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,

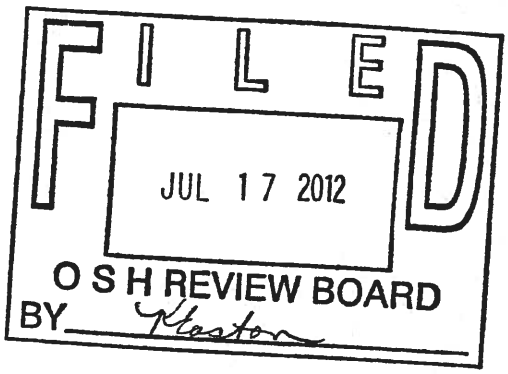
vs.

BIGGEST LITTLE INVESTMENTS, LP,

Respondent.

_____/

Docket No. RNO 12-1564



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 14th day of June, 2012, 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. JOHN SKOWRONEK, SR. and MR. RICK CAMPBELL, ESQ., on behalf of Respondent, **BIGGEST LITTLE INVESTMENTS, LP**; 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 1926.501(b)(1). The complainant alleged an employee of respondent employer was painting

the front of a building while standing on a pitched section of roof approximately 14' 9-3/4" in height from the eve to the ground without fall protection as required by the cited standard. The alleged violation was classified as "Serious". The proposed penalty for the alleged violation is in the amount of THREE THOUSAND DOLLARS ($3,000.00).

Prior to presentation of the evidence and testimony, counsel stipulated to the marking and admissibility of complainant's Exhibits 1 and 2, and respondent's Exhibits A and B. Counsel further stipulated to the applicability of the standard, and the noncomplying conditions of an employee performing painting work on a roof without wearing fall protection. The parties further stipulated that the issue before the board will be directed to the facts and law involving employer knowledge.

Counsel for complainant through compliance safety and health officer (CSHO) Marc Stewart, presented evidence and testimony in support of the violation and proposed penalty. Mr. Stewart testified that he inspected the respondent's worksite located in Reno, Nevada, after observing an employee working on a pitched roof area without any fall protection. He referenced his narrative and inspection report at Exhibit 1, pages 3-5 and testified as to his observations and investigation. Mr. Stewart identified Exhibit 2 as a photograph of the subject respondent employee on the roof taken by him on the day of the inspection. He testified the photograph confirmed his personal observation that the employee was not wearing safety equipment. He interviewed the employee after he descended from the roof area and identified him as Mr. Miguel Garcia, an employee of the cited respondent. Mr. Garcia reported Mr. Karl Brokmann to be his responsible

supervisor. Mr. Brokmann arrived at the worksite and informed the CSHO that he had to contact a higher authority who he identified as co-owner of the property. He then informed CSHO Stewart that he (Brokmann) was to deal with the CSHO with regard to the investigation. Mr. Brokmann identified himself as an office worker employed in investment operations. He informed CSHO Stewart there was no maintenance supervisor on the job site. Neither he nor CSHO Stewart could locate anyone on site responsible for directly supervising Mr. Garcia.

The building being painted was not under construction but an existing occupied structure that had been damaged by "graffiti". Mr. Garcia was engaged in painting over the damaged areas. CSHO Stewart testified that Mr. Garcia told him the maintenance supervisor, Mr. Brokmann, instructed him to go on to the roof and perform the paint-over work. Exhibit 1, Page 7 was identified as a form signed by Mr. Brokmann reflecting his title as "property manager".

Mr. Stewart testified in response to questions with regard to his classification of the cited violation as serious. He described the hazard exposure and substantial probability that death or serious physical injury could occur from a fall of approximately 15 feet, the height at which employee Garcia was working. He described the method of assessing a penalty, the system for rating gravity, probability and credits allowed in accordance with the OSHA operations manual.

