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,

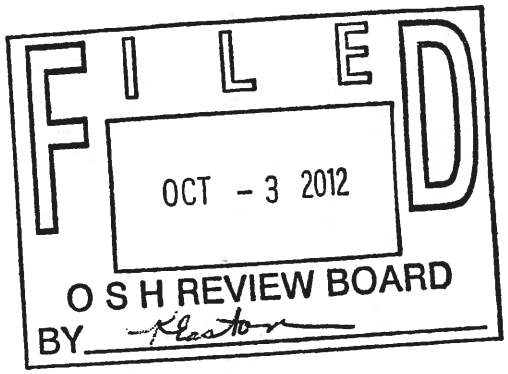
Complainant,

vs.

GARDNER ENGINEERING,

Respondent.
_____/

Docket No. RNO 12-1592



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 12th day of September, 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 JOHN MOORE, ESQ., on behalf of Respondent, **GARDNER ENGINEERING;** 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 NRS 618.375(1). Complainant alleges the respondent violated the cited Nevada Revised Statute by failing to ensure that employees were furnished employment at a place of employment which were free from recognized hazards causing or likely to cause death or serious physical harm. The proposed penalty for the alleged violation is in the amount of TWO THOUSAND TWENTY-FIVE DOLLARS ($2,025.00).

Counsel for the Chief Administrative Officer presented testimony and documentary evidence with regard to the alleged violations. Certified Safety and Health Officer (CSHO) Jared Mitchell testified he was assigned to investigate a reported accident at a worksite located at the Washoe County Library in Reno, Nevada. A "walk around" inspection was conducted by CSHO Mitchell accompanied Mr. James Krueger, Superintendent for respondent Gardner Engineering and Mechanical Services, Inc. (GEMS). The respondent was contracted to retrofit new HVAC equipment within the library building. Bragg Crane Service was subcontracted by respondent to lift the HVAC equipment into place from a truck bed to the second floor of the library building. Mr. Mitchell testified from Exhibit 1 including his inspection report, narrative and work sheets. At the job site respondent employee Schwindt rigged four synthetic polyester roundslings to an approximate 7,221 lb. section of HVAC equipment to be lifted by the crane. When the crane raised the load the slings appeared to have contacted sharp metal edges of the HVAC equipment causing the slings to tear apart resulting in the load falling back onto the truck (approximately 2-3 feet) and the weight ball of the crane to swing through a window of an adjacent building occupied by U.S. Bank. Mr. Krueger informed CSHO Mitchell that he and

other employees left the rigging area and went to the second floor of the building facility before the next section of equipment (the one that failed) was lifted to facilitate placement of the previously lifted section of the HVAC equipment.

During employee and witness interviews CSHO Mitchell determined Superintendent Krueger was the employee responsible for overseeing the rigging operation and signaling the crane operator under the established method for lifting the equipment in place. Mr. Schwindt, an apprentice employee, was assisting the rigging operations. When Mr. Krueger left the area to assist other employees, Mr. Schwindt completed rigging on the equipment. Mr. Mitchell testified there was no padding in place during either the first lift, where no failure occurred, nor on the subject failed lift. He determined the sharp edges of the equipment came in contact with and cut through the poly straps and caused the failure. Mr. Schwindt informed CSHO Mitchell he did not notice the sharp edges on the unit when completing the rigging prior to the lift. Mr. Schwindt also reported to CSHO Mitchell that he did not realize the crane operator was going to lift the load and was surprised when it occurred. He attempted to gain the attention of the operator to cease the lift, however it was too late as the straps were tearing and the equipment fell approximately 2-3 feet onto the truck bed and the ball swung through the window of the adjacent building. Mr. Mitchell testified he personally observed sharp edges on the unit that fell and also saw a sharp edge on one other of the units which comprised three separate sections.

CSHO Mitchell identified Exhibit 2 as photographs of the subject equipment and torn poly (nylon) lift straps. He further identified Exhibit 3 as manufacturer information on synthetic polyester roundslings

(straps) similar to the ones utilized which included precautionary measures and restrictions for use when sharp edges existed on equipment to be lifted. He further referenced American Standard ASME B30.9-1990 as the ANSI industry reference for utilization of roundslings/straps for lifting materials with sharp edges and the restrictions associated with same.

