

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH

2 REVIEW BOARD

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

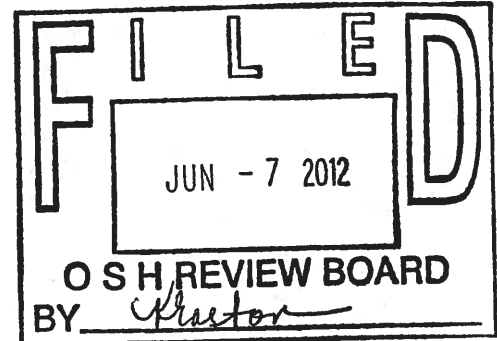
Docket No. LV 12-1555

Complainant,

vs.

JENSEN PRECAST,

Respondent.



11
12 **DECISION**

13 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
14 **HEALTH REVIEW BOARD** at a hearing commenced on the 9th day of May, 2012,
15 in furtherance of notice duly provided according to law, MR. MICHAEL
16 TANCHEK, ESQ., counsel appearing on behalf of the Complainant, **Chief**
17 **Administrative Officer of the Occupational Safety and Health**
18 **Administration, Division of Industrial Relations (OSHA)**; and MR. ROBERT
19 D. PETERSON, ESQ., appearing on behalf of Respondent, **H & E**
20 **Construction, Inc.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
21 **BOARD** finds as follows:

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

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

27 Citation 1, Item 1, charges a violation of 29 CFR 1626.652(b)(2).
28 The complainant alleged the respondent employer failed to protect

1 employees working in an excavation by failing to ensure maximum
2 allowable slopes were determined in accordance with the site conditions
3 standard and requirements thereby exposing employees to possible cave-in
4 hazards. The alleged violation was classified as "Serious" and
5 "Repeat". The proposed penalty for the alleged violation is in the
6 amount of \$12,600.00.

7 Citation 2, Item 1, charges a violation of 29 CFR 1926.404(f)(6).
8 The complainant alleged the respondent employer failed to ensure that
9 the electrical path to ground on a power cord was permanent and
10 continuous. The violation was classified as "Serious" and a penalty
11 proposed in the amount of \$3,600.00.

12 Citation 2, Item 2, charges a violation of 29 CFR 1926.651(c)(2).
13 The complainant alleged the employer failed to ensure that stairway,
14 ladder or other safe means of egress were located in an excavation that
15 was four (4) feet or more in depth. The violation was classified as
16 "Serious" and a penalty proposed in the amount of \$3,600.00.

17 Citation 2, Item 3, charges a violation of 29 CFR 1926.651(k)(1).
18 The complainant alleged the employer failed to ensure that inspection
19 of excavations was made by a competent person prior to start of work and
20 as needed throughout the work shift. The violation was classified as
21 "Serious" and a penalty proposed in the amount of \$6,300.00.

22 Citation 3, Item 1, charges a violation of 29 CFR
23 1926.405(g)(20)(iv). The complainant alleged the employer failed to
24 ensure that flexible cords were connected to devices so that strain
25 relief was provided which would prevent pull from being directly
26 transmitted to joints or terminal screws. The violation was classified
27 as "Other" and a zero penalty proposed.

28 Counsel for the complainant, through Compliance Safety and Health

1 Officer (CSHO) Bob Harris, presented evidence and testimony in support
2 of the violations and proposed penalties. Mr. Harris testified he
3 conducted an unprogrammed inspection of the respondent employer's job
4 site in Las Vegas, Nevada on or about August 23, 2011. He identified
5 complainant's Exhibit 1, which was admitted in evidence over the
6 objection of respondent. The exhibit included the CSHO narrative
7 inspection report. Mr. Harris identified Exhibit 2 admitted in evidence
8 without objection as a previous citation issued to the respondent and
9 an informal settlement agreement confirming a prior violation. Mr.
10 Harris also identified Exhibit 4, admitted in evidence without
11 objection, which included photographs of the subject site taken during
12 the inspection as numbers 1-10.

