NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION OF THE DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA,

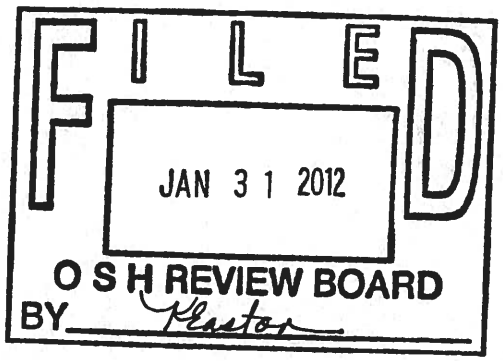
Complainant,

vs.

HARRIS SALINAS REBAR, INC.,

Respondent,

Docket No. RNO 12-1536



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 14th day of December, 2011, in furtherance of notice duly provided according to law, MR. MICHAEL TANCHEK, 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, **Harris Salinas Rebar, 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 Serious violation of 29 CFR 1926.501(b)(5). Complainant alleges a respondent employee engaged in "tying steel" on a shear wall approximately 45 feet above

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ground without protection from a fall to the ground level through utilization of a personal fall arrest system, safety net or positioning device. The violation was classified as **serious**. The proposed penalty is in the amount of Two Thousand Six Hundred Seventy Seven Dollars and No/100 ($2,677.00).

Citation 1, Item 2, charges a Serious violation of 29 CFR 1926.701(b). Complainant alleges the respondent employer did not protect an employee from exposure to an impalement hazard by failing to cap exposed rebar.

During the course of the hearing division counsel moved to dismiss Citation 1, Item 1, a Serious violation of 29 CFR 1926.501(b)(5).

Complainant and respondent counsel stipulated to the admission into evidence of complainant's Exhibit A, the OSHA investigative report, photographs, and documents obtained during the inspection. Counsel also stipulated to the admission into evidence of respondent's Exhibit B-1 through B-30, as well as B-31 and B-32, which were photos taken by the CSHO but introduced by respondent.

Counsel for the Chief Administrative officer presented testimony and evidence with regard to the remaining alleged violation Citation 1, Item 1, 29 CFR 1926.701(b). Certified Safety and Health Officer (CSHO) Mr. Kurt Garrett testified that he investigated an accident on July 1, 2011 at the respondent job site located on the University of Nevada campus in Reno, Nevada. He testified that respondent employee, Mr. Adolfo Aguilar was reportedly engaged in steel erection work ("tying steel") on a "grid" at approximately 45 feet above ground and fell to the ground level sustaining serious injuries including broken bones. He testified there was no eye witness to the actual fall but

he obtained information from a crane operator who reported his observations that employee Aguilar was not "100% tied off" to the steel matting of the grid. Mr. Garrett testified the injured employee, Mr. Aguilar reported he did not remember if he properly re-hooked his positioning device during movement or whether his personal fall arrest system lanyard was attached to effectuate the 100% tie-off safety policy required by the respondent employer. Mr. Garrett identified photographs admitted in evidence by stipulation as Exhibit A-2 consisting of four depictions of the accident scene. He identified photographic Exhibit A-5 which depicted extended rebar protruding from concrete or form work in an uncapped condition. He testified the photo was taken shortly after the accident by Mr. Farthing, the superintendent of the general contractor. He further testified the general contractor was cited in addition to the respondent because the respondent foreman on the site also had a duty to assure his employees were protected and should have noticed there was uncapped rebar in the area. Mr. Garrett testified he obtained actual measurements of various distances and made his own estimates as to the height of the work being performed at above the minimums requiring protection under OSHA standards. He initially cited the employer at Citation 1, Item 1 for failing to ensure the subject employee was protected by a fall arrest system. The citation was dismissed by complainant counsel after completion of complainant witness testimony.