Mr. Mitchell determined the failure occurred from the unit edge cutting one side of the strap and then the other thereby causing the ultimate failure of the lift as the poly-nylon straps were unable to withstand the sharp edges on the unit being lifted. He cited respondent for a violation of the **general duty clause** determining it was appropriate due to there being no specific standard for vertical lifts of equipment with sharp edges. He testified that he found use of unprotected poly-nylon rigging straps a **recognized hazard** for the industry based on the ANSI standard and other manufacturer recommendations and restrictions. All allowable credits were provided and classification of the violation as **serious** due to the substantial probability of serious injury or death.

Complainant presented witness testimony from Ms. Jan Watson, an employee at the adjacent bank building. She testified the weight ball (headache ball) of the crane swung through the window of her office causing substantial damage but no serious injury or death.

Mr. Nathan Schwindt, an employee of respondent, was called as a witness and testified under subpoena. Mr. Schwindt identified himself as a respondent employee participating in the rigging work. He assisted with rigging the first HVAC unit which was lifted into place without incident. When Mr. Krueger was called away he (Schwindt) felt obliged to complete the rigging work on the subject unit testifying that he had

been involved in various other rigging operations and, although an apprentice, qualified to perform such work. He testified that he did not notice any sharp edges on the equipment nor place any padding or protection under the straps when he rigged the loads for either the successful or the unsuccessful lift. He further testified that when he finished the rigging for the failed lift and stepped away, the crane operator commenced hoisting, without being signaled to do so. He tried to stop the lift by shouting for attention but without success and the straps failed causing the incident. The witness statement of Mr. Schwindt introduced in respondent's case as Exhibit B, confirmed that he (Schwindt) did not notice sharp edges on the equipment.

After the conclusion of complainant's case, respondent presented testimony and evidence in defense of the citation and alleged violation. Respondent Superintendent James Krueger identified his witness statement, Exhibit A, and described the cause of the accident as failure of one of the straps provided by the crane company (Bragg Crane). He was in charge of the lifting operation and the designated "signaler", rather than employee apprentice Schwindt. He had lifted "hundreds" of pieces of equipment similar to this without any problems in the past.

On cross-examination, Mr. Krueger testified that apprentice Schwindt did the rigging "on his own simply . . . being a good apprentice . . .". He testified that he is familiar with Exhibit 3, the ASME/ANSI directive and manufacturer restrictions on use of poly straps when there are sharp edges on any equipment.

At the conclusion of respondent's case, both complainant and respondent presented closing argument. Complainant argued the employer utilized inappropriate lifting straps made of nylon poly material without padding protection to hoist an approximate 7,000 lb. air

conditioning unit with clearly observable sharp serrated edges. Superintendent Krueger was the responsible supervisory employee and aware of the ANSI standards and manufacturers restrictions on use of nylon strapping exposed to sharp edges. Apprentice Schwindt was left with the attached load in the rigging area but without supervision and completed the rigging on his own, unaware of sharp edges on the equipment. Respondent failed to ensure employees were provided employment free of a recognized hazard.

Respondent argued there was a safe process in place for a safe lifting operation and it was followed. He asserted the accident occurred because the crane operator ". . . picked the load before signaled to do so causing the load to shift against the sharp edges of the unit which tore the polyester strapping. He further asserted that "lift eyes" were part of the HVAC equipment installed by the manufacturer and designed so sharp edges would not come in contact with the lifting straps.

The board in reviewing the facts, documentation, testimony and other evidence must measure same against the established applicable law developed under the Occupational Safety & Health Act.

NRS 618.375(1) commonly known as the "General Duty Clause" provides in pertinent part:

> ". . . Every employer shall:
>
> 1. Furnish employment and a place of employment which are **free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees** . . ." (emphasis added)
>
> In citing an employer under the General Duty Clause, it is specifically necessary to demonstrate the existence of a recognized hazard as mandated by the statute; whereas citing an employer under a specific standard does not carry such a requirement because Congress has, in codification, adopted the recognition of (certain) hazards for the particular industry. To establish a violation of the General

Duty Clause, the complainant must do more than show the mere presence of a hazard. The General Duty Clause, ". . . obligates employers to rid their workplaces of recognized hazards . . ." Whitney Aircraft v. Secretary of Labor, 649 F.2d 96, 100 (2nd Cir. 1981). (emphasis added)

