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,

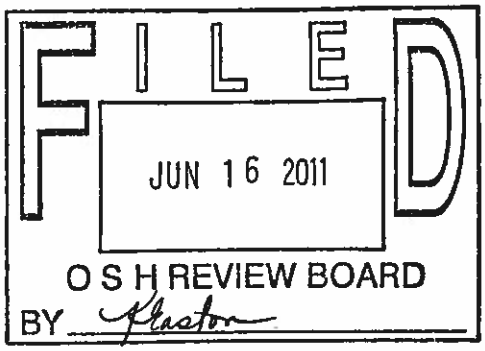
vs.

H & E CONSTRUCTION, INC.,

Respondent.

_____/

Docket No. RNO 11-1481



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of April, 2011, in furtherance of notice duly provided according to law, MR. ROB KIRKMAN, 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, **H & E Construction, Inc.**; 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 1626.501(b)(1).

The complainant alleged the respondent employer failed to ensure the each employee on a walking/working surface with an unprotected side or edge six (6) feet or more above a lower level, was protected from falling by the use of an approved fall arrest system. The alleged violation was classified as "Serious" and "Repeat". The proposed penalty for the alleged violation is in the amount of $6,600.00.

Citation 2, Item 1, charges a violation of 29 CFR 1926.100(a). The complainant alleged the respondent employer failed to ensure employees were protected by protective helmets. The violation was classified as "Other" with a zero penalty proposed.

Citation 2, Item 2, charges a violation of 29 CFR 1926.1052(c)(1)(ii). The complainant alleged the employer failed to ensure that stairways having four or more risers was equipped with one stair rail system along each unprotected side or edge. The violation was classified as "Other" with a zero penalty proposed.

Citation 2, Item 3, charges a violation of 29 CFR 1926.1053(a)(3)(I). The complainant alleged the employer failed to ensure that the rungs of fixed ladders were not spaced more than 14 inches apart. The violation was classified as "Other" with a zero penalty proposed.

Counsel for the complainant, through Compliance Safety and Health Officer (CSHO) Jake La France presented evidence and testimony in support of the violation and appropriateness of the penalty. Mr. La France testified that while en route to scheduled inspection, he and Inspector Fuller observed employees working near the edge of the roof of an Elks Lodge building in Reno, Nevada. He contacted his superiors and was authorized to inspect the property to determine whether there were employees exposed to fall hazards without recognized protection.

Mr. La France testified he introduced himself to the supervisor on the job site who identified the employer as respondent H & E Construction Inc. Supervisor Arnold consented to the inspection. When questioned by the inspector as to why one employee was wearing a harness and the other two were not, the supervisor responded that the employees were not required to be protected because they were working over six feet from the edge of the roof structure. Mr. La France advised there was no six foot exemption rule in the standard and noted that Mr. Arnold appeared surprised to be so informed. Inspectors La France and Fuller continued their inspection which included measuring the distance of the roof from the ground with a tape measure to establish the height at approximately 12'4". Exhibits 1 and 2 were admitted in evidence. Mr. La France testified that employee Lenz informed him that he was working approximately "10 feet past the edge of the roof. . ." while loading materials onto forks of the forklift. Inspector La France did not enter the roof but relied upon employee statements as to the proximity of their work near the edge and photographs that he had taken from the ground level depicting employees on the roof. Exhibit 1, pages 54, 55 and 56 are the statements signed by employees Lenz, Aguilar and Murguia. Inspector La France interviewed the employees individually and then later collectively. He wrote out the statements of their verbal responses and each employee reviewed and signed them in his presence. Employee Murguia stated he was ". . . about 7 feet from the edge (of the roof) cutting (materials) . . ." He stated ". . . I have not had fall protection training . . ." He stated there was no requirement for him to tie-off at the distance he was working because he was over six feet from the edge. Mr. Aguilar was the only respondent employee equipped with a fall arrest system. He stated he was working approximately

twenty feet from the edge. Mr. La France testified that employee Murguia informed him that he was not working "near the edge . . . and only got as close as seven feet from the edge . . .". He further testified that Supervisor Arnold appeared to be unaware of the fall protection requirements for employees workig in proximity to the roof edge.

