one another. At Exhibits 3, 4 and 5, SHR LaFronz identified an email from a manufacturing company sales representative to the respondent which provided that the fall arrest system tie off attachments in use by respondent were ". . . not a problem . . . for weight capacity and that he had . . . spoken to an engineer . . ." regarding same. He testified that Exhibit 4 contained a letter from an engineer for the manufacturer providing that the davit arm was designed

by engineers with a load factor of 4,000 lbs. and that a ". . . properly trained individual could safety utilize tie off for fall protection . . ." In response to a question from respondent representative as to compliance of the system with the CFR 1910 fall arrest standard, Mr. LaFronz answered that it would satisfy the standard but in his opinion it (29 CFR 1910) was not (the standard) applicable to the facts.

Mr. LaFronz identified Exhibit E as an engineering company representative letter opining that as a member of the ANSI I-14 committee, rigging to a davit arm is a safe anchor point. He further identified Exhibit 5, page 2 as a fax to OSHA counsel from respondent with a copy of a structural engineer's letter advising that primary and secondary attachments to a single arm at independent locations is an acceptable safety system because the system could ". . . not be loaded (fully) at the same time due to the weight of a (single) worker . . ." Mr. LaFronz testified that he is aware two different standards apply to fall arrest systems, one for maintenance and another for construction. He also testified the actual load factor on the respondent system was under 4,000 lbs. On further questioning he testified in answer to a question of just how much load the respondent would need to protect for given the single individual use of the safety system and responded that a ". . . catastrophic . . . arm failure . . . could cause the entire arm and trolley to which the employee was attached to fail. Mr. LaFronz testified at Exhibit D as to the condominium tower worksite inspection plan report which identified the subject system as designed for window cleaning maintenance and admitted it was satisfactory. Counsel inquired as to whether catastrophic failure was probable but Mr. LaFronz responded that he could not answer the question. Mr. LaFronz testified that a 24 inch lanyard could be a greater hazard based upon a need to

detach the line from the safety ring on the harness to get over a parapet wall. On continuing questioning Mr. LaFronz admitted there was no evidence that a manufacturer's engineer informed the inspecting SHR that the davit arm was not an acceptable attachment point, despite earlier testimony.

Respondent presented evidence and testimony through witness Alejadro Amarcon who identified himself as a 12-year employee of respondent and engaged in the work effort of window washing maintenance at various locations, including the high rise condominium worksite involved in the citation. He testified photographic Exhibits 8 and 9 showed independent anchor points. He identified Exhibit 10 to be the OSHA inspection report for the year 2009 at the same building for the same equipment. He testified the Exhibit 10 OSHA inspection report approved the subject equipment and safety system, and no citation for violation was issued. He testified that OSHA had conducted four inspections during which he demonstrated the safety system, with no citations having been issued. He testified he believes the existent safety system to be OSHA compliant, that he currently uses the system for his own safety and has utilized the system for approximately 12 years. He further testified that when the initial inspection subject of citation was performed no work was underway. He testified that Exhibit B, photograph 5 depicted an additional independent tie-off point at the base of the davit arm and to which the employees connect when actually engaged in work. He referenced Exhibits 8 and 9 to better show the attachment points. He testified that when employees are working they are connected to the two loops attached the davit arm and also the base point where the arm connects to the roof of the building.

Mr. Amercon testified as to the lanyard length he utilizes at 44

inches as opposed to the 24 inch lanyard under the I-14 ANSI standard. He testified that it was unsafe to utilize a 24 inch safety harness and detach same when maneuvering over a parapet wall because there would be a period of time with no safety attachment during the detachment and reattachment process. He testified the 44 inch lanyard length permitted an employee to maneuver over a parapet wall and remain constantly connected while suspended high in the air unlike the 24 inch lanyard. He testified it would be more hazardous to utilize a 24 inch line and be required to detach the line from the harness ring while maneuvering over a wall because it would leave a period of complete exposure to a fall hazard without any attachment whatsoever. Mr. Amarcon testified that during the detachment and reattachment time frame there would be exposure to a far greater hazard unless a 44 inch line was utilized.