13 CSHO Harris testified Mr. Victor Salazar was the respondent
14 employer foreman on the job site and a trained **competent person**. Upon
15 initial arrival at the site Mr. Harris obtained photographs of what he
16 determined to be violative conditions as previously identified in
17 Exhibit 4, numbers 1-10. He testified photograph number 2 depicted
18 foreman employee Salazar standing at the top edge of the trench looking
19 into a "concrete box" located inside the excavation. He described the
20 box as comprised of wooden forms braced by 2"x4"s and cross bars at the
21 top of the form. He further testified there was no shoring in the
22 excavation nor the required slope of the spoils materials at or near the
23 top edge as depicted in Exhibit 4, photograph 2. Photographs 3, 4, and
24 6 were identified as additional views of the excavation including the
25 concrete box in the trench and spoils material at the top edge.
26 Photograph 5 was described as another depiction of Mr. Salazar shown
27 standing inside the concrete box in the excavation without shoring.

28 The remaining photographs were identified by Mr. Harris in support

1 of the violations including photograph 7 depicting a steel "trench box"
2 on the job site and a means often used to protect excavations from
3 collapse or cave-in. Photographs 8 and 10 depicted an electrical
4 extension cord without required strain relief protection; and photograph
5 9 the cited extension cord without a grounding pin. Mr. Harris
6 described each of the violations he personally observed and documented
7 by the photographs in Exhibit 4.

8 At the conclusion of his inspection Mr. Harris cited the respondent
9 at Citation 1, Item 1 for a failure to properly determine and slope the
10 spoils areas for the subject excavation to prevent the potential for
11 sloughing of the spoils material or failure of the vertical walls which
12 could result in a cave-in and serious injury or death to the employees
13 he observed working inside the concrete box. He described the
14 probability, severity and gravity factors for potential serious injury
15 or death. Mr. Harris identified the bases for his calculating penalties
16 in furtherance of the OSHA operations manual. He further testified with
17 regard to the **Repeat Serious** classification by identifying and
18 explaining the evidence at Exhibit 2, a previous violation by respondent
19 employer of the same standard cited at Citation 1, Item 1. Mr. Harris
20 also testified he personally observed employees Salazar and Godinez in
21 the concrete box in the excavation on his arrival and took the photos
22 at Exhibit 4 to support his observation.

23 CSHO Harris cited the respondent at Citation 2, Item 1 for a
24 failure to ensure a ground pin was located in the extension cord he
25 observed during his inspection identified at Exhibit 4, photograph 9.

26 Mr. Harris cited the respondent at Citation 2, Item 2 based upon
27 his observation of employee Jose Godinez climbing out of the concrete
28 box located in the excavation without use of a stairway, ladder or other

1 safe means of egress. He described the employee as stepping on various
2 components of the concrete box to assist him in exiting the box in the
3 excavation and a violation of the standards.

4 At Citation 2, Item 3, Mr. Harris cited the employer for failure
5 to ensure inspection of the excavation was made by a **competent person**
6 prior to the start of work. He testified that information gathered
7 during his investigation statements made to him by Mr. Salazar confirmed
8 the respondent employees had been working in the box within the unshored
9 excavation for approximately four days. Mr. Salazar admitted he was
10 competent person trained but did not inspect the excavation at any time
11 prior to work. Mr. Salazar also informed Mr. Harris that he did not
12 know the soil type within the excavation. He identified Exhibit 3,
13 subject to objection by respondent, as a report supporting the soil
14 classification as "Type A". Based upon the applicable OSHA standards,
15 the sloping was determined by Mr. Harris to be non-compliant for
16 protection of employees working in an excavation containing "Type A"
17 soil. Mr. Harris testified that he conducted a field test and
18 determined the soils to be more closely related to "Type B", meaning
19 more loosely held, but borderline to "Type A". He testified that
20 notwithstanding the type differential, the sloping and protection
21 requirements of the standard were not subject of compliance by the
22 respondent.

23 Mr. Harris testified at Citation 3, Item 1, he was informed by Mr.
24 Salazar that he had been using the identified extension cords throughout
25 the day on the worksite, although not in use when examined. The
26 flexible cords were depicted in Exhibit 4, photograph 10, as without
27 sufficient strain relief to satisfy the standard.

28 Counsel for respondent conducted cross-examination. Mr. Harris

1 testified he measured the excavation from the top and determined it to
2 be 23 feet long, 13 feet wide and 6 feet deep. He described the work
3 project to include respondent employees installing concrete form boxes
4 for a drop inlet in the trench excavation and preparing them for filling
5 with concrete as subject of the photographs, investigation report and
6 previous testimony. He testified Exhibit 4, photograph 2 shows the
7 vertical trench walls and soil conditions. He observed no employees
8 standing in the trench "outside" the concrete box but rather only
9 employees inside the box in the excavation. He confirmed the identity
10 of employees in the photograph as being Messrs. Salazar and Godinez.