Upon completion of his investigation, Inspector La France cited the respondent employer for a violation of 29 CFR 1926.501(b)(1). He noted a prior violation occurred in December of 2010 as Inspection No. 313965907 for a similar violation and therefore classified the subject violation as a "Repeat and Serious" violation. He assessed a penalty in accordance with the enforcement manual in the amount of $6,600.00.

Mr. La France testified that Federal OSHA has issued interpretation letters of the cited standard which permits the installation of a warning line 15 feet from the edge of a roof allowing work on a flat roof structure without the proscribed fall arrest systems. He added however there was no warning line in place on the roof where the subject employees were working nor were two of the employees equipped with a harness or engaged in any tie-off or utilizing any other proscribed, recognized or alternate means of protection from a fall hazard. Mr. La France testified by reference to the written standard in subpart M, including the preamble which provides OSHA's position for protection against fall hazards. He testified there is "no safe distance from a roof edge because of winds, employee mobility and other factors while working and moving about a roof." He testified that employee Lenz was engaged in mobile work on the roof structure and Murguia was similarly engaged in cutting and/or carrying sheets of plywood. He further testified that the condition described in the scope and purposes for

protection in the preamble subpart M fit the factual criteria found from his inspection to support violations of the applicable standards.

Inspector La France testified on direct and cross examination as to Citation 2, Items 1, 2 and 3. He described the violative conditions, the classifications of "Other" due to his opinion of low probability for serious injury and his reason for lack of assessment of any monetary penalty due to the low gravity involved in the classifications.

Counsel discussed and agreed upon the evidentiary exhibits which reflected the following:

Exhibit 1 consisted of the inspection report and related materials as well as the employee interview statements, with the exception of black and white photos which were unclear and removed. Exhibit 2, page 3, was a photo of an employee standing on the roof next to a fork lift. Exhibit 3 was a photo of the roof from the air and Exhibit 4 consisted of color photos 1 trough 17. Complainant concluded his case.

Respondent presented witness testimony from Mr. Nick Arnold, the supervisor of respondent. He testified that he is a 10 year employee of H & E Construction Inc. and supervised three employees on the subject job site. He testified that he measured the roof area from the edge to where the employees were working after the inspection when he again met with the employees and questioned the exact location of their work efforts on the day of the inspection. He further testified that there is an "industry standard" which permits no tie off of employees working on an unguarded roof edge if they remain six feet from that edge. He further testified that if work is going to "take you closer to six foot . . . then you want to tie off."

On cross-examination Mr. Arnold was questioned with regard to how he could explain employee Murguia's written statement and verbal

responses to Mr. La France which established he was working seven feet from the roof edge. Mr. Arnold testified that ". . . you can't rely on Murguia's estimates of distance . . ." He was further questioned as to his previous statement that if your work ". . . takes you **near** means six feet not for example seven feet . . .". He responded that he was misunderstood and he intended the exemption to apply to six feet rather than the "**near** seven feet distance."

At the conclusion of the presentation of the evidence, complainant presented his closing argument. Counsel argued that the facts are undisputed to establish a violation. Two employees, Messrs. Murguia and Lenz were working on a roof more than six feet above ground without tie off or other fall hazard protection as required by the cited standard 29 CFR 1926.501(b)(1). The written employee statements and verbal advice to Inspector La France was that employee Murguia was working seven feet from the unguarded roof edge and employee Lenz working ten feet from the roof edge. Supervisor Arnold testified they were working seventeen feet as to Mr. Lenz and 20 to 22 feet as to Mr. Murguia. Complainant counsel argued that the stated distances were irrelevant to the facts of violation because all constituted violative working conditions as governed by the promulgated standard cited. The evidence of violation is clear based upon the employee statements coupled with the CSHO observations from the ground level. The employees were apparently confused and believed there to be an exemption if they remained six feet from the edge of the roof. He further argued in reference to the cited standard preamble and subpart M which recognizes the hazardous conditions for employees working on an elevated work structure, particularly when they are involved in mobile work, carrying materials, exposed to the wind, and/or have access to hazardous