"The elements of a **general duty clause** violation identified by the first court of appeals to interpret Section 5(a)(1) have been adopted by both the Federal Review Commission and the Courts. In National Realty and Construction Co., Inc. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973), the court listed three elements that OSHA must prove to establish a general duty violation; the Review Commission extrapolated a fourth element from the court's reasoning: (1) a **condition or activity in the workplace presents a hazard** to an employee; (2) the condition or activity is **recognized as a hazard**; (3) the hazard is causing or is **likely to cause death or serious physical harm**; and (4) a **feasible means exists to eliminate or materially reduce** the hazard. The four-part test continues to be followed by the courts and the Review Commission. E.g., Wiley Organics Inc. v. OSHRC, 124 F.3d 201, 17 OSH Cases 2125 (6th Cir. 1997); Beverly Enters., Inc., 19 OSH Cases 1161, 1168 (Rev. Comm'n 2000); Kokosing Constr. Co., 17 OSH Cases 1869, 1872 (Rev. Comm'n 1996). The National Realty, decision itself continues to be routinely cited as a landmark decision. See, e.g., Kelly Springfield Tire Co. v. Donovan, 729 F.2d 317, 321, 11 OSH Cases 1889 (5th Cir. 1984); Ensign-Bickford Co. v. OSHRC, 717 F.2d 1419, 11 OSH Cases 1657 (D.C. Cir. 1983); St. Joe Minerals Corp. v. OSHRC, 647 F.2d 840, 845 n.8, 9 OSH Cases 1946 (8th Cir. 1981); Pratt & Whitney Aircraft Div. v. Secretary of Labor, 649 F.2d 96, 9 OSH Cases 1554 (2d Cir. 1981); R.L. Sanders Roofing Co. v. OSHRC, 620 F.2d 97, 8 OSH Cases 1559 (5th Cir. 1980); Magma Copper Co. V. Marshall, 608 F.2d 373, 7 OSH Cases 1893 (9th Cir. 1979); Bethlehem Steel Corp. v. OSHRC, 607 F.2d 871, 7 OSH Cases 1802 (3d Cir. 1979). Rabinowitz Occupational Safety and Health Law, 2008, 2nd Ed., page 91. (emphasis added)

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

The testimony of CSHO Mitchell, together with the photographic

exhibits, demonstrate that the section of HVAC equipment being lifted during the failure clearly bore sharp non-rounded edges. Mr. Krueger, the job superintendent in control of the worksite and the person responsible for signaling the crane operator, knew or should have known of the equipment condition. He was aware of the requirements and restrictions of performing a lift with polyester straps as identified in complainant's Exhibit 3 reflecting industry standards and restrictions as well as the ANSI data. He testified that he had been involved in ". . . hundreds . . ." of crane assisted lifting operations.

The legal duty of respondent is not to protect against unknown, unforseen or extreme events, but rather **recognized hazards** as defined by or developed under applicable occupational safety and health law.

> "A condition may be **recognized** as a [recognized hazard] only when the evidence shows that it is **commonly known by the public in general or in the cited employer's industry as a hazard** of such type." Consolidated Engineering Co., Inc., 2 OSHC 1253, 1974-1975 OSHD ¶ 18,832, at page 22,670 (1974). Also see National Realty and Construction Company, Inc. v. OSAHRC, 489 F.2d 1257, 1265 n. 32 (D.C. Cir. 1973); Atlantic Sugar Association, 4 OSHC 1355, 1976-1977 OSHD ¶ 20,821 (1976). (emphasis added)

> Only **"preventable"** hazards must be eliminated from the work site in accordance with occupational safety and health legislation and case law. National Realty and Construction Company, Inc. V. OSAHRC, 489 F.2d 1257, 1266 (D.C. Cir. 1973). (emphasis added)

To satisfy the burden of proof for an alleged general duty clause violation under established Occupational Safety and Health Law, the division must show **by a preponderance of evidence** that there existed a **"recognized hazard"** of which the **employer had knowledge** (actual or constructive) in order to **foresee** and, thus, **prevent** injury or harm to its employees by utilizing **feasible** measures that would reduce the

likelihood of injury.

The evidence demonstrates by a preponderance of evidence that hoisting of equipment with sharp or non-rounded edges using unprotected polyester straps is a recognized hazard in the subject and other industries. Utilization of polyester material near sharp edges, particularly when raising equipment of such weight, clearly demonstrates existence of a potential hazard which is reasonably foreseeable and requires protection to keep the workplace safe from such a hazard. Further, it is reasonable to infer that a polyester strap on heavy material with non-rounded edges constitutes an **obvious** hazard. The courts have long recognized that an obvious or glaring nature of a hazard may itself suffice to provide the basis for a finding of **recognition** in the context of a "recognized hazard", a required proof element under the general duty clause. See, Kelly Springfield Tire Co. V. Donovan, 729 F.2d 317, 321, 11 OSH Cases 1889 (5th Cir. 1984). Hazards previously recognized by the courts and the review commission as meeting the criteria have included operation of a crane with obstructed view in a work area, utilization of a freight elevator lacking safety features, and similar **obvious** hazardous conditions.