Mr. Amarcon testified that he was trained to attach a lanyard to the chest area hook on the front of the safety harness and utilize the longer line to avoid a greater hazard due to an inability to reach behind for support in the case of a fall or to detach and reattach.

On cross-examination Mr. Amarcon testified that it would be possible to utilize both a 24 inch and 44 inch line to comply with the ANSI standard and be equally safe.

On redirect examination, Mr. Amarcon testified that he prefers a 44 inch line versus both a 24 and 44 inch line because one can become confused and forget if hooking and/or unhooking while engaged in a work task suspended high in the air. He further testified that his training was to use just one longer line based on the building structure and height of working conditions. One 44 inch lanyard avoids both confusion and enables protection for the working conditions.

On closing argument, complainant argued the respondent had agreed

to applicability at Exhibit C the site plan and Exhibit F the I-14 ANSI standard, but now asserts that it's okay to deviate from the ANSI standard and follow CFR 1910 because an engineer says its compliant. He further asserted the ANSI standard clearly requires the lanyard length be 24 inches. He argued the testimony showed use of both a 24 and 44 inch lanyard could have been utilized. Counsel asserted that the ANSI standard is applicable and given the high risk involved in the work effort the respondent should have comported with the site plan and the consensus standard as he agreed to avoid a violation. Counsel argued that the weight capacity under the ANSI standard is 5,000 lbs. and respondent clearly did not meet the weight load. He argued that Exhibit B demonstrates two loops attached to the same arm and asked if those are the two "independent attachment points" the standard contemplated for safety. He concluded by asserting that the probability of death was so grave given the height of the work that the serious classification of the standard cannot be questioned.

Respondent representative submitted closing argument. He noted Exhibit C as the site specific plan which appropriately identified all recognized hazards. He referenced Exhibit 2, the blueprint for the engineered safety system utilized and noted the verbiage on the engineer stamp established 29 CFR 1910 compliance. He asserted that notwithstanding the applicability of the 29 CFR 1910 standard to powered work platforms and similar devices, if that higher standard meets all safety requirements to support multiple employees working at heights on a platform, then it certainly should be more than sufficient to protect a single worker. He argued the higher specific standard (29 CFR 1910) is far more applicable to the working conditions than the general duty clause as cited.

Respondent representative argued the evidence established that a structural engineer and president of the manufacturing company that built the engineered safety system determined the most appropriate fall arrest protection for use by respondent. He asserted that all references in 29 CFR 1910 are to **design** the highest level of protection and that respondent is unquestionably in compliance with same. He argued that OSHA merely cited for a general duty clause violation because it could not otherwise find any violative conditions. He noted there are many standards "out there" and very confusing so he consulted with Desert States, a well recognized safety training company for fall arrest training and safety systems. He asserted the Desert States company trains most of the people involved in the window maintenance field, including OSHA personnel and that they train for protection under 29 CFR 1910 and **engineered designs**. He argued that the manufacturing company engineer, as demonstrated by the blueprints in evidence, designed the fall arrest system to be the safest for his employees and OSHA compliant. The evidence was not disputed to show the anchor points (loop rings) to be independent of each other and therefore technically constitute two independent attachment points. He further argued that testimony and evidence showed the designed system actually utilized by the employees when working included an additional attachment point at the base of the support arm where it entered the roof of the building structure.

The respondent argued the weight capacity is not an issue because there is no realistic "probability" for the arm to fail under the weight of a single worker. The safety design and training to the level of 29 CFR 1910 applicable to multiple use work platforms clearly shows the system was designed to a higher standard than the ANSI I-14 and

therefore very safe for use by an individual employee. He argued the evidence showed a structural engineer "signed off" on the load capacity as sufficient and the system therefore an "engineered design" in full compliance with 29 CFR 1910, the highest standard for personal fall arrest systems. If the system could hold a work platform with multiple employees then it is more than capable of safely supporting one employee.

Respondent argued the lanyard at 44 inches with a front attachment to the harness ring is the recognized training for employees in the industry. He asserted that even though the ANSI standard references a 24 inch length, when one understands the reasoning for the lanyard length and applies it to a high rise building structure with parapet walls, then the use of a 44 inch system along with training and an engineered system is not only compliant but avoids a **greater hazard** as testified by Mr. Amarcon. He asserted the entire reason for using a lanyard is to prevent a fall hazard. Requiring a 24 inch length under I-14 when knowing an employee would have to detach himself while maneuvering over a parapet and then reattach makes no sense and exposes the employee to a fall hazard for no reason.