Mr. Garrett described the process for a "100% tie-off" policy as including the use of a safety hook in conjunction with a lanyard such that whenever an employee repositions himself or engages in other type work, there would never be any point in time when he was not 100%

tied-off by one of the two devices that completed the 100% tie-off system. He further testified that while no one saw the actual accident other than the employee falling through the air and landing at the ground level approximately 45 feet below, the on site crane operator told him, but did not complete a written statement, that the accident occurred because the employee was not completely tied off to the steel matting. Mr. Garrett testified the crane operator was observing the employee working as he (operator) was holding the supporting steel mat with the crane to maintain the material in place while employee Aguilar was completing his "tying" work. The operator reported he saw Mr. Aguilar unhook his positioning hook device, step down the wall and fall to the ground below. The operator further stated that he thought the lanyard would catch the employee but then realized the lanyard was not attached and therefore concluded that 100% tie-off was not completed by the employee to arrest the fall.

Mr. Garrett testified the respondent was a subcontractor on the job and West Coast Contractor Inc. the general contractor responsible under the written job contract for installing caps on all rebar protruding out of the concrete and/or form work. He determined it was appropriate to cite both the general contractor contractually responsible for capping the rebar, as well as the respondent who should have assured capping protection to be in place for protection of its own employees from exposure to a fall hazard.

CSHO Garrett identified the Exhibit 3 as photographs provided by the general contractor to demonstrate there were no caps on some rebar at the site near where employee Aguilar fell, but not immediately beneath his work area.

Counsel for respondent conducted cross-examination of CSHO

Garrett. He testified that in completing his investigation report he confirmed respondent maintained an adequate safety program. He identified Exhibit 3, pages 2-18 as the documentation delivered to him during the investigation when he requested evidence of training and safety. He also testified that no one knows why employee Aguilar fell to the ground or why he was not tied off to his lanyard when he apparently unhooked his safety clip to reposition himself on the grid. Mr. Garrett testified he had no information or evidence that either the general contractor or respondent knew any portion of the rebar was not capped. The only person he determined **exposed** to rebar at the time of the accident was injured employee Aguilar. The job work was concluding on the day of the accident and the weekend was approaching leaving only Mr. Aguilar, the crane operator, and respondent foreman Freeman at the site.

In response to additional questions regarding his investigative report, Mr. Garrett testified he was told by all employees interviewed at the site that respondent had a 100% tie-off policy. He testified foreman Freeman reportedly checked the job site regularly for capping of rebar but stated that with work underway often times caps are knocked off so must be continuously replaced. He also recalled a statement from the general contractor representative that the caps are checked regularly during the day but often knocked off due to work and must be continuously replaced.

Complainant presented witness testimony by Mr. Robert T. Farthing, the superintendent of the general contractor West Coast Contracting, Inc. Mr. Farthing identified photos of the project site and the area where employee Aguilar fell. He identified Exhibit A-3, page 1, his signature on the cover sheet, and photos at pages 2 and

3 which he took approximately one hour after the accident. He also identified photos at A-5 and A-6 depicting no caps on some rebar. He testified caps were put on after the accident occurred.

On cross-examination of Mr. Farthing, he confirmed it was the legal contractual responsibility of the general contractor to cap rebar on the project site. He further testified he was aware respondent had a 100% tie-off safety policy and knew respondent was enforcing the policy before the accident. In response to an inquiry as to the actual area where the uncapped rebar existed, Mr. Farthing testified it was east of the area of the fall. He further testified the photographic exhibits also demonstrated an upper level platform with a guardrail at the edge of the wall on which Mr. Aguilar was working which was intended to provide added protection for employees from any rebar. Mr. Farthing further testified he expected his employees to cap all rebar.

At the conclusion of the complainant's case respondent presented witness testimony and evidence in defense of the citation. Mr. Henry Ward identified himself as the branch manager of respondent at the time of the accident. He testified there was no employer knowledge and that any rebar on the site had not been capped, capping was a requirement of the general contractor, and no respondent employee aware capping had not been accomplished.