11 On continued cross-examination, Mr. Harris testified he did not
12 observe any employees operating the power saw while attached to the
13 extension cords subject of the Citation 2, Item 1. He admitted the
14 verbiage in the citation erroneously referenced the saw cord rather than
15 **extension** cord. He confirmed on inquiry as to Citation 2, Item 2 that
16 he personally observed Mr. Godinez stepping on the concrete box form and
17 utilizing it to assist his exiting the box in the excavation. Mr. Harris
18 also testified that Mr. Salazar told him he was not the competent person
19 for the trench. He concluded his testimony by answering affirmatively
20 that both Mr. Godinez and Mr. Salazar spoke English and communicated
21 capably with him during the course of his investigation.

22 At the conclusion of complainant's case, respondent offered no
23 witnesses or documentary evidence and rested.

24 Complainant presented closing argument asserting the burden of
25 proof had been met through the unrebutted testimony of CSHO Harris and
26 pictorial exhibits and documents in evidence. He also argued that any
27 disparity between the citation verbiage referencing an electrical cord
28 to the saw or the extension cord connected to same was insignificant

1 because the electrical power source was the same and should not render
2 the citation invalid. Counsel asserted the violative conditions and
3 exposure to employees was proven and should be confirmed based upon the
4 photographs admitted without objection and the exhibits in evidence
5 which corroborated the unrebutted testimony of Mr. Harris.

6 Respondent argued there was no proof of employee exposure except
7 that which might be concluded through hearsay testimony of Mr. Harris
8 referencing what he was told by Mr. Salazar at the worksite. Counsel
9 argued there could be no finding of a serious violation based only upon
10 hearsay. He argued the employees were not simply working in an unshored
11 trench but rather standing in a concrete form box placed inside the
12 excavation and therefore sufficiently protected from any sloughing or
13 cave-in by **alternative compliance** afforded by the concrete form box
14 itself. He argued there was a substantial difference between employees
15 working inside the box in the excavation and any employees working on
16 the excavation floor outside of the box which Mr. Harris admitted was
17 not found during his investigation.

18 He further argued the extension cord with the missing ground pin
19 was not in use at the time of inspection to establish employee exposure,
20 nor was the citation properly drawn by referencing the cord being
21 attached to the saw rather than an extension cord. He argued at Citation
22 2, Item 2 there was a safe means in and out of the trench box where the
23 employees utilized the structure itself to safely exit. He said there
24 was no room for other equipment and therefore the practice sufficiently
25 safe and within the purview of standard compliance. He further argued
26 Mr. Harris' testimony that Mr. Salazar said he did not inspect the
27 trench prior to the work was not sufficient evidence to prove a lack of
28 any trench inspection by respondent.

1 Counsel concluded his argument asserting the entire complainant
2 case is based upon violations for employees "in a trench without
3 protection ..." and inaccurate because all of the evidence demonstrated
4 the employees were in a concrete form box within the trench excavation
5 and therefore sufficiently protected from the identified hazards.

6 To find a violation of the cited standards, the board must consider
7 the evidence and measure same against the established applicable law
8 promulgated and developed under the Occupational Safety & Health Act as
9 incorporated by reference in Nevada Revised Statutes.

10 . . . All federal occupational safety and health
11 standards which the Secretary of Labor promulgates,
12 modifies or revokes, and any amendments thereto,
13 shall be deemed Nevada occupational safety and
14 health standards unless the Division, in accordance
15 with federal law, adopts regulations establishing
16 alternative standards that provide protection equal
17 to the petition provided by those federal
18 occupational safety and health standards. (NRS
19 618.295(8))

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

23 All facts forming the basis of a complaint must be
24 proved by a preponderance of the evidence. The
25 decision of the hearing examiner shall be based upon
26 a consideration of the whole record and shall state
27 all facts officially noticed and relied upon. It
28 shall be made on the basis of a preponderance of
reliable and probative evidence. 29 CFR 1905.27(b).
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD
¶16,958 (1973). *Olin Construction Company, Inc. v.*
OSHARC and Peter J. Brennan, Secty of Labor, 525
F.2d 464 (1975).

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

1 (No. 76-1408, 1979); *American Wrecking Corp. v.*
2 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
2003).

