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,

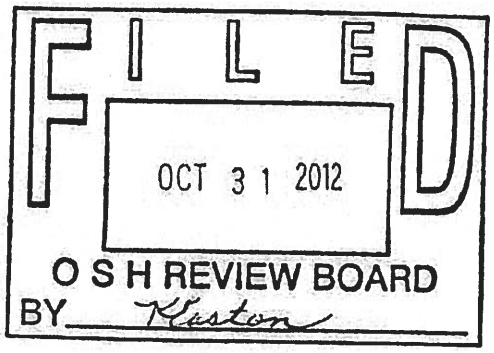
vs.

M&H ENTERPRISES, INC., dba MARTIN HARRIS CONSTRUCTION,

Respondent.

_____/

Docket No. LV 13-1615



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of October, 2012, in furtherance of notice duly provided according to law, MR. DON SMITH, 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. TYSON HOLLIS, Safety Director, appearing on behalf of Respondent, **M&H ENTERPRISES, INC., dba MARTIN HARRIS CONSTRUCTION**; 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. The alleged violations in Citation 1, Items 1a through 1c reference, respectively, 29 CFR 1926.501(b)(4), 29 CFR 1926.501(c)(1)

and 29 CFR 1926.1053(b)(16).

At Citation 1, Item 1a, the employer was charged with exposure of employees to serious injury from a potential fall through an unguarded hole cut in a roof deck. An extension ladder was positioned through the hole for access to a decked roof level. The alleged violation was classified as "Serious" and a grouped penalty proposed in the amount of TWO THOUSAND SEVEN HUNDRED EIGHTY ONE DOLLARS ($2,781.00).

Citation 1, Item 1b, referenced 29 CFR 1926.501(c)(1). The employer was charged with exposing employees to a serious injury from rolling or falling objects. A 30x36 inch hole cut for access to a roof deck level was not protected by use of toeboards, screens, guardrails, or other preventative measures. Employees utilizing an extension ladder or working below were exposed to injury from possible rolling or falling objects. The violation was classified as Serious and a zero penalty proposed based upon the grouped penalty at Item 1a.

Citation 1, Item 1c, referenced 29 CFR 1926.1053(b)(16). The employer was charged with exposing employees to a fall hazard of approximately 3.5 feet above the ground level from a damaged rung on an extension ladder. The violation was classified as "Serious" with no penalty proposed based upon the grouped penalty assessed at Item 1a.

Counsel for the complainant introduced testimony and evidence from witness Mr. Tyson Hollis who identified himself as the Corporate Safety Director of respondent. Mr. Hollis testified that his employees cut the hole in the roof on approximately April 4, 2012 to permit repairs from damage which occurred on approximately March 30, 2012. He testified the size of the hole cut in the roof structure was approximately 30x36 inches.

Complainant counsel introduced further testimony and evidence

through Certified Safety and Health Officer (CSHO) Virginia Wicklund. She identified the complainant evidence package at Exhibits 1, 2 and 3 and made reference to her narrative and investigative reports. Ms. Wicklund testified that respondent was the general contractor and responsible for the entire job site. During her initial "walk around" inspection she found a ". . . very well maintained job site . . ." but observed a damaged ladder rung. She identified Exhibit 2, photograph number 3 and testified it depicted a dented ladder rung which was the basis of her citation at Item 1c. She also identified at Exhibit 2, photograph number 4 depicting a new ladder immediately placed in service by the respondent during the inspection after removal of the damaged ladder. The respondent superintendent informed her he knew of the cited ladder damage and had been ". . . watching it . . ." for replacement.