On cross-examination Mr. Ward testified all rebar was capped when he arrived on the scene after the accident, and that he is aware of OSHA standards requiring capping of rebar. He further testified that the "form saver or tie-in" rebar is not required to be capped because it does not present an impalement hazard due to its horizontal position on the grid.

At the conclusion of presentation of evidence and testimony, complainant and respondent presented closing arguments.

Complainant argued that responsibility for capping was admittedly governed by contract and the responsibility of the general contractor but respondent also had a duty to its employees to assure there was no exposure to an impalement hazard created by others. Respondent should have protected the site better to safeguard its employees who were in proximity to uncapped rebar. Counsel argued there is no question that some rebar on the site was uncapped at the time of the accident; and how long it existed in that condition exposing employees is unknown. Counsel submitted that the basic position of the complainant is that the cited OSHA standard required rebar be capped and it was the responsibility of both the general contractor and respondent to assure no employees were exposed to the admitted uncapped rebar.

Respondent presented closing argument. Counsel reiterated his opening statement comments that there was simply no impalement hazard exposure to Mr. Aguilar at the subject site because he did not fall in an area where there existed any uncapped rebar. He asserted there was no evidence, testimony, photos or even an argument that the area where employee Aguilar fell contained an impalement hazard. He asserted that had there been uncapped rebar in the fall area, the employee would have been impaled and suffered death or far more serious injuries than those sustained described in previous testimony.

Counsel further argued that even had there been evidence of exposure to an impalement hazard to establish violation, all four elements of the recognized defense of unpreventable employee misconduct were already in evidence through witness testimony,

documents and the CSHO investigative report. Respondent argued that a critical and essential element to prove a violation under established occupational safety and health law is exposure to a hazard. He argued that no one knows, and there was no evidence as to why, employee Aguilar failed to maintain dual connection points and satisfy the respondent safety rule of 100% tie-off. He asserted it is clear and undisputed that the area where the employee fell did not contain any exposed rebar. There was simply no exposure to hazards of uncapped rebar. There might have been uncapped rebar in an area nearby but not one where Mr. Aguilar fell or could have fallen while working on the grid. He argued the OSHA photos at Exhibit A-2 show there was no way the employee could have fallen on rebar without some extraordinary and unforeseeable catapulting during the fall to reach the area where the evidence demonstrated there to be exposed rebar. He argued complainant should never have cited the respondent for a violation based upon pure speculation of exposure to an impalement hazard from uncapped rebar that was simply not in or proximate to the area of the fall. He argued the state failed to meet its essential burden of proof; there was no basis, facts or evidence to find a violation.

The board in reviewing the evidence and testimony finds insufficient evidence to demonstrate respondent employee Aguilar was exposed to an impalement hazard as charged at Citation 1, Item 2, referencing 29 CFR 1926.701(b). There was no evidence that Mr. Aguilar did or could have come in contact with exposed rebar which was not in or dangerously near the area where he landed at ground level. CSHO Garrett testified that Mr. Aguilar was the only employee identified as exposed to the hazard.

To find a violation of the cited standard, 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).
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> 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 to the hazard**, 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). Emphasis added.

There was no preponderance of evidence to establish actual hazard exposure.

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.** (emphasis added)

The required essential element of employee exposure to prove a violation not being established **directly** would have to be satisfied **constructively** through the **rule of access** to find a violation. The evidence does not meet the established case law requirements to satisfy constructive exposure to a hazard.

> 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)

There was insufficient evidence to establish the existence of a hazard **zone of danger** given the location of the uncapped rebar, the area of Mr. Aguilar's work and the location of where he fell to the ground. There was no evidence Mr. Aguilar had **access** to the hazard of falling upon uncapped rebar.