3 The board finds a preponderance of evidence to support a finding
4 of violation Citation 1, Item 1, referencing 29 CFR 1926.652(b)(2).
5 Further the board finds from the evidence at Exhibit 2, a prior
6 violation of the same standard to confirm the "Repeat/Serious"
7 classification and total penalties proposed.

8 The photographic exhibits in evidence without objection depicted
9 **non-complying conditions** at the worksite. The **standard was applicable**
10 to the excavation based upon the photographs and unrefuted testimony of
11 CSHO Harris. **Employee exposure** was established through the photographic
12 exhibits depicting employee Salazar and Godinez in the a concrete form
13 box in the unshored excavation. **Employer knowledge** was confirmed
14 through the unrefuted testimony of the CSHO that Mr. Salazar was a
15 supervisory employee of respondent and in fact foreman and qualified as
16 a **competent person**. See *Belger Cartage Service, Inc.*, 79 OSAHRC 16/B4,
17 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948,
18 1979); *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90,
19 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); *American*
20 *Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
21 2003), supra.

22 A respondent may rebut evidence by showing:

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

27 Counsel's assertion that the employees in the excavation were
28 protected by the concrete form as an **alternate means of compliance** is

1 not supported by any facts in evidence or the applicable law.
2 Respondent made no showing that some means of shoring or other permitted
3 protective measures recognized under the standards could not effectively
4 be utilized or would create a greater hazard. Further, while the cited
5 standard permits alternative protective measures, they must be ". . .
6 designed or approved by a professional engineer." Accordingly, without
7 the use of, for example, a shoring box similar to the one that was
8 located on the site but not in use, an **engineered** system could be
9 utilized to provide an alternate means of employee protection.

10 When the Secretary has introduced evidence showing
11 the existence of a hazard in the workplace, the
12 **employer may, of course, defend by showing that it**
13 **has taken all necessary precautions to prevent the**
14 **occurrence of the violation.** *Western Mass. Elec.*
15 *Co., 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981).*
16 (emphasis added)

17 A citation may be vacated if the employer proves
18 that: (1) the means of compliance prescribed by the
19 applicable standard would have been infeasible
20 under the circumstances in that either (a)
21 implementation would have been technologically or
22 economically infeasible or (b) necessary work
23 operations would have been technologically or
24 infeasible after its implementation; and (2) either
25 (a) **an alternative method of protection was used** or
26 (b) there was no feasible alternative means of
27 protection. (emphasis added) Rabinowitz,
28 *Occupational Safety and Health Law, 2008, 2nd Ed.,*
page 152. *Beaver Plant Operations Inc., 18 OSH*
Cases 1972, 1977 (Rev. Comm'n 1999), *rev'd on*
another ground, 223 F.3d 25, 19 OSH Cases 1053 (1st
Cir. 2000); Gregory and Cook Inc., 17 OH Cases
1189, 1190 (Rev. Comm'n 1995); *Seibel Modern Mfg.*
& Welding Corp., 15 OSH Cases 1218, 1228 (1991);
Mosser Constr. Co., 15 OSH Cases 1408, 1416 (Rev.
Comm'n 1991); Dun-Par Engineered Form Co., 12 OSH
Cases 1949 (1986), *rev'd on another ground, 843*
F.2d 1135, 13 OSH Cases 1652 (8th Cir. 1988).

26 There was no evidence the concrete forms in which the employees
27 were working inside the excavation or any other benching or sloping
28 systems were **engineered or designed** to withstand sloughing or cave-in.

1 The evidence at Exhibit 4, photographs 2 through 6 depict merely a wood
2 concrete form inside an excavation where respondent employees were
3 working at a depth requiring protection. Spoils materials at the side
4 and edge of the trench, the depth and height and depicted vertical walls
5 subject to testimony by CSHO Harris all demonstrated direct and/or
6 constructive exposure of observed and photographed employees to the
7 potential hazards intended for protection under the standards.

