

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD

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Docket No. LV 13-162

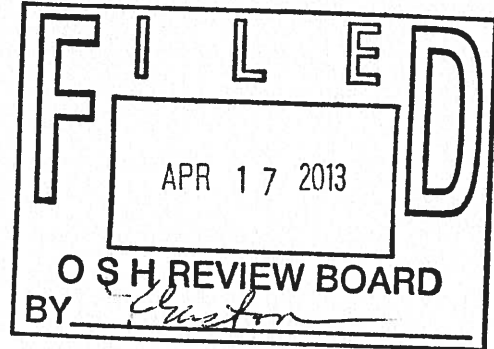
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5 CHIEF ADMINISTRATIVE OFFICER
6 OF THE OCCUPATIONAL SAFETY AND
7 HEALTH ADMINISTRATION, DIVISION
8 OF INDUSTRIAL RELATIONS OF THE
9 DEPARTMENT OF BUSINESS AND
10 INDUSTRY, STATE OF NEVADA

Complainant,

vs.

11 TERRA CONTRACTING, INC.,

12 Respondent.
13 _____/



14
15 DECISION

16 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
17 **HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of March
18 2013, in furtherance of notice duly provided according to law, MR. DON
19 SMITH, ESQ., counsel appearing on behalf of the Complainant, **Chief**
20 **Administrative Officer of the Occupational Safety and Health**
21 **Administration, Division of Industrial Relations** (OSHA); and MR. ROBERT
22 RYAN, ESQ. appearing on behalf of Respondent, **TERRA CONTRACTING, INC.**;
23 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

24 Jurisdiction in this matter has been conferred in accordance with
25 Chapter 618 of the Nevada Revised Statutes.

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

1 Citation 1, Item 1, charges a violation of 29 CFR 1926.651(k) (2)
2 as follows:

3 **Citation 1, Item 1:** 29 CFR 1926.651(k) (2): Where the
4 competent person finds evidence of a situation that could
5 result in a possible cave-in, indications of failure of
6 protective systems, hazardous atmospheres, or other hazardous
conditions, exposed employees shall be removed from the
hazardous area until the necessary precautions have been
taken in to ensure their safety:

7 At the Southwest corner of 6th and Clark Street, in Las Vegas,
8 Nevada, the competent person did not remove an employee from
9 a trench that did not have a cave-in protection system. The
trench was approximately 8 feet deep. The employee working
inside the trench was exposed to a possible cave-in.

10 The violation was classified as "Serious". The proposed penalty
11 for the alleged violation is in the amount of \$3,500.00.

12 Citation 1, Item 2, charges a violation of 29 CFR 1926.652(a) (1)
13 as follows:

14 **Citation 1, Item 2:** 29 CFR 1926.652(a) (1): Each employee in
15 an excavation shall be protected from cave-ins by an adequate
16 protective system designed in accordance with paragraph (b)
17 or (c) of this section except when excavations were made
18 entirely in stable rock; or excavations were less than 5 feet
(1.52 m) in depth and examination of the ground by a
competent person provides no indication of a potential cave-
in:

19 At the Southwest corner of the 6th and Clark Street, in Las
20 Vegas, Nevada, an employee was observed working in a trench
8 feet deep. The trench did not have a cave-in protection
system. The employee was exposed to a possible cave-in.

21 The violation was classified as "Serious". The proposed penalty
22 for the alleged violation is in the amount of \$3,500.00.

23 Complainant and respondent stipulated to the admission of
24 documentary and photographic evidence at complainant's Exhibits 1
25 through 4 and respondent's Exhibit A through H.

26 Complainant presented evidence with regard to the alleged
27 violation. Mr. Jamal Sayegh, a certified safety and health officer
28 (CSHO) testified as to his inspection and the citations issued to the

1 employer.

2 CSHO Sayegh conducted a referral inspection of respondent's
3 worksite located at the southwest corner of 6th and Clark Streets in Las
4 Vegas, Nevada on or about August 6th, 2012. While approaching the
5 worksite he observed ". . . white hard hats . . . in an excavated trench
6 . . .". Mr. Sayegh testified he initially saw two employees working in
7 an unprotected excavation and another employee (later identified as Mr.
8 Francisco Chavez, the respondent competent person), in a nearby smaller
9 trench.