CSHO Wicklund testified Exhibit 2, photograph number 1 depicted the roof deck opening which had been cut into the roof by respondent and the ladder extending through the hole. Ms. Wicklund confirmed the hole dimensions were 30x36 inches as testified by Mr. Hollis. She cited the violation at Item 1a for inadequate protection of employees as required by the referenced standard based upon the employer duty to ". . . cover an open hole or require employees to wear fall protection when working around it . . ." No cover was found at the site nor could any be produced by the respondent employees. She testified the employees were not using any fall protection while working near the hole. Ms. Wicklund interviewed eight respondent employees who informed her they were working at or near the subject hole without any fall protection system. She further testified that respondent employees and other subcontractor employees had **access** to the hazardous conditions or were directly exposed based upon their work assignments. She cited the respondent

employer because it cut the hole, placed the ladder through the penetration, and responsible for exposure of its employees and those of other subcontractor employees who used or had access to the hazardous conditions.

Ms. Wicklund testified as to Exhibit 2, photograph number 1, and identified the barricade, cones and tape marking an area around the hole as depicting how the respondent protected the opening to immediately abate the condition during her inspection. She described employee exposure for each of the cited conditions. At Item 1a, she found evidence from the work area, employee interviews and observed site conditions of a potential for a fall through the hole hazard. At Item 1b, she found evidence of employee exposure based on the worksite conditions and employee interviews for objects to roll or fall onto employees working below the hole on or at the bottom of the ladder. The defective ladder exposed employees to a fall hazard should the damaged rung fail completely.

Counsel questioned CSHO Wicklund on her violation classifications, penalty calculations and ratings. She testified from her report at Exhibit 1 and specifically identified the bases for same as in accordance with the operations manual. Ms. Wicklund classified the violation at Item 1a as serious because of the possibility for serious injury or death from a fall through the hole at a height equal to that of the extension ladder. Screens or other protective/preventative measures could have been utilized to avoid a potential for injury. She testified at Items 1b and 1c that she had initially proposed classifications of **other than serious** but they were eventually cited as **Serious**, based upon directions from her district manager. CSHO Wicklund testified that her reason for proposing the lesser classifications was

based upon her findings that the roof area and job site were very clean and free of debris; except for a piece of iron depicted in the Exhibit 2 photo on the roof near the ladder extension which could possibly have been kicked and fallen on someone below. She testified that she also proposed the **other** classification due to extensive other safety measures in place, including particularly hard hats worn by the employees to protect them from falling objects. Ms. Wicklund testified the dented ladder rung was only approximately 3.5 feet from the ground level which did not appear a potential for serious injury in the event of a failure and fall from such a low height. She testified that her district manager did consider her initial proposals for lesser classifications at items 1b and 1c by grouping the penalties rather than reclassifying the violations to "other." He informed her of a lack of authority to reclassify the violations given the requirements of the standards and his own determination of the probability for serious injury to occur. She further testified as to her probability, gravity and severity ratings being very limited although addressed by her manager through penalty grouping and related reduction of total proposed penalties in the final citations issued.

On cross-examination of Ms. Wicklund, Mr. Hollis questioned whether use of toeboards on the roof near the hole, as depicted in Exhibit 2, photograph 2, could create a trip hazard. Ms. Wicklund acknowledged the possibility of same.

Safety representative Hollis asserted the defenses of both employee misconduct and lack of evidence to support serious classifications of the violations based upon no reasonable potential for any serious injury to occur. Respondent offered to witness or documentary evidence.

At the conclusion of the respondent's case, the parties offered

closing arguments.

Complaint argued that the evidence established violations of the cited standards by a preponderance and submitted there was no documentary or testimonial evidence offered to rebut the evidence presented by and through CSHO Wicklund. Counsel argued at Citation 1, Item 1a, that the photograph at Exhibit 2 depicts the hole which respondent safety supervisor Hollis admitted was cut by the respondent. Counsel asserted the height of the unguarded or protected hole shown by the ladder extending through the penetration is clear evidence of the potential fall hazard and proves the cited violation and a substantial probability for serious injury to occur from a fall. He argued the unrebutted testimony of CSHO Wicklund that respondent employees worked near or at the hole proves exposure to the fall hazard. Photograph 1 depicts a metal object near the hole which could have been dislodged by an employee and either created a trip hazard to cause a fall into the hole or kicked through the hole onto employees working below. He argued that photograph number 3 at Exhibit 2 clearly established the violative condition depicting a dented rung on the ladder used or accessible by employees as cited at Item 1c.