8 Under Occupational Safety and Health Law, there
9 need be no showing of **actual** exposure in favor of
10 a rule of **access** based upon reasonable
11 predictability - (1) the **zone of danger** to be
12 determined by the hazard; (2) **access** to mean that
13 employees either while in the course of assigned
14 duties, personal comfort activities on the job, or
15 while in the normal course of ingress-egress will
16 be, are, or have been in the zone of danger; and
17 (3) the **employer knew** or could have known of its
18 employees' presence so it could have warned the
19 employees or prevented them from entering the zone
20 of danger. *Gilles & Cotting, Inc.*, 3 OSHC 2002,
21 1975-1976 OSHD ¶ 20,448 (1976); *Cornell & Company,*
22 *Inc.*, 5 OSHC 1736, 1977-1978 OSHD ¶ 22,095 (1977);
23 *Brennan v. OSAHRC and Alesea Lumber Co.*, 511 F.2d
24 1139 (9th Cir. 1975); *General Electric Company v.*
25 *OSAHRC and Usery*, 540 F.2d 67, 69 (2d Cir. 1976).
26 (emphasis added)

27 Respondent further asserts a violation cannot be found based solely
28 upon hearsay evidence arguing the CSHO Harris testified Mr. Salazar
informed him that he had been working in and/or on the concrete form box
in the excavation for approximately four days. The unrebutted testimony
of Mr. Harris' observations corroborated by the photographs do not
constitute inadmissible hearsay to prove employee exposure. See *Biegler*
v. Nevada Real Estate Division, 95 Nev. 691 (1979). Hearsay can be
utilized in an administrative hearing to establish a violation so long
as it is **corroborated** by other evidence. See *Nardini v. McConnell*, 310
P.2d, 644 (Cal 1957); *Walker v. City of San Gabriel*, 129 P.2d, 349f (Cal
1942); *State Department of Motor Vehicles v. Kiffe*, 101 Nev. 729 (1985).

1 Further, reported statements of Mr. Salazar or Mr. Godinez to Mr.
2 Harris are not hearsay but rather **statements against interest**. Nevada
3 Revised Statute (NRS) 51.035(3)(d) provides in pertinent part:

4 "Hearsay" means a statement offered in evidence to
5 prove the truth of the matter asserted **unless: the**
6 **statement is offered against the party** and is . . .
7 A **statement by the party's agent or servant**
8 concerning a matter **within the scope of the party's**
9 agency or **employment**, made before the termination
10 of the relationship. (emphasis added)

11 Nevada statutes define such statements as non-hearsay and recognize
12 the "carve out" for classifying them as **statements against interest**.

13 The aforementioned statute was drawn from rule 801(d)(2)(D) the Federal
14 Rules of Evidence which provide:

15 A statement that meets the following conditions is
16 not hearsay: . . . The statement is offered against
17 an opposing party and . . . was made by the party's
18 agent or employee on a matter within the scope of
19 that relationship and while it existed.

20 The Nevada Supreme Court applied the recognized distinction between
21 hearsay and statements against interest in *Paul v. Imperial Palace*, 111
22 Nev. 1544 (1995).

23 . . . the employees' statements were not hearsay.
24 A statement is not hearsay if it is offered against
25 a party and is made by the party's agent or servant
26 concerning a matter within the scope of agency or
27 employment before termination of the relationship.
28 NRS 51.035(3)(d). The record indicated that the
employees who made the statements were working in
the area of the dining room and buffet line.
Therefore, the statements concerned the matters
within the scope of the workers' employment and
were admissible as statements against Imperial's
interest. Id. At 1549-1550.

The Ninth Circuit Court of Appeals confirmed the Nevada Supreme
Court position in *Sea-Land Service, Inc. v. Lozen International, LLC*,
285 F.3d 808 (9th Cir. 2002).

. . . evidence is not-hearsay if is offered against
a party and is a statement by the party's agent or

1 servant concerning a matter within the scope of the
2 agency or employment made during the existence of
3 the relationship.

4 The narrative report at Exhibit 1, the documents at Exhibit 2 and
5 3, the testimony of CSHO Harris, and the photographic evidence at
6 Exhibit 4 taken together would not prevent a finding of violation even
7 if based upon testimonial hearsay because of the corroboration. This
8 board's reliance upon *Bigler, supra* and the referenced Nevada Revised
9 Statutes at 51.035(3)(d), Federal Rules of Evidence 801(d)(2)(D), *Paul*
10 *v. Imperial Palace, supra*, and *Sea-Land Service, Inc. v. Lozen*
11 *International, LLC, supra*, distinguishing a statement against interest
12 from hearsay supports a finding of violation. The facts in evidence
13 satisfy both lines of case authority and the statutory references. The
14 elements within both rules were met. Statements were made to CSHO
15 Harris by an employee (Salazar) concerning the matter within the scope
16 of the employment and made during the existence of his employee
17 relationship. Additionally, statements of Mr. Salazar to CSHO Harris
18 were corroborated by Exhibits 1, 2, 3 and 4. Accordingly the board
19 recognizes the principles in *Bigler, supra*, that hearsay can establish
20 a necessary element of violation if supported by corroborating evidence;
21 but even if not corroborated, where the statements meet the definition
22 of NRS 51.035(3)(d) as interpreted in the applicable case law, those
23 statements are not hearsay and subject to reliance to find a violation.
24 When statements are admitted they can be evaluated by the finder of fact
25 as to weight and credibility. See, *State of Nevada Employment Security*
26 *Dept. v. Hilton Hotels*, 102 Nev. 606, 609 (1986).