On cross-examination, Mr. Stewart testified the hazard exposure identified was abated immediately when Mr. Garcia ceased working as instructed by Mr. Brokmann. However, he rendered no "quick fix" penalty reduction of 15% because an employer is expected to stop any work or terminate conditions that are hazardous and subject to immediate abatement. Mr. Stewart described his training and the operations manual

guidelines as requiring he not render "quick fix" reduction based only upon abatement because more is required than simply compliance upon discovery of a violative condition. Mr. Stewart also testified as to his lack of rendering any "history" credit penalty reduction. He testified he was unable to do so because there had been no inspection of respondent's facility within the past five years. He explained that based upon recent modifications to the federal operations manual guideline, history credit is not authorized when no OSHA inspection has occurred within five years. Counsel referenced the Nevada Operations Manual terms and conditions permitting credit for good history when no citation has been issued within a five year period. Mr. Stewart testified the information was correct, but explained that because there had been no inspection whatsoever in the five year period, there was no triggering of the authorization to render a credit.

On re-direct examination with regard to the operations manual and the rendering of credits, Mr. Stewart testified the **Federal OSHA** computer program provided for implementation under the **Nevada OSHA** state plan changed the bases for rendering such credits and therefore the reason for his following the provisions for same.

At the conclusion of complainant's case, respondent presented a motion to dismiss the complaint based upon failure to satisfy the burden of proof to establish the essential element of **employer knowledge** to prove a violation. He argued the CSHO testified he was told by Mr. Garcia that he was instructed by Mr. Brokmann to perform the work, which is hearsay and cannot be relied upon to prove the essential element of employer knowledge to establish a violation. He argued there was no admissible competent evidence to satisfy the requirements of NRS 618.625(2) to establish the employer knew or with the exercise of

reasonable diligence could have known that Mr. Garcia entered upon the roof and performed work without fall protection. He argued that without employer knowledge, through sufficient notice for the employer to have prevented violative conduct or protected against exposure, there can be no violation.

The review board denied the motion to dismiss and ruled that hearsay evidence is admissible in administrative hearings and can be relied upon to find an ultimate element of violation so long as corroborated. The board further ruled that the statements made by Mr. Garcia to CSHO Stewart appeared to meet Nevada statutory and case law interpretations to qualify as **statements against interest** rather than to hearsay. The review board ordered respondent to proceed with presentation of evidence and testimony.

Respondent presented witness testimony from Mr. Isreal Teller who identified himself as the manager of the cited respondent and supervisor of Mr. Miguel Garcia. He testified that he did not instruct Mr. Garcia to perform any of the work subject of citation, including obtaining a ladder or entering onto the roof to paint over graffiti. He testified Mr. Garcia does not speak or write English well. He further testified he had no knowledge Mr. Garcia was even on the roof. He never spoke to CSHO Stewart nor did anyone from OSHA ever attempt to reach him regarding the matter.

On cross-examination by complainant, Mr. Teller testified he is the only supervisor of Mr. Garcia but if he is ill then ". . . I imagine someone at the office would know what Mr. Garcia is doing . . .". He testified that on the day of the inspection Mr. Garcia's assigned job was to clean up the parking lot. He also testified that Mr. Brokmann is directly in charge if he (Teller) is not at the office or worksite.

He further testified that he has had graffiti problems before and either he, himself, or Mr. Garcia had painted over same.

On re-direct examination, Mr. Teller testified that while he does not normally layout Mr. Garcia's work for the day, he does walk through the job site regularly to find areas of work for Mr. Garcia. He did not give Mr. Garcia instructions on the day of the inspection or instruct him to go to the roof and paint over graffiti. He testified this was the first time any graffiti appeared in the roof area, and had occurred approximately two (2) days prior to the inspection.

On cross-examination Mr. Teller testified the company has a standard practice to paint over graffiti immediately. He further responded affirmatively as to the responsibility of either he or Mr. Garcia to complete the work. He testified that graffiti is usually painted over on the same day as discovered, but there is no formal work rule on graffiti as such.

On the completion of evidence and testimony, complainant and respondent offered closing argument.

