

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

4 CHIEF ADMINISTRATIVE OFFICER
5 OF THE OCCUPATIONAL SAFETY AND
6 HEALTH ADMINISTRATION, DIVISION
7 OF INDUSTRIAL RELATIONS OF THE
8 DEPARTMENT OF BUSINESS AND
9 INDUSTRY,

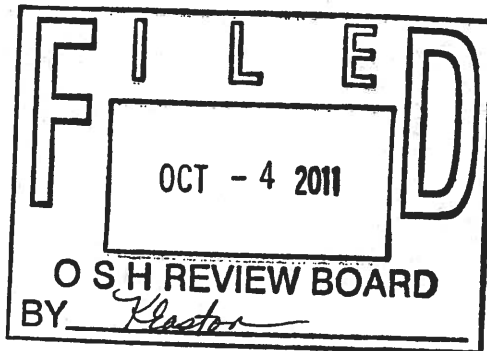
Docket No. RNO 11-1495

Complainant,

vs.

10 GEMINI INCORPORATED,

Respondent.



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13 DECISION

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 14th day of September,
16 2011, in furtherance of notice duly provided according to law, MR.
17 MICHAEL TANCHEK, ESQ. and MR. JOHN WILES, ESQ., counsel appearing on
18 behalf of the Complainant, **Chief Administrative Officer of the**
19 **Occupational Safety and Health Administration, Division of Industrial**
20 **Relations (OSHA)**; and MR. LEONARD E. MACKEDON, ESQ., appearing on behalf
21 of Respondent, **GEMINI INCORPORATED**; the **NEVADA OCCUPATIONAL SAFETY AND**
22 **HEALTH REVIEW BOARD** finds as follows:

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

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

28 Citation 1, Item 1, charges a violation of 29 CFR 1910.212(a)(1).

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1 The complainant alleged the respondent employer failed to provide
2 machine guarding of spindle wheel components to protect employees from
3 the hazards of rotating parts. The alleged violation is classified as
4 "Serious". The proposed penalty for the alleged violation is in the
5 amount of \$1,800.00.

6 Citation 1, Item 2, charges a violation of 29 CFR
7 1910.219(c)(2)(I). The complainant alleged the respondent employer
8 failed to guard rotating horizontal machine shafts to protect employees
9 from the hazards of rotating parts during operations. The alleged
10 violation was classified as "Serious". The proposed penalty for the
11 alleged violation is in the amount of \$1,800.00.

12 Complainant and respondent counsel stipulated to the admission in
13 evidence of Exhibits 1, 2, 3, 4 and 5 on behalf of complainant and A,
14 B, C, D and E on behalf of respondent.

15 Counsel for the complainant, through Compliance Safety and Health
16 Officer (CSHO) Ee Foo Lee presented evidence and testimony in support
17 of the alleged violations and proposed penalties. Mr. Lee testified
18 that he conducted an inspection of the respondent's worksite in Fallon,
19 Nevada based upon a referral. After identifying himself and presenting
20 his credentials Mr. Lee commenced inspection of the issues subject of
21 referral. While engaged in the inspection he noted certain polishing
22 machines with unguarded exposed rotating parts. He obtained photographs
23 of the conditions and identified same at Exhibit 2 in evidence
24 consisting of five photos. He testified that based upon his interviews
25 and investigation the machines were used by employees on a daily basis,
26 although not continuously.

27 At Citation 1, Item 1, referencing 29 CFR 1910.212(a)(1) CSHO Lee
28 determined that employees operating the machinery would be exposed to

1 potential hazards due to the unguarded spindle wheel ends being exposed,
2 even though not a power transmission device because they rotated during
3 operations. At Citation 1, Item 1, Mr. Lee differentiated the Citation
4 1, Item 2 violation by reference to the different applicable standards
5 cited because the exposure at item 2 was to a power driven transmission
6 apparatus. In both instances the identified hazard was potential
7 exposure to rotating parts by employees engaged in operations.

8 Mr. Lee testified as to Citation 1, Item 2 referencing photographic
9 Exhibit 1, photos number 1, 2 and 4, which depicted the subject
10 unguarded shafts. He testified as to the applicability of the cited
11 standard to the power driven rotation which he determined must be "cased
12 or covered" (guarded) to prevent employee contact.

13 Mr. Lee testified that during his interviews, the Plant Manager
14 stated two or three employees used the machines daily, but not
15 continuously. He determined there to be **employer knowledge** based upon
16 the manager's statements that the machines had been on site for a long
17 period of time and that employees used the machines daily or regularly.
18 Mr. Lee further testified the plant manager told him he did not realize
19 the shafts needed guarding.