27 At Citation 2, Item 1, 29 1926.404(f)(6), the board finds the
28 complainant failed to meet its burden of proof to establish a violation
29 by a preponderance of evidence. Exhibit 4, photograph 9, depicting an

1 extension cord without a ground pin taken alone is not sufficient
2 evidence to satisfy the critical elements for a violation, particularly
3 with regard to **employee exposure**. CSHO Harris testified the extension
4 cord was not in use at the time of the inspection. The cord was rolled
5 and not connected to the saw. There was no evidence the ground pin was
6 missing during previous use, or became dislodged at the time work ended
7 and the cord disconnected. There was no evidence the defective
8 extension cord was in use by employees constituting a hazard exposure.
9 While employees might have **access** to the hazard given the descriptions
10 of the previous work utilizing same to CSHO Harris by Mr. Salazar, the
11 evidence was not preponderant to satisfy the burden of proof to find a
12 violation. Violations cannot be based upon mere inference or
13 assumption.

14 . . . The Secretary's obligation to demonstrate the
15 alleged violation by a preponderance of the
16 reliable evidence of record **requires more than**
17 **estimates, assumptions and inferences . . .** [t]he
18 Secretary's **reliance on mere conjecture is**
19 **insufficient to prove** a violation . . . [findings
must be based on] 'the kind of evidence on which
responsible persons are accustomed to rely in
serious affairs.' William B. Hopke Co., Inc., 1982
OSAHRC LEXIS 302 *15, 10 BNA OSHC 1479 (No. 81-206,
1982) (ALJ) (citations omitted). (emphasis added)

20 Further, the citation charged that the ground pin was missing on the
21 ". . . saw cord". However the missing pin was located on the **extension**
22 **cord** rather than the **saw cord**. While the applicable OSHA case law
23 recognizes the requirement of **citation particularity** same might have
24 been corrected by evidence or testimony to allow the actual citation to
25 conform to the evidence, however there was simply insufficient evidence
26 to satisfy the burden of proof.

27 At Citation 2, Item 2, referencing 29 CFR 1926.651(c) (2), the board
28 finds a preponderance of evidence to meet the burden of proof to find

1 a violation but not the classification of **serious** or penalty assessed.
2 The terms of the standard require various means to enter or exit an
3 excavation including use of a stairway or ladder, but also identifies
4 ". . . other safe means of egress . . .". Given the configuration of
5 the concrete form box, the location of employees inside, and the small
6 space to enter and exit, it would be difficult to exit the box in the
7 excavation and access a ladder to climb out. Elements of **infeasibility**
8 and **greater danger** are demonstrated by the facts mitigating the
9 violative conditions. Further, trained employees working in such a
10 configuration often use the assistance of various means, provided they
11 are safe, to enter or exist areas where traditional methods are
12 impractical or infeasible. The fact that the box was inside an
13 excavation further mitigates the violative conditions to the extent that
14 a relatively safe means was available to exist the box which reached the
15 top of the excavation as subject of testimony by CSHO Harris. Further,
16 the minimal gravity, severity and probability factors must be considered
17 given the overall charge for non-complying conditions. A violation
18 occurred but due to the mitigating facts and circumstances, it is more
19 appropriately classified as **other** than serious and the penalty
20 eliminated.

21 In reviewing the applicable law for classification of violations
22 as "serious" the board notes NRS 618.625 as follows:

23 . . . 2. . . . a serious violation exists in a
24 place of employment if there is a **substantial**
25 **probability** that death or serious physical harm
26 could result from a **condition** which exists, or from
27 one or more practices, means, methods, **operations**
28 or processes which have been adopted or are in use
in that place of employment . . . (emphasis added)

27 The board finds insufficient proof to support classification of the
28 violation as "serious". The facts in evidence do not demonstrate a

1 "substantial probability" that death or serious physical harm could
2 result from the working conditions and/or operations subject of the
3 cited violation. However the board finds substantial evidence for
4 reclassification of the violation as "other than serious".