conditions on the roof structure including a falling away edge. There are no distance exceptions recognized in the standard to permit work without fall hazard protection other than a 15 foot warning line, but it is undisputed that none existed on the subject job site. He further argued that the respondent conceded there were no alternate means of compliance in place. Rather the supervisor and all employees felt that there was some type of industry guideline or exception to the applicable standard which permitted them to work without safety protection so long as they remained six foot from the edge of the roof. When questioned about the seven foot distance as to Mr. Murguia, Mr. Arnold simply dismissed the written statement of an approximate seven foot distance and further indicated that Mr. Murguia should not be believed because he is not good at estimating distances. Even giving the employer every benefit of the distances identified by its employees, it is still recognized that distance alone is not controlling with regard to fall hazard protection. The protection required for employees working on a roof structure is specific with only certain recognized exceptions in the standard, particularly a 15 foot warning line which prevents anyone from going beyond that distance without fall hazard protection. There was no warning line, the two employees provided written statements and verbal confirmation of their working proximate to the roof edge, the roof had a falling away edge without a parapet wall or any type of other protection; and there were no alternate means of compliance to satisfy the standard.

Counsel further argued that Citation 1, Item 1 must be found to be a repeat violation because all the criteria were met by the evidence proving a previous confirmed violation of the same or similar hazardous condition. This satisfied all current legal criteria for finding of a

repeat violation.

Counsel concluded by arguing that the burden of proof had been met with regard to Citation 1, Item 1. Citation 2, Items 1, 2 and 3, there was no evidence, testimonial or documentary, produced by respondent to rebut or even counter the charged violations or documentary evidence or testimony of Inspector La France.

Respondent presented closing argument. He asserted that notwithstanding any lack of any written exceptions in the standards allowing employees to work within six feet of a roof edge without fall arrest protection, there can be no violation because of the "six (6) foot industry guideline" recognized in Nevada. He asserted furthermore that the board cannot rely upon the written statement of Mr. Murguia that he was working as close as seven feet from the roof edge and that it should be attributed to simply a guess or the response of a nervous individual who was not accustomed to being questioned by an OSHA inspector. He argued there was no evidence to prove proximity to the edge other than one employee estimate of seven feet, Mr. Lenz's statement that he was approximately 20 feet and Mr. Arnold's measurement at 22 feet. He asserted there was no proof of a violation due to a lack of credible evidence and because all employee witnesses were working more than six feet from the edge. Counsel further argued that based upon the decision of the Nevada Occupational Safety and Health Review Board in Docket No. LV 10-1426 Penhall Company, the law in the state of Nevada as defined by the board recognized the construction industry guideline as the standard for employees working near a roof edge and allows exemption from protection for fall arrest if the work being conducted is beyond six feet from the edge.

To find a violation of the cited standards, 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).
>
> 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).
>
> 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.

A "repeat" violation is established if based upon a prior violation of the same standard, a different standard, or general duty clause, if the present and prior violation is substantially similar.

A violation is considered a repeat violation:

> If, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation. Potlatch Corp., 7 BNA OSHC 1061, 1063 (no. 16183,

1979). A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard. Superior Electric Company, 17 BNA OSHC 1635, 1638 (No. 91-1597, 1996). Robert B. Reich, Secretary of Labor, United States Department of Labor v. D.M. Sabia Company and Occupational Safety and Health Review Committee, 90 F.3d 854 (1996); Caterpillar, Inc. v. Alexis M. Herman, Secretary of Labor, and Occupational Safety and Health Administration, Respondents and United Auto Workers, Local 974, Intervenors, 154 F.3d 400 (1998).