20 The violations were classified as "Serious" because of the CSHO
21 determination that harm from this type of exposure could cause loss of
22 fingers, limbs, eyes, or maybe even death. He established penalties
23 initially at \$4,000.00 for each violation in furtherance of the
24 operations manual but rendered appropriate credits for size, history and
25 other factors to reduce the penalties to \$1,800.00 for each violation.
26 The violations were abated within a 14 day period to demonstrate
27 employer good faith. Testimony referenced the inspection report
28 prepared by Mr. Lee at Exhibit 1, including the penalty calculations,

1 adjustment factors and classifications for severity at Medium (M),
2 probability of Lesser (L) and gravity of 05.

3 On cross-examination CSHO Lee testified that the buffer wheel on
4 the polishing machine was made of fabric not metal, no machine was in
5 use during the inspection, and that employees would stand at
6 approximately "arms length . . . maybe one foot to 18 inches from the
7 machine during operation . . .".

8 Respondent presented witness testimony and evidence through Mr. Jet
9 Tran, the employer Safety Officer. After testifying to his extensive
10 background and qualifications in the manufacturing safety field Mr. Tran
11 provided a general history of the company which owns and operates seven
12 different plant sites throughout the country. He testified there are
13 over twenty safety programs for plant operations. He conducts weekly
14 safety meetings, and every two years invites OSHA (SCATS) to the plant
15 sites for review and site inspection advisories. He testified that
16 SCATS has performed 26 invited inspections at company plant sites during
17 his tenure. He testified as to various awards issued to the plant and
18 identified same in Exhibit A. Mr. Tran also testified that there have
19 been no previous citations for the Fallon plant with regard to the
20 subject violations or any others. He referenced Exhibit B, pages 1
21 through 3, in support of this testimony.

22 Mr. Tran testified on direct examination by counsel that he did not
23 believe the subject machines required guarding under the cited standards
24 based upon his own professional opinion and because SCATS had gone
25 through the plant repeatedly and made no comment or reference with
26 regard to the exposed spindles or the rotating shafts. He testified
27 that eight OSHA visits at the Fallon plant site never identified or
28 cited a hazard. Mr. Tran testified he believed it would be difficult

1 or impossible for an employee to come in contact with any rotating parts
2 while operating the machines. Operation of the machines requires an
3 employee to stand in front of the machine where he/she is not proximate
4 to or have access to the cited unguarded components.

5 On cross-examination by complainant counsel, Mr. Tran testified
6 that the point of operation for the machinery is not near the spindle
7 ends or the horizontal shaft so an employee cannot come into contact
8 with the exposed rotating parts.

9 On re-direct examination Mr. Tran testified there has never been
10 any injury to an employee from an exposed rotating shaft or spindle.

11 At the conclusion of the case presentation both complainant and
12 respondent offered closing arguments.

13 Complainant counsel argued the evidence clearly establishes the
14 violative conditions of unguarded rotating parts at both Citations 1 and
15 2 to satisfy the legal burden of proof. He submitted that the evidence
16 demonstrated, based upon the testimony of Mr. Lee, that serious
17 violations had occurred and that the penalties were significantly
18 reduced but well within the guidelines of the operations manual.

19 Respondent counsel presented closing argument. Counsel argued that
20 even if the alleged violative conduct did occur, notwithstanding the
21 testimony of lack of exposure based upon the point of operation and
22 remote access to the rotating parts, the classifications as serious were
23 inappropriate. He argued that repeated inspections by SCATS
24 demonstrated a lack of safety concern for the subject conditions.
25 Counsel noted OSHA was on the premises because of a referral which
26 resulted in no findings of violative conduct. The inspector merely
27 noted the subject machines during the course of his inspection, but no
28 one had complained or reported an injury due to same. Counsel asked how

1 these violative conditions could go unnoticed after eight OSHA
2 inspections, and suggested the answer to be that they demonstrated no
3 serious conditions and should not have been cited as serious violations.
4 Counsel referenced NRS 618.625(2) providing the definition of a serious
5 violation and argued that the **substantial probability** of serious
6 physical harm or death could not exist under the facts in evidence. He
7 argued that such violations could not be found if the employer did not
8 know or could not know the serious nature of the conditions. He
9 asserted that because SCATS had not noted any guard problem after
10 repeated inspections it was reasonable that the employer could not have
11 realized the conditions to be serious. Counsel referenced the
12 "probability" factors and questioned how over the many years of
13 operating the subject plant and other plant facilities the company never
14 had an injury from exposed shafts or spindles. He asserted the past
15 record for the cited operations must be considered in analyzing the
16 seriousness of the violations.

17 The case was concluded and the matter submitted for board
18 consideration.

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

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

24 All facts forming the basis of a complaint must be
25 proved by a preponderance of the evidence. Armor
Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958
26 (1973).