10 CSHO Sayegh testified the site was a **multi-employer worksite**. SR
11 Contractors was the general contractor, and respondent Terra
12 Contracting, Inc. the subcontractor. At the time of inspection, Mr.
13 Sayegh identified Mr. Russ Stevens, superintendent of SR Contractors,
14 Inc. and Mr. Francisco Chavez, the competent person for respondent. He
15 testified that both appeared to be supervising the two (2) respondent
16 employees installing a "grease trap box" in the trench. The excavation
17 was observed and photographed on his arrival with no cave-in protection
18 system. A respondent employee was also observed and photographed
19 outside the excavation assisting with the installation of the grease box
20 being lowered into the trench. He identified respondent employees
21 inside the unprotected excavation as Mr. Mike Chee and Mr. Raul
22 Santillanes. Neither superintendent Stevens of SR Contractors nor
23 competent person Francisco Chavez, of respondent Terra Contracting,
24 removed the exposed employees from the unprotected excavation as
25 required by the OSHA trench safety standards.

26 The photographs obtained on immediate arrival at the site are
27 identified in Exhibit 3 as photos numbers 1 through 3 taken at
28 approximately 9:12 a.m. The photos depicted the violative conditions

1 as observed and testified to by CSHO Sayegh. During the initial OSHA
2 interview Mr. Chavez identified himself to CSHO Sayegh as the respondent
3 **competent person** on site and recited his duties on the job. He
4 personally tested the soils and determined they were type "C". Mr.
5 Chavez explained the duties of a competent person, including the ability
6 to stop work if any problems occur. CSHO Sayegh interviewed the two
7 respondent employees observed working inside the excavation. Employee
8 Chee provided an initial signed statement, but later changed his mind
9 and revised the document as to the extent of his time working in the
10 trench. He reported that he was "in and out of the ditch Thursday or
11 Wednesday . . .". Mr. Chee also stated that he ". . . saw Raul
12 (Santillanes) in the trench" (complainant's Exhibit 2, page 15).
13 Employee Santillanes also provided a written statement providing that
14 he had been ". . . on the job site for one and one-half months, in the
15 trench for one minute and . . . his supervisor did not instruct him to
16 go into the trench . . ." (complainant's Exhibit 2, page 16). He
17 confirmed his height to be approximately five foot eight inches (5'8").
18 CSHO Sayegh testified Mr. Santillanes provided him with the basis for
19 initial estimation of the trench depth prior to measuring the box in
20 place to confirm the excavation was in excess of 5 foot which requires
21 protection under OSHA standards.

22 Mr. Sayegh testified he awaited the arrival of employer
23 representative and proceeded to conduct the formal opening conference.
24 After the walkaround inspection he returned to the subject trench and
25 discovered the excavation had been backfilled with soil and benched.
26 He inquired as to why this had occurred while the investigation was
27 underway and after he had instructed cessation of work. The general
28 contractor superintendent, Russ Stevens, informed him the trench was

1 ". . . already benched . . . backfilled . . . and in the . . . same
2 condition as before the inspectors arrived at the job site." After Mr.
3 Stevens comments, the photographs taken of the trench prior to the
4 opening conference were shown to SR superintendent Russ Stevens and
5 safety director Ron Forster clearly confirming the excavation was not
6 initially benched nor backfilled with soil. Notwithstanding the CSHO
7 advisory and photographs, the safety director and superintendent
8 insisted the trench was benched and backfilled with soil prior to
9 arrival of the OSHA personnel. CSHO Sayegh again referenced the
10 photographic exhibits at Exhibit 4 and testified on the difference in
11 time as to photographs numbered 1 through 3 taken upon arrival at 9:12
12 a.m. from those numbered 4 through 7 taken at 10:30 a.m. to establish
13 the trench was initially unprotected and employees exposed to the cited
14 hazards.

15 After concluding the opening conference, CSHO Sayegh testified he
16 informed the representatives he would be citing the respondent for two
17 standard violations. Mr. Sayegh found violations of the referenced OSHA
18 standards based upon his observations at the jobsite, photographs of the
19 respondent employees working in (Messrs. Chee and Santillanes) and near
20 (Mr. Chavez) the trench, and the statements taken at the time of the
21 inspection now in evidence. He determined employee hazard exposure
22 based upon the observed and photographed lack of any recognized trench
23 protection, including benching, shoring, or other means as permitted
24 under the trench safety standards. The presence of respondent competent
25 person Francisco Chavez, who failed to remove the exposed employees from
26 the unprotected trench established the violation at Citation 1, Item 1.
27 He also concluded that because Mr. Chavez, the competent person for
28 respondent, was present during the violative conduct as supervisory

1 personnel, his presence, participation and knowledge is imputed under
2 Nevada and OSHA law to the respondent employer, Terra Contracting, Inc.