Respondent presented closing argument. Mr. Hollis asserted that employee misconduct is a viable defense because the clean condition of the job site and the history of the employer demonstrate a safe work area and safety consciousness. He argued the barricade depicted in the Exhibit 2 photograph, which was immediately erected during the inspection, demonstrates the respondent employer had all the materials and capability to protect the hole in accordance with the standards, and shows it could have been done by the employees initially but for their misconduct. He argued that he, as a company supervisor, had not

personally been on the roof structure so did not observe the lack of protection. Mr. Hollis concluded by arguing the "ding" or dent in the damaged ladder did not in and of itself establish a defective and violative condition. Further, the proximity of the damaged rung to the floor did not create any reasonable potential for serious injury nor warrant a classification of serious violation.

The board in reviewing the facts, documents and testimony in evidence must measure same against the established law developed under the Occupational Safety & Health Act, Code of Federal Regulations (CFR) and Nevada Revised Statutes (NRS).

> 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).
>
> 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, 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).

A respondent may rebut allegations 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. See Anning-Johnson Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

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 board finds the testimonial and documentary evidence presented by and through CSHO Wicklund was credible, unrebutted and established the violations at Citation 1, Items 1a, 1b and 1c. The testimony was fully corroborated by the photographs at Exhibit 2.

Respondent presented insufficient evidence or testimony to establish the recognized defense of **unpreventable employee misconduct.** The employer did not satisfy the legal burden to prove the necessary elements of the defense by a preponderance of evidence. This board relies upon long established Federal and OSHRC case law providing that for an employer to prevail on the defense of unpreventable employee misconduct, it must meet its burden of proof by a preponderance of evidence that despite established safety policies in a safety program which is effectively communicated and enforced, the conduct of its employees in violating the policy was unforeseeable, unpreventable or an isolated event.

> Evidence that the employer effectively communicated and 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). (emphasis added)

> 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).
>
> An employer has the affirmative duty to anticipate and protect against **preventable** hazardous conduct by employees. Leon Construction Co., 3 OSHC 1979, 1975-1976 OSHD ¶ 20,387 (1976). **Employee misbehavior, standing alone, does not relieve an employer.** Where the Secretary shows the existence of violative conditions, an employer may defend by showing that the employee's behavior was a deviation from a uniformly and **effectively enforced work rule**, of which deviation the employer had neither actual **nor constructive** knowledge. A. J. McNulty & Co., Inc., 4 OSHC 1097, 1975-1976 OSHD ¶ 20,600 (1976). (emphasis added)

While the employer demonstrated to the inspecting CSHO that respondent maintained general work rules and a safety program designed to prevent violations, it offered no proof of **effective enforcement** of safety rules sufficient to avoid violations. Respondent provided no evidence or testimony that it **adequately communicated** safety policies and rules to employees in its work practice for safely carrying out the job. Respondent did not demonstrate that it took **meaningful steps to discover** violations which should have been easily observable by supervisory representatives on the construction site. The defense of unpreventable employee misconduct must fail because violative conditions were readily **foreseeable** in plain view and **reasonably preventable.** Adequate communication and **meaningfully enforced** work rules would have prevented the violative conditions and the citations. See Jensen Construction Co., 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, Marson Corp., 10 OHSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

> . . . cases make clear the existence of an employer's defense for the unforeseeable