A repeated violation may be found based on a prior violation of the same standard, a different standard, or the general duty clause, but the present and prior violations must be **substantially similar**. Caterpillar, Inc., 18 OSH Cases 1005, 1006 (Rev. Comm'n 1997), *aff's*, 154 F.3d 400, 18 OSH Cases 1481 (7th Cir. 1998); GEM Indus., Inc., 17 OSH Cases 1861, 1866 (Rev. Comm'n 1996). OSHA may generally establish its prima facie case of substantial similarity by showing that the prior and present violations are of the same standard. The employer may rebut that showing by establishing that the violations were substantially different. Where the citations involve different standards, OSHA must present "sufficient evidence" to establish the substantial similarity of the violations. A similar showing must be made if the citations involve the same standard but the standard is broadly worded. Repeated violations are not limited to factually identical occurrences. Provided that the hazards are similar, minor differences in the way machines work or in the size and shape of excavations will usually not lead to a finding of dissimilarity. In general, the key factor is whether the two violations resulted in substantially similar hazards. **It is not necessary, however, that the seriousness of the hazard involved in the two violations be the same.** Rabinowitz, Occupational Safety and Health Law, 2nd Ed. 2008 at pp. 230-231. (emphasis added)

The board finds a preponderance of substantial evidence to support a finding of violation at Citation 1, Item 1, referencing 29 CFR 1926.501(b)(1). The statements of respondent employees Murguia and Lenz in evidence at Exhibit 1, pages 54 through 56, the testimonial evidence of Supervisor Arnold, transcript pages 108-114, and the ground level

photographs and observations of CSHO La France meet the burden of proof to establish a violation of the cited standard by a preponderance of evidence. Two (2) respondent employees (Murguia and Lenz) were exposed and/or had access to hazardous fall conditions. They admitted to working within varying distances of seven feet, to 17 feet to 22 feet from the edge of the roof structure. The roof was measured at over 12 feet 4 inches in height from ground level. The two (2) respondent employees were not equipped with any fall arrest systems nor was there any evidence of **alternate means of compliance**. There was no warning line in place. The respondent employees were engaged in various work efforts on the roof structure. The evidence and testimony established the employees were involved in cutting materials, loading items on the forks of a forklift near the roof edge, and moving about the roof structure to effectuate their work efforts. The roof was without any barriers, barricades or parapet wall. The roof structure was a **fall away edge** type with no obstructions to prevent, slow or impede a fall to the ground. To perform their job task, the employees who admitted they were **exposed** to the proximity of various distances in their written statements (Murguia and Lenz) and corroborated by the supervisor testimony (Arnold), also had **access** to hazardous fall conditions.

> 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)

In reviewing the "repeat" status of the cited violation, the board finds the violative conditions cited are **substantially similar** to the previous violation upon which the repeat status was premised. Caterpillar supra pg. 110. NRS at 618.635 Willful or **repeated** violations provides:

> Any employer who willfully or **repeatedly violates** any requirements of this chapter, any standard, rule, regulation or order promulgated or prescribed pursuant to this chapter, may be assessed an administrative fine of not more than $70,000 for each violation, but not less than $5,000 for each willful violation. (emphasis added)

> "In general, the key factor is whether the two violations resulted in substantially similar hazards. It is **not necessary, however, that the seriousness of the hazard involved in the two violations be the same.**" Rabinowitz, Occupational Safety and Health Law, 2008, 2nd Ed., page 231. (emphasis added)

The "repeat" status of the violation is confirmed based upon the unrebutted evidence of prior violation.

In reviewing the classification of "serious" the board notes NRS 618.625 as follows:

> ". . . 2. . . . 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 **in that place of employment** . . ." (emphasis added)

The board finds insufficient proof to support classification of the violation as "serious". The facts in evidence do not demonstrate a "substantial probability" that death or serious physical harm could result from the working conditions and/or operations subject of the cited violation. However the board finds substantial evidence for reclassification of the

violation as "other than serious".

> "Where the Secretary alleges but fails to prove the seriousness of a violation, a non-serious violation generally will be found. *A.R.A. Mfg.*, 11 OSH Cases 1861, 1863-64 (Rev. Comm'n 1984). Rabinowitz, Occupational Safety and Health Law, 2008, 2nd Ed., page 225."

At Exhibit 1, pages 27 and 28, CSHO La France recognized the **minimal gravity** of the violative conduct in his rating of .03. Further CSHO La France noted a **low proximity** (fringe of danger rating .02). He and also concluded a **lesser probability** assessment.