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

A serious violation can be established under Nevada occupational safety and health law in accordance with Nevada Revised Statutes.

(NRS) 618.625(2) provides:

> ...a serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists or from one or more practices, means, methods, operations or processes

which have been adopted or are in use at the place of employment unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation.

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

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator.

NRS 618.375(1) commonly known as the "General Duty Clause" provides in pertinent part:

> ". . . Every employer shall:
>
> 1. Furnish employment and a place of employment which are free from **recognized hazards** that are causing or are likely to cause death or serious physical harm to his employees . . ." (emphasis added)
>
> In citing an employer under the General Duty Clause, it is necessary to demonstrate the existence of a **recognized hazard** as mandated by the statute; whereas citing an employer under a **specific standard** does not carry such a requirement because Congress has, in codification, adopted the recognition of such hazard for the particular industry. To establish a violation of the General Duty Clause, the complainant must do more than show the mere presence of a hazard. The General Duty Clause, ". . . obligates employers to rid their workplaces **not** of possible or reasonably foreseeable hazards, but **recognized hazards** . . ." Whitney Aircraft v. Secretary of Labor, 649 F.2d 96, 100 (2nd Cir. 1981). (emphasis added)

At Citation 1, Item 1, complaint cited respondent for a violation of NRS 618.375(1), the "General Duty Clause".

> "The elements of a general duty clause violation identified by the first court of appeals to interpret Section 5(a)(1) have been adopted by both the Review Commission and the courts in subsequent cases. The court in National Realty and Construction Co., Inc. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973), listed three elements that OSHA must prove to establish a general duty violation, and the Review Commission extrapolated a fourth element from the court's reasoning: (1) a condition or activity in the workplace presents a hazard to

> an employee; (2) the condition or activity is recognized as a hazard; (3) the hazard is causing or is likely to cause death or serious physical harm; and (4) a feasible means exists to eliminate or materially reduce the hazard. The four-part test continues to be followed by the courts and the Review Commission. E.g., Wiley Organics Inc. v. OSHRC, 124 F.3d 201, 17 OSH Cases 2125 (6th Cir. 1997); Beverly Enters., Inc., 19 OSH Cases 1161, 1168 (Rev. Comm'n 2000); Kokosing Constr. Co., 17 OSH Cases 1869, 1872 (Rev. Comm'n 1996). The National Realty, decision itself continues to be routinely cited as a landmark decision. See, e.g., Kelly Springfield Tire Co. v. Donovan, 729 F.2d 317, 321, 11 OSH Cases 1889 (5th Cir. 1984); Ensign-Bickford Co. v. OSHRC, 717 F.2d 1419, 11 OSH Cases 1657 (D.C. Cir. 1983); St. Joe Minerals Corp. v. OSHRC, 647 F.2d 840, 845 n.8, 9 OSH Cases 1946 (8th Cir. 1981); Pratt & Whitney Aircraft Div. v. Secretary of Labor, 649 F.2d 96, 9 OSH Cases 1554 (2d Cir. 1981); R.L. Sanders Roofing Co. v. OSHRC, 620 F.2d 97, 8 OSH Cases 1559 (5th Cir. 1980); Magma Copper Co. V. Marshall, 608 F.2d 373, 7 OSH Cases 1893 (9th Cir. 1979); Bethlehem Steel Corp. v. OSHRC, 607 F.2d 871, 7 OSH Cases 1802 (3d Cir. 1979). (emphasis added)
>
> When the Secretary has introduced evidence showing the existence of a hazard in the workplace, the **employer may, of course, defend by showing that it has taken all necessary precautions to prevent the occurrence of the violation.** Western Mass. Elec. Co., 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981). (emphasis added)

The board finds the fall hazards associated with window washing maintenance at a high rise facility are **recognized** in the industry. However the issue before the board is whether the employer failed to protect against the recognized hazard and thereby maintained an unsafe workplace based upon the evidence of the actual personal fall arrest system in place.