> disobedience of an employee who violates the specific duty clause. However, the disobedience defense will fail if the employer does not *effectively communicate and conscientiously enforce the safety program at all times. Even when a safety program is thorough and properly conceived, lax administration renders it ineffective.* P. Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 110-111 (1st Cir. 1997). Although the mere occurrence of a safety violation does not establish ineffective enforcement, Secretary of Labor v. Raytheon Constructors Inc., 19 O.S.H.C. 1311, 1314 (2000) the *employer must show that it took adequate steps to discover violations of its work rules and an effective system to detect unsafe conditions* control. Secretary of Labor v. Fishel Co., 18 O.S.H.C. 1530, 1531 (1998). Failure to follow through and to require employees to abide by safety standards should be evidence that disciplinary action against disobedient employees progressed to levels of punishment designed to provide deterrence. *Id.* See also, Secretary of Labor v. A&W Construction Services, Inc., 19 O.S.H.C. 1659, 1664 (2001); Secretary of Labor v. Raytheon Constructors Inc., 19 O.S.H.C. 1311, 1314 (2000). A disciplinary program consisting solely of verbal warnings is insufficient. Secretary of Labor v. Reynolds Inc., 19 O.S.H.C. 1653, 1657 (2001); Secretary of Labor v. Dayton Hudson Corp., 19 O.S.H.C. 1045, 1046 (2000). Similarly, disciplinary action that occurs long after the violation was committed may be found ineffective. (emphasis added)

Employee exposure can be based on preponderant evidence of direct exposure or **access to a hazard.**

> **Actual** knowledge (**of employee exposure to violative conditions**) 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).
>
> 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).

Complainant met the statutory burden of proof and established the **serious** classification of the violation at Citation 1, Item 1a by a preponderance of evidence. The unguarded hole in violation of the cited standard created a ". . . substantial probability for serious injury or harm to occur . . ."

However, notwithstanding the establishment of violative conditions at Citation 1, Items 1b and 1c in satisfaction of the burden of proof by complainant, the board finds insufficient evidence to prove the classifications of **serious**.

At Item 1b, the photographic exhibits and sworn testimony presented by CSHO Wicklund demonstrated a very clean job site, no debris in the area (except for a piece of metal near the hole but not lying at or close to the edge), employees well equipped with hard hats and all appropriate "PPE", and other safety/precautionary measures in place. At Item 1b, the probability for something on the roof deck to fall through the hole on an employee below was remote and not proven by any actual conditions found at the site. While employees informed the CSHO that they had worked at or near the hole, and others had (legally defined) **access** to same, thus establishing the critical proof element

of exposure, no evidence depicted in the photographs or subject of testimony demonstrated a **substantial probability** for serious injury or harm from falling or rolling objects.

Similarly at Item 1c, the evidence of a damaged fourth rung at the bottom of a ladder, approximately 3.5 feet above ground level, does not in and of itself establish by a preponderance of evidence a **substantial probability** for **serious injury or harm to occur** from such a low potential fall.

The board follows well established case law emanating from the Federal courts and OSHRC which vests in the Commission (board) authority to revise classifications based upon the evidence.

> "The Commission . . . may reduce or eliminate a penalty by **changing the citation classification** or by amending the citation . . .". *See* Reich v. OSCRC (Erie Coke Corp.), 998 F.2d 134, 16 OSH Cases 1241 (3d Cir. 1993) (emphasis added)

The board finds insufficient proof to support classification of the violation at Citation 1, Items 1b and 1c as "serious". The facts in evidence do not demonstrate a "substantial probability" that serious injury or harm could result from the working conditions and/or operations subject of the cited violations. However the board finds substantial evidence for reclassification of the violation as "other than serious".

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

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 1a, 29 CFR 1926.501(b)(4). The violation, Serious

classification and proposed penalty in the amount of TWO THOUSAND SEVEN HUNDRED EIGHTY-ONE DOLLARS ($2,781.00) are confirmed and approved.

It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that violations of Nevada Revised Statute did occur as to Citation 1, Item 1b, 29 CFR 1926.501(c)(1) and Citation 1, Item 1c, 29 CFR 1926.1053(b)(16). The violations are reclassified from "Serious" to "Other than Serious". There were no penalties proposed at Items 1b and 1c based upon the grouping at Item 1a and therefore no additional penalties approved.

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 31st day of October, 2012.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By _____
JOE ADAMS, Chairman