3 Mr. Sayegh testified he classified the violations as serious due
4 to the potential for serious injury that could occur through collapse
5 or cave-in of the trench. He further testified as to his probability
6 ratings and reductions to the penalty of 30%. He cited the violation
7 at Citation 1, Item 1, for the failure of Francisco Chavez, the
8 competent person, to remove an employee from the unprotected trench.
9 He cited the violation at Citation 1, Item 2, based upon a respondent
10 employee working in the unprotected trench. Both were classified as
11 serious and each included a penalty assessed at \$3,500.00.

12 On cross-examination, Mr. Sayegh explained that while two
13 identified respondent employees were observed working in the trench, the
14 citation only identified one, because of the timing of the confirming
15 photographs. He further responded to examination by respondent's
16 counsel as to employer knowledge. Mr. Sayegh testified that both the
17 general contractor SR Construction and the subcontractor Terra
18 Construction, Inc. were presumed to have (constructive) "employer
19 knowledge". The general contractor superintendent was observing the
20 work, and respondent subcontractor Terra competent person Francisco
21 Chavez was directing the work.

22 At the conclusion of complainant's case, respondent presented
23 testimony and evidence in defense of the violations. Mr. Justin
24 Anderson, the general manager of respondent Terra Contracting, Inc.,
25 identified Exhibit A as the company safety program. It was admitted in
26 evidence over objection that it had not previously been provided to
27 OSHA. He identified Exhibit B, the training records of Mr. Francisco
28 Chavez and testified he (Chavez) had been trained and passed an

1 examination on trench safety. Mr. Anderson responded similarly to
2 questions with regard to employee Raul Santillanes as to training and
3 experience in trench safety. Exhibit D was identified as evidence of
4 the weekly safety training meetings. Mr. Anderson testified Exhibits
5 G and H confirmed corrective counseling of employee Chavez and
6 Santillanes after they were "written up" for violations of the
7 respondent safety program. He testified the respondent complied with
8 all its OSHA obligations.

9 Mr. Anderson testified respondent representatives were not invited
10 to or involved in the opening conference and accordingly denied a right
11 to participate in the proscribed inspection process.

12 On cross-examination, Mr. Anderson testified Ms. Gina Martinez, who
13 signed Exhibit 2, page 2, of the opening conference worksheet, was the
14 HR safety person.

15 At the conclusion of evidence and testimony, both complainant and
16 respondent provided closing argument.

17 The complainant argued the statutory burden of proof had been met
18 by a preponderance of evidence for each of the elements required to
19 prove the cited violations. The trench safety standards were applicable
20 to the facts in evidence, and the conditions of the trench were not
21 compliant with the required standards cited. He argued the elements
22 applied both to the competent person failure of corrective action to
23 remove his employee from the violative trench; and respondent employee
24 Santillanes working in the unprotected excavation. Employee exposure
25 to the hazards was demonstrated by the testimony and photographic
26 evidence on the depth and unguarded condition of the trench. The
27 photographs corroborated testimony that the identified respondent
28 employee was working in the unprotected excavation. Employer knowledge

1 was established constructively by imputation through competent person
2 Chavez, and directly because of the employer's responsibility for
3 reasonable due diligence to be aware or become aware of violative
4 worksite conditions. Counsel asserted the defense of employee
5 misconduct cannot be relied upon to excuse the employer because the
6 evidence showed lack of enforcement of the company safety plan, and
7 personal violative conduct of supervisory employee competent person,
8 Francisco Chavez. He argued there were two employees in violation of
9 the safety program. The direct violation of Mr. Chavez and failure to
10 enforce the written company safety plan must be imputed to the
11 respondent employer.

12 Respondent presented closing argument. He identified the history
13 of safety compliance of the respondent asserting there had been only one
14 previously serious violation brought against the company. The evidence
15 clearly demonstrated the existence of a written safety plan, appropriate
16 training meetings, disciplinary action, and an effectively enforced
17 safety program. He argued the documents in evidence demonstrated the
18 subject respondent employees knew better and were trained in safety, but
19 simply did not follow the employer's safety plan and instructions. Both
20 employees were "written up" and retrained to demonstrate enforcement.
21 The purpose of the law was met. No employer is perfect and cannot
22 prevent an isolated event of two employees briefly entering into a
23 trench which can never be stopped on any construction site. He argued
24 that burden should not be imposed upon any employer nor the respondent.