There was no evidence that the respondent employer knew, or with the exercise of reasonable diligence could have known, the violative conditions under the facts in evidence. Employer **knowledge** cannot be inferred from the evidence in the record. The responsibility for the uncapped rebar was that of the general contractor. Certainly the respondent employer had a duty to similarly protect its employees notwithstanding a contractual agreement between a general and subcontractor. However there was no weight of evidence that uncapped

rebar existed throughout the site. To the contrary both complainant and respondent witnesses testified as to respondent's safety policy and reasonable enforcement of same. Most importantly there was no evidence that respondent employee Aguilar was actually exposed to the subject uncapped rebar. The rebar was not located in a "zone of danger". The facts, photographs and other evidence in the record could not demonstrate or support an inference for the potential of Mr. Aguilar to have fallen on the uncapped rebar as it was not located in an area that he might have reached from other than an extraordinary, hypothetical and/or speculative scenario during his fall.

The general contractor and the employer exercised reasonable efforts to assure protection of the site and the employees through capping and 100% tie-off safety practices and policies. The evidence and testimony clearly established appropriate safety rules and policies in effect and compliance with same. Employee Aguilar apparently erred by not completing 100% tie-off which resulted in the fall. However when he did fall, it was in an area where no impalement hazard existed nor to which he had access.

> An employer cannot in all circumstances be held to the strict standard of being an absolute guarantor or insurer that his employees will observe all the Secretary's standards at all times. An isolated brief violation of a standard by an employee which is unknown to the employer and is contrary to both the employer's instructions and a company work rule which the employer has uniformly enforced does not necessarily constitute a violation of [the specific duty clause] by the employer. *Id.*, 1 O.S.H.C. at 1046.
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> ". . . employers are not liable under the Act for an individual single act of an employee which an employer cannot prevent." *Id.*, 3 O.S.H.C. at 1982. The OSHRC has repeatedly held that "employers, however, have an affirmative duty to protect against preventable hazards and preventable hazardous conduct by employees. *Id.*

See also, Brock v. L.E. Meyers CO., 818 F.2d 1270 (6th Cir.), *cert. denied* 484 U.S. 989 (1987).

The burden of proof rests with OSHA under Nevada Law (NAC 618.798(1)). Here the burden of proof was not met due to a lack of establishing the critical element of **hazard exposure**. However even had the complainant met its burden of proof and established a prima facie case of violation, the essential elements required for the defense of **unpreventable employee misconduct** were in evidence to rebut a finding of violation.

The elements required for the defense of unpreventable employee misconduct are:

(1) The employer must establish work rules designated to prevent the violation

(2) The employer must adequately communicate these rules to its employees

(3) The employer must take steps to discover violations

(4) The employer must effectively enforce the rules when violations have been discovered.

See *Jensen Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10 OHSHC 2128, 1980 OSHC 1045 ¶24,174 (1980). Also see, Evidence that the employer effectively communicated enforced safety policies to protect against the hazard permits an inference that the employer justifiably relied on its employees to comply with the applicable safety rules and that violations of these safety policies were not foreseeable or preventable. Austin Bldg. Co. v. Occupational Safety & Health Review Comm., 647 F.2d 1063, 1068 (10th Cir. 1981). When an employer proves that it has effectively communicated and enforced its safety policies, serious citations are dismissed. See Secretary of Labor v. Consolidated Edison Co., 13 O.S.H. Cas. (BNA) 2107 (OSHRC Jan. 11, 1989); Secretary of Labor v. General Crane Inc., 13 O.S.H. Cas. (BNA) 1608 (OSHRC Jan. 19, 1988); Secretary of Labor v. Greer Architectural Prods. Inc., 14 O.S.H. Cas. (BNA) 1200 (OSHRC July 3, 1989).

The board finds that Complainant did not meet the required statutory burden of proof to establish a violation of the cited standard. While not required to rule on the defense of unpreventable employee misconduct, there was substantial evidence to support the defense even had the complainant met its burden of proof.

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 2, referencing 29 CFR 1926.701(b). The proposed penalty in the amount of Two Thousand Six Hundred Seventy-Seven Dollar ($2,677.00) is denied. No violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR 1926.501(b)(5) based upon the withdrawal of the citation during the course of the hearing.

The Board directs counsel for the Respondent 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 31st day of January 2012.

NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

By /s/
JOE ADAMS, Chairman