Complainant confirmed that the element of employer knowledge is the issue before the board as agreed upon by the parties prior to commencement of the hearing. He asserted the burden of proof of employer knowledge was met based upon Mr. Teller's testimony which confirmed the testimony of CSHO Stewart. The graffiti was existent for at least two days. The company practice is to paint over graffiti as soon as possible. He referenced Mr. Teller's testimony that since it is the job of either he or Mr. Garcia to perform the work, he should have known that either he or Mr. Garcia would go up and do it in accordance with the company practice. He further argued that it is reasonable to believe that someone is in charge of Mr. Garcia and based

on the testimony in evidence it is either Mr. Teller or Mr. Brokmann. He argued either of them "should have known" that some employee, and likely Mr. Garcia, would follow the company standard practice and paint over the graffiti which occurred approximately two (2) days previous. He argued that Mr. Teller testified if he is not there on the site someone else in the office oversees Mr. Garcia. Mr. Teller also testified that it was Mr. Brokmann who was in charge of Mr. Garcia when he (Teller) was not on site. Counsel argued this confirms what CSHO Stewart testified he was told by Mr. Garcia; Mr. Brokmann was the individual who instructed him to paint over the graffiti.

Respondent presented closing argument. He argued NRS 618.625(2) requires satisfaction of the burden to prove the employer knew, or with reasonable diligence could have known, of violative conduct in order to establish a violation. He argued there was no evidence of employer direct or constructive knowledge. Counsel further argued the Nevada operations manual requires there be ". . . evidence of a supervisor with knowledge if there is a need to rely upon constructive employer knowledge to establish a violation . . .".

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 as incorporated by reference in Nevada Revised Statutes.

> . . . All federal occupational safety and health standards which the Secretary of Labor promulgates, modifies or revokes, and any amendments thereto, shall be deemed Nevada occupational safety and health standards unless the Division, in accordance with federal law, adopts regulations establishing alternative standards that provide protection equal to the protection provided by those federal occupational safety and health standards. (NRS 618.295(8)
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> 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. The decision of the hearing examiner shall be based upon a consideration of the whole record and shall state all facts officially noticed and relied upon. It 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).
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> 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). (emphasis added)

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 (exposure). See, *Anning-Johnson Co.*, 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

The board finds a preponderance of evidence to support a finding of violation at Citation 1, Item 1, referencing 29 CFR 1926.501(b)(1).

The photographic exhibits stipulated in evidence, without objection, together with the stipulation of respondent counsel confirm **non-complying conditions** at the worksite. It was also stipulated by respondent that Mr. Garcia, the individual in the photograph at Exhibit 2, was performing work painting over graffiti **without any fall arrest protection.** The **standard was applicable** to the facts based upon the

testimony of Mr. Stewart, the pictorial evidence, and the facts admitted on stipulation. **Employee exposure** was established through the stipulation of the parties and the photographic exhibit together with the testimony and observations of Mr. Stewart. The remaining element subject of proof involves the issue identified by the parties as disputed - **employer knowledge.**

Employer knowledge was confirmed through the sworn unrefutted testimony of CSHO Stewart based upon his reported interview with Messrs. Brokmann and Gracia and the direct testimony of Mr. Teller.

Mr. Teller testified that Mr. Brokmann was in charge of Mr. Garcia when he was unavailable. Mr. Garcia informed CSHO Stewart that Mr. Brokmann was his supervisor and sent him to perform the work.