5 Where the Secretary alleges but fails to prove the
6 seriousness of a violation, a non-serious violation
7 generally will be found. *A.R.A. Mfg.*, 11 OSH Cases
8 1861, 1863-64 (Rev. Comm'n 1984). Rabinowitz,
9 Occupational Safety and Health Law, 2008, 2nd Ed.,
10 page 225.

11 At Citation 2, Item 3, referencing 29 CFR 1926.651(k) (1), the board
12 found a preponderance of evidence to meet the burden of proof to
13 establish a violation and the appropriateness of the penalties assessed.
14 In analyzing the evidence and testimony, Mr. Salazar admitted he did not
15 inspect the excavation, that he was a trained **competent person** and in
16 fact the **foreman** of respondent. It is an essential aspect of excavation
17 safety that an inspection be performed by a competent person qualified
18 to analyze the conditions for work in an area governed by the particular
19 requirements of the standards. As with Citation 1, Item 1, the elements
20 to prove a violation were satisfied. Further, again referencing the
21 rationale and findings as to Citation 1, Item 1, Mr. Salazar's
22 statements to CSHO Harris were not hearsay but **statements against**
23 **interest** and admissible to support findings of a violation.
24 Additionally, Mr. Salazar was the job foreman and therefore knowledge
25 can be imputed to the employer.

26 Evidence that a foreman or supervisor violated a standard permits
27 an inference that the employer's safety program was not adequately
28 enforced. (See *D.A. Collins Construction Co. v. Secretary of Labor*, 117
29 F.3d 691, 695 (2d Cir. 1997); *Harry C. Crooker & Sons, Inc. V.*
30 *Occupational Safety & Health Review Commission*, 537 F3 79, 85 (1st Cir.

1 2008).) *Division of Occupational Safety and Health vs. Pabco Gypsum,*
2 105 Nev. 371, 775 P.2d 701 (1989).

3 Citation 3, Item 1, referencing 29 CFR 1926.405(g)(2)(iv)
4 classified as Other and without a proposed penalty must is confirmed as
5 a violation based upon respondent withdrawal of contest of same at the
6 time of hearing.

7 Based upon the above and foregoing, it is the decision of the
8 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of
9 Nevada Revised Statute did occur as to Citation 1, Item 1, 29 CFR
10 1926.652(b)(2). The classification of "Repeat Serious" is proper and
11 the assessed penalty of TWELVE THOUSAND SIX HUNDRED DOLLARS (\$12,600.00)
12 confirmed. The board finds a violation of Citation 2, Item 2, 29 CFR
13 1926.651(c)(2). The violation is reclassified from "Serious" to "Other"
14 and the penalty reduced to ZERO DOLLARS (\$0.00). The board finds a
15 violation of Citation 2, Item 3, 29 CFR 1926.651(k)(1). The
16 classification of "Serious" is proper and the assessed penalty of SIX
17 THOUSAND THREE HUNDRED DOLLARS (\$6,300.00) confirmed. The board finds
18 a violation of Citation 3, Item 1, 29 CFR 1926.405(g)(2)(iv). The
19 classification of "Other" is proper and the assessed penalty of ZERO
20 DOLLARS (\$0.00) confirmed.

21 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**
22 **HEALTH REVIEW BOARD** that no violation did occur as to Citation 2, Item
23 1, 29 CFR 1926.404(f)(6) and the proposed penalty denied.

24 The Board directs counsel for the Complainant, **CHIEF ADMINISTRATIVE**
25 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION**
26 **OF INDUSTRIAL RELATIONS**, to submit proposed Findings of Fact and
27 Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
28 **BOARD** and serve copies on opposing counsel within twenty (20) days from

1 date of decision. After five (5) days time for filing any objection,
2 the final Findings of Fact and Conclusions of Law shall be submitted to
3 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing
4 counsel. Service of the Findings of Fact and Conclusions of Law signed
5 by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
6 **BOARD** shall constitute the Final Order of the **BOARD**.

7 DATED: This 7th day of June, 2012.

8 NEVADA OCCUPATIONAL SAFETY AND HEALTH
9 REVIEW BOARD

10 By /s/
11 JOE ADAMS, Chairman