The ANSI standard I-14 is "consensus standard" and therefore advisory in rather than mandatory. 29 CFR 1910 is the codified enforcement standard for fall arrest safety and applicable specifically to work from platforms for multiple employee site work. The unrefutted

evidence was that respondent employees "tied off" at **two points** on the davit arm and also a **third point** at the base of the arm where it connects to the roof. There were **three** attachment points for safety. The respondent system was designed and approved by a structural engineer to be 29 CFR 1910 compliant. The manufacturer built the system to meet the requirements of 29 CFR 1910. The unrefutted testimony was that Desert States safety training company relied upon 29 CFR 1910 to train for the window washing maintenance industry.

There was insufficient evidence of an unsafe workplace based upon the recognized hazard existent to support a violation of NRS 618, the General Duty Clause. Not only was there evidence of **three** tie-off points rather than two, an **engineered** safety system protected employees to the highest level of safety for fall arrest systems governed by 29 CFR 1910. There is no specific **enforcement** standard applicable to individual window washing maintenance as such, however the respondent designed, trained and implemented a safety system in accordance with the highest fall arrest standard in the industry to prevent the recognized fall hazards which might occur for high-rise window washing work. (Western Mass. Elec. supra)

The testimony of Mr. Amarcon regarding utilization of a 44 as opposed to a 24 inch lanyard would well support a defense of "greater hazard" if indeed there had been satisfaction of the burden of proof to establish a violation of the general duty clause, which there was not.

Violations of the general duty clause are the most difficult to prove. The subject case demonstrates that forcing an employer to comply with an agreed upon consensus standard would result in a reduced level of fall hazard protection for employees which does not comport with the spirit and intent of the occupational safety and health act. In

complying with the **higher specific enforcement standard** and utilizing an **engineered** safety system approved by a structural engineer, the manufacturer, and Desert States training company, the employer ". . . has taken all necessary precautions to prevent the occurrence of the violation" (Western Mass. Elec. supra) and accordingly did not fail to ". . . furnish employment and a place of employment . . . free from recognized hazards . . . likely to cause death . . ." (NRS 618.375(1) supra)

The employer implemented a fall arrest system higher than the consensus standard of ANSI and within the compliance parameters of 29 CFR 1910. The safety system addressed the recognized worksite hazards better than the consensus standard was appropriate for the working conditions, and sufficient to protect against the probability of a fall from extended working heights.

Without a more specific standard enacted by congress for individual maintenance work, the respondent better served the protection of its employees and thus the spirit and intent of occupational safety and health law by obtaining an engineered/designed system. Respondent met a higher level of protection as codified in 29 CFR 1910 for fall arrest systems based upon the facts confronted in the workplace.

The testimony of SHR LaFronz supported the arguments of respondent representative as to the lack of **probability** for failure of the davit arm assembly except under a "catastrophic" condition. The Federal Review Commission has rejected a **catastrophe** level for protection under the probability factor

> ". . . The existence of a hazard is established if the hazard can occur under other than a freakish or utterly implausible occurrence of circumstances." Walden Healthcare Ctr., 16 OSH Cases 1052, 1060 (Rev. Comm'n 1993) (quoting National Realty &

Constr. Co. v. OSHRC, 489 F.2d 1257, 1265-66, 1 OSH Cases 1422 (D.C. Cir. 1973)).

For the subject system to fail with three independent attachment points there would have to be an incredible catastrophe where no possible means of protection could be achieved, whether referencing the I-14 ANSI standard, 29 CFR 1910 or any plausible fall arrest system. An entire building collapse where all attachment points failed simultaneously may be possible, however the probability factor for such an implausible event cannot support a serious violation.

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 Statutes did occur as to Citation 1, Item 1, NRS 618.375(1), the general duty clause, and the proposed penalty is denied.

Proposed Findings of Fact and Conclusions of Law shall be served upon complainant and respondent counsel within twenty (20) days from date of decision. If no objections are filed within five (5) days, final Findings of Fact, Conclusions of Law and Final Order shall be served on the parties. Service of the Findings of Fact, Conclusions of Law and Final Order signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

DATED: This 21st day of January, 2011.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
TIM JONES, Chairman