27 To prove a violation of a standard, the Secretary
must establish (1) the applicability of the
28 standard, (2) the existence of noncomplying
conditions, (3) employee exposure or access, and
(4) that the employer knew or with the exercise of

1 reasonable diligence could have known of the
2 violative condition. See Belger Cartage Service,
3 Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
4 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
5 Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
6 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
7 (No. 76-1408, 1979); American Wrecking Corp. v.
8 Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.
9 2003).

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

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

15 The board finds a preponderance of evidence to support a finding
16 of violations at Citation 1, Item 1, referencing 29 CFR 1910.212(a)(1)
17 and Citation 1, Item 2, referencing 29 CFR 1910.219(c)(2)(I). The
18 exhibits in evidence and testimony of CSHO Lee, meet the burden of proof
19 to establish a violation of the cited standards by a preponderance of
20 evidence.

21 A respondent may rebut allegations by showing:

- 22 1. The standard was inapplicable to the situation
23 at issue;
- 24 2. The situation was in compliance; or lack of
25 access to a hazard. See, Anning-Johnson Co.,
26 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

26 The evidence and testimony in rebuttal of the violation did not
27 meet the burden of proof.

28 In reviewing the classification of "serious" the board notes

1 particularly NRS 618.625 as follows:

2 ". . . 2. . . . a serious violation exists in a
3 place of employment if there is a **substantial**
4 **probability that death or serious physical harm**
5 **could result from a condition which exists, or from**
6 **one or more practices, means, methods,** operations
7 or processes which have been adopted or are in use
8 in that place of employment . . ." (emphasis added)

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

15 "Where the Secretary alleges but fails to prove the
16 seriousness of a violation, a non-serious violation
17 generally will be found. *A.R.A. Mfg.*, 11 OSH Cases
18 1861, 1863-64 (Rev. Comm'n 1984). Rabinowitz,
19 Occupational Safety and Health Law, 2008, 2nd Ed.,
20 page 225."

21 The board, in reviewing the evidence and testimony also finds that
22 the respondent employees were not subject to a high degree of exposure
23 for contact with the rotating parts due to the unrebutted testimony on
24 the point of operation to perform the work task required in the
25 operative process. It would be difficult for an employee to access the
26 rotating parts during operations. Similarly, the facts depict a work
27 effort and employee positioning such that if the employee tripped or
28 accidentally came in contact with the subject rotating parts there would
29 not be a reasonable likelihood of severe or serious injury or certainly
30 death given the nature of the exposed parts as opposed to some which may
31 have very sharp components readily subject of contact. The board also
32 found the lack of history of injuries from the machinery must be duly
33 noted in support of the low probability factor which the CSHO identified

1 in his report. At Exhibit 1, pages 5 through 10, CSHO Lee recognized
2 the **minimal gravity** of the violative conduct in his rating of 05.
3 Further CSHO Lee noted severity at a Medium (M) level and probability
4 at Lesser (L). The board also noted testimony of the smoothness of the
5 shaft and lack of accessibility for contact which demonstrated that
6 while accidents can always occur, there simply was not a **substantial**
7 **probability that death or serious physical harm could result** from such
8 conditions as defined in Nevada statutes.

9 The board finds complainant did not meet the burden of proof to
10 establish the serious classification for the violations even though the
11 evidence established violations. The standards were **applicable** to the
12 facts in evidence, and **non-complying conditions** were admitted by both
13 complainant and respondent witnesses. **Employer knowledge** of the
14 violative conditions is imputed by the governing law to the employer
15 when a supervisor knew or with reasonable diligence could have known of
16 the violative conditions. See Division of Occupational Safety and
17 Health v. Pabco Gypsum, 105 Nev. 371, 775 P.2d 701 (1989). Evidence
18 established that the plant manager knew of the conditions and should
19 have known them to be violative. Employer knowledge was further
20 established at respondent's Exhibit C wherein SCATS noted the lack of
21 guarding on previous visits requisite for correction.

22 Based upon the facts, evidence and applicable law, it is the
23 decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that
24 violations of Nevada Revised Statutes did occur as to Citation 1, Item
25 1, 29 CFR 1910.212(a)(1) and Citation 1, Item 2, 29 CFR
26 1910.219(c)(2)(I). The violations are reclassified from "Serious" to
27 "Other". The proposed penalties in the amount of ONE THOUSAND EIGHT
28 HUNDRED DOLLARS (\$1,800.00) for each violation at a total of THREE

1 THOUSAND SIX HUNDRED DOLLARS (\$3,600.00) are confirmed.

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

13 DATED: This 4th day of October, 2011.

14 NEVADA OCCUPATIONAL SAFETY AND HEALTH
15 REVIEW BOARD

16 /s/
17 By _____
 JOE ADAMS, Chairman