> **Actual knowledge is not required for a finding of a serious violation.** Foreseeability and preventability render a violation serious provided that a **reasonably prudent employer, i.e., one who is safety conscious and possesses the technical expertise normally expected in the industry concerned, would know of the danger.** Candler-Rusche, Inc., 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723 (1976), appeal filed, No. 76-1645 (D.C. Cir. July 16, 1976); Rockwell International, 2 OSHC 1710, 1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d 1283 (6th Cir. 1976); Mountain States Telephone & Telegraph Co., 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365 (1973). (emphasis added)
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> 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 addition to the foregoing, the record is clear from the testimony of Mr. Teller as to the company standard practice of either he or Mr. Garcia being responsible for painting over graffiti as soon as it was identified. He further testified that if he was not around someone at the office would know what Mr. Garcia is doing. Mr. Teller then testified that Mr. Brokmann is directly in charge if he is not there. The weight of the testimony, given plain meaning and credibility of the witnesses, permits a conclusion and/or reasonable inference that one of the two individuals, Brokmann or Teller, was in charge of Mr. Garcia's work. Accordingly, it can be reasonably inferred from the evidence both **knew or with the exercise of reasonable diligence, should have known** Mr. Garcia would follow company practice and paint over the graffiti when it was noticed. Additionally, the unrebutted testimony of Mr. Stewart was that Mr. Garcia informed him that Mr. Brokmann instructed him to paint over the graffiti. No other evidence or testimony was offered to rebut the evidence in the record which satisfied the burden to prove by a preponderance the element of **employer knowledge** and finding of violation.

Both Messrs. Teller and Brokmann had the supervisory authority of respondent and control over the work of Mr. Garcia. The testimonial evidence established both were supervisory employees of Mr. Garcia. Accordingly, employer knowledge of the violative conduct is established, both direct and constructively, from the admitted facts, testimony and evidence and supported by the applicable case law. *Division of Occupational Safety and Health vs. Pabco Gypsum,* 105 Nev. 371, 775 P.2d 701 (1989). Evidence that a foreman or supervisor violated a standard

permits an inference that the employer's safety program was not adequately enforced. (See *D.A. Collins Construction Co. v. Secretary of Labor*, 117 F.3d 691, 695 (2d Cir. 1997); *Harry C. Crooker & Sons, Inc. V. Occupational Safety & Health Review Commission*, 537 F3 79, 85 (1st Cir. 2008).) 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), supra.

Respondent further asserts a violation cannot be found based solely upon hearsay evidence arguing that CSHO Stewart testified as to what Mr. Garcia told him with regard to Mr. Brokmann directing him to perform the work. Counsel asserts that the subject and other testimony is inadmissible hearsay to establish a violation. However the reported statements of Mr. Garcia by CSHO Stewart are not hearsay but rather **statements against interest.**

Nevada Revised Statute (NRS) 51.035(3)(d) provides in pertinent part:

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

Nevada statutes define such statements as non-hearsay and recognize the "carve out" for classifying them as **statements against interest.** The aforementioned statute was drawn from rule 801(d)(2)(D) the Federal Rules of Evidence which provide:

> A statement that meets the following conditions is not hearsay: . . . The statement is offered against

> an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.

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

> . . . the employees' statements were not hearsay. A statement is not hearsay if it is offered against a party and is made by the party's agent or servant concerning a matter within the scope of agency or employment before termination of the relationship. 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 servant concerning a matter within the scope of the agency or employment made during the existence of the relationship.

In reviewing applicable law for the classification of violations as "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 proof by a preponderance to support classification of the violation as "Serious" based upon the pictorial evidence, testimony and admitted non-complying conditions at the worksite to demonstrate a **substantial probability** that death or serious physical

harm could result from working at a height of approximately 15 feet above ground without any fall protection or equivalent safety equipment.

Notwithstanding the finding and classification of violation, the board does not find evidence to support the penalty as assessed. The evidence was equivocal with regard to reliance upon a computer system to calculate penalty violations, information that Federal OSHA updated its computer program to set certain conditions contrary to the Nevada OSHA operations manual guidelines, and conclusions reached without sufficient grounds that no credit for a history of non-violation could be rendered because no inspection occurred within the last five years. The lack of rendering a credit appropriate and fair under the Nevada operations manual or based upon good cause is unsupported by the fact evidence nor reasonable. Accordingly the board modifies the penalty calculation to permit the application of the 10% history credit and reduces the proposed penalty from $3,000 to $2,500.

Based upon the evidence and testimony, 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 1910.501(b)(1) and the classification of "Serious" is confirmed. The proposed penalty assessed is modified and reduced to a final penalty of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00).

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 17th day of July, 2012.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JOE ADAMS, Chairman