Respondent superintendent Krueger was in **control** of the job site and the lifting operations. Under well established Occupational Safety and Health Law, "... liability is imposed ... on a contractor who **creates a hazard or who has control** over the condition on a multi-employer worksite ...". See, Brennan v. OSHRC (Underhill Construction Corp.), 513 F.2d 1032 (2nd Cir. 1975). The commission and courts have recognized that protection from hazard exposure to employees is the responsibility of the employer and confirmed that ". . . policy is best effectuated by placing responsibility for hazards on those who create

them." Even if the subcontractor crane company operator lifted the load without being signaled, responsibility remains with the respondent who **created and/or controlled** the conditions at the worksite. Superintendent Krueger was in control of the crane signaling operations and rigging. His responsibility was to ensure a complete safe rigging and coordinated lift. Under occupational safety and health law, the actions of a supervisory employee are imputed to the respondent employer. See, Division of Occupational Safety and Health vs. Pabco Gypsum, 105 Nev. 371, 775 P.2d 701 (1989).

To establish a violation, Nevada OSHA is required to prove by a preponderance of the evidence that:

(1) The employer failed to render its workplace **"free" of a hazard;**
(2) The hazard was **recognized;**
(3) The recognized hazard was **foreseeable** and likely to cause death or serious physical harm; and
(4) There was a **feasible and useful** method to correct the hazard which the employer had not undertaken.

The board finds sufficient evidence by a preponderance to meet the burden of proof to establish a violation of Citation 1, Item 1. The employer failed to render its **workplace free of the recognized hazard** when the crane operator, under the superintendent's control, hoisted the load which was rigged using non-appropriate equipment by an apprentice employee without supervision. The hazardous condition was **recognized** in the industry both through the manufacturer's recommendations and the ANSI standard promulgated under ASME; and also **obvious** when heavy equipment with sharp edges is hoisted using unprotected nylon straps in the lifting process. Further, the recognized hazard was **foreseeable** as likely to result in a lift failure and cause death or serious physical harm. The superintendent, and therefore the respondent, has extensive experience in the industry; and knew or should have known that

utilization of unprotected polyester straps near visibly sharp non-rounded edges was unsafe. Mr. Krueger left an apprentice in the rigging area without supervision, and a crane operator without full visibility of the load or an effective signaling system leaving the hoisting procedure unattended by the signaler. A load failure involving such great weight easily had a potential to cause serious injury or death, particularly with a crane and ball assembly in the process.

There was a **feasible** and reasonable method to prevent the hazard. The superintendent could have directed other strapping material be utilized rather than that provided by the crane operator, utilized a "spreader bar" which is common in such an arrangement, assured there was padding on any sharp or potential contact edges, and established a confirmed meaningful signaling methodology with the crane operator which would have never permitted a hoist, whether done solely on the volition of the operator, by a miscue of the apprentice left in charge of the load, or other causes.

Based upon the above and foregoing, the required elements to establish a general duty clause violation were proven by a preponderance of evidence.

The violation was appropriately classified as **serious**. NRS 618.625 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 in that place of employment **unless the employer did not and could not, with the exercise of reasonable diligence, know** of the presence of the violation."

The evidence clearly demonstrated that the approximate 7,000 lb. load with visible sharp non-rounded edges hoisted with polyester

strapping and no other protection from padding, spreader bar, or other feasible means could cause serious injury or death in the event of a failure. The testimonial evidence from Ms. Watson was that the weight ball crashed through the window of her office in the adjacent building and narrowly avoided serious injury of death to her. Further, while the load failed at only 2-3 feet above the truck from which it was being removed, it could reasonably be inferred from the evidence that the load had potential to fall and strike other employees on the ground, even though they were not directly under the lift area. Had the load reached the second floor height where it was intended and failed, there is a **substantial probability** that serious physical injury or death could have occurred from a fall to the ground level.

The board finds, as a matter of fact and law, that a violation did occur as to Citation 1, Item 1, citing NRS 618.375(1). The violation was appropriately classified as "serious". The proposed penalty in the amount of $2,025.00 is reasonable.

It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, NRS 618.375(1). The classification of the violation as "Serious" and the proposed penalty in the total sum of Two Thousand Twenty-Five Dollars ($2,025.00) are approved and confirmed.

The Board directs counsel for the complainant, 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 3rd day of October 2012.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JOE ADAMS, CHAIRMAN