The board, in reviewing the evidence and testimony also finds the respondent employees were not specifically engaged in high risk roofing work. Their work efforts, while indeed exposing them to hazardous fall conditions, did not demonstrate a **substantial probability** for death or serious physical injury as would be the case, for example, if employees were engaged in work at or very near the roof edge. Further, the fall potential of approximately 12 feet was not so high as to be sufficiently dangerous to result in a **substantial probability** of **serious injury or death**. The subject respondent employees were all experienced and trained in roofing work. One employee was equipped with a fall arrest system. No employees were observed working or engaged in high risk activities. The work efforts subject of testimony by all witnesses did not bring the employees to or dangerously close to the roof edge. All of these factors considered, together with the testimony of CSHO La France, and the ratings rendered in his report do not support a finding of "serious" classification.

The respondent asserts an absolute defense to the written terms of the cited standard based upon a previous Nevada Occupational Safety and Health Review Board (board) decision in Docket No. LV 10-1426,

Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry vs. Penhall Company. The Penhall case is distinguished on its facts and evidence from the subject action. The Penhall decision did not recognize or create a new special exemption in Nevada based upon an asserted "six (6) foot industry guideline". The board denied the alleged violation in Penhall due to a **lack of competent evidence to meet the burden of proof to establish a violation**. The alleged violation in the Penhall case was based upon only uncorroborated circumstantial evidence. The facts in Penhall demonstrated unproven allegations that an employee spent an unobserved approximate half hour drilling small hole penetrations in a roof structure near a parapet wall. There was no competent evidence or proof the employee who filed a JHA and equipped with a harness was not tied off. There were no employee admissions, evidence or observations of a lack of tie off. There was no direct evidence of the actual work effort, mobility on the roof, carrying, loading, cutting of materials, or any other factors similar to the subject case. The unrefuted facts in Penhall established the roof structure was not a **fall away edge** as here but rather equipped with a parapet wall. There was no measurement evidence to establish the height of the parapet wall. Furthermore, reference in Penhall to an industry guideline of six feet was merely supplementary to the overall lack of sufficient evidence to meet complainant's legal burden of proof. The board noted in Penhall that **additional** to the lack of direct evidence, no corroboration of the limited circumstantial evidence, and failure of proof to establish a violation, ". . . there was insufficient evidence to infer a fall hazard based upon the construction industry guideline for fall protection when working less than six feet from the edge on a roof structure."

The Penhall decision is restricted to the facts of that case and cannot be extended or misinterpreted to provide a precedent for creation of a conditional element or exemption to the codified standard 29 CFR 1926.501(b)(1) as adopted in Nevada Revised Statutes (NRS).

The Nevada Occupational Safety and Health Review Board has and continues to follow 29 CFR 1926.501(b)(1) as incorporated by reference in Nevada Revised Statute (NRS) 618.2959(8). This board has not and does not create an exemption or exception to the cited standard.

At Citation 2, Items 1, 2 and 3, respondent provided no evidence or testimony to rebut the evidence of violation. A respondent may rebut evidence 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).

Complainant met the burden of proof to establish violations at Citation 2, Items 1, 2 and 3, through the sworn testimony and admitted documentary evidence of CSHO La France.

Based upon the above and foregoing, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of Nevada Revised Statute did occur as to Citation 1, Item 1, 29 CFR 1926.501(b)(1). The violation is reclassied from "Serious" to "Other". The status of Citation 1, Item 1 as "Repeat" is confirmed. The proposed penalty of SIX THOUSAND SIX HUNDRED DOLLARS ($6,600.00) is modified and reduced to THREE THOUSAND DOLLARS ($3,000.00). The violations of Citation 2, Items 1, 2 and 3, are confirmed. The classification of Citation 2, Items 1, 2 and 3 as "Other" and the proposed penalty of ZERO DOLLARS ($0.00) are confirmed.

The Board directs counsel for the Complainant, **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 8 day of June, 2011.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By _____
TIM JONES, Chairman