25 The board reviewed the facts in evidence and weighed the testimony
26 provided by the witnesses of complainant and respondent. The board
27 finds a preponderance of evidence to support violations of the cited
28 trench protection safety standards referenced at Citation 1, Item 1, and

1 Citation 1, Item 2.

2 N.A.C. 618.788(1) provides:

3 In all proceedings commenced by the filing of a
4 notice of contest, the burden of proof rests with
the Administrator.

5 All facts forming the basis of a complaint must be
6 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶
7 16,958 (1973).

8 To establish a prima facie case, the Secretary
(Chief Administrative Officer) must prove 1) the
9 cited standard applies; 2) the requirements of the
10 standard were not met; 3) employees were exposed to
or had access to the violative condition; 4) the
11 **employer knew or, through the exercise of
reasonable diligence could have known of the
violative condition;** 5) there is substantial
12 probability that death or serious physical harm
could result from the violative condition (in a
"serious" violation case). See *Bechtel
13 Corporation*, 2 OSHC 1336, 1974-1975 OSHD ¶ 18,906
(1974); *D.A. Collins Construction Co. Inc., v.
14 Secretary of Labor*, 117 F.3d 691 (2nd Cir. 1997).
(Emphasis added)

15
16 A "serious" violation defined in NRS 618.625(2) provides in
17 pertinent part:

18 ". . . a serious violation exists in a place of
19 employment if there is a **substantial probability**
that death or **serious physical harm** could result
20 from a condition which exists or from one or more
practices, means, methods, operations or processes
21 which have been adopted or are **in use at that place**
of employment unless the employer did not and could
22 **not, with the exercise of reasonable diligence,**
know the presence of the violation." (Emphasis
23 added)

24 The testimony and evidence establish the existence of violative
25 conduct in contravention of the cited standards. Respondent presented
26 no evidence to refute the facts of violation, but asserted the
27 recognized defense of **isolated, unpreventable employee misconduct.**

28 The board finds at Citation 1, Item 1, and Item 2, that

1 complainant's initial burden to prove the violations was met by the
2 un rebutted sworn testimony of CSHO Sayegh, the photographs in evidence
3 at complainant Exhibit 4, photos 1-7, and the evidence at Exhibit 2.

4 The burden of proof to confirm a violation rests with OSHA under
5 Nevada law (NAC 618.798(1)); but after establishing same, **the burden**
6 **shifts to the respondent to prove any recognized defenses.** See *Jensen*
7 *Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶ 23,664 (1979). Accord,
8 *Marson Corp.*, 10 OSHC 2128, 1980 OSHC 1045 ¶ 24,174 (1980).

9 The defense (**unpreventable employee misconduct**) has
10 been stated in various ways, but it **basically**
11 **requires an employer to show that its employees**
12 **were required to take protective measures that**
13 **would comply with the standard and it enforced that**
14 **requirement.** *E.g.*, *Brock v. L.E. Myers Co.*, 818
15 F.2d 1270, 13 OSH Cases 1289 (6th Cir.), cert.
16 *Denied*, 484 U.S. 989 (1987); *Texland Drilling*
17 *Corp.*, 9 OSH Cases 1023 (Rev. Comm'n 1980). The
18 Commission has distilled its decisions as requiring
19 **four elements of proof:** that (1) the employer has
20 established work rules designated to prevent the
21 violation; (2) it has **adequately communicated those**
22 **rules to its employees;** (3) it has **taken steps to**
23 **discovery violations;** and (4) it has effectively
24 enforced the rules when violations have been
25 discovered. *E.g.*, *Capform Inc.*, 16 OSH Cases 2040,
26 2043 (rev. Comm'n 1994). Rabinowitz Occupational
27 Safety and Health Law, 2008, 2nd Ed., pages 156.

19 An employer has the affirmative duty to **anticipate and protect**
20 **against preventable hazardous conduct by employees.** *Leon Construction*
21 *Co.*, 3 OSHC 1979, 1975-1976 OSHD ¶ 20,387 (1976). Employee misbehavior,
22 standing alone, does not relieve an employer. Where the Secretary shows
23 the existence of violative conditions, an employer may defend by showing
24 that the employee's behavior was a deviation from a uniformly and
25 **effectively enforced work rule, of which deviation the employer had**
26 **neither actual nor constructive knowledge.** *A. J. McNulty & Co., Inc.*,
27 4 OSHC 1097, 1975-1976 OSHD ¶ 20,600 (1976). (emphasis added)

28 In order to establish an unpreventable employee

1 misconduct defense, the employer must establish
2 that it had: established work rules designed to
3 prevent the violation; **adequately communicated**
4 **those work rules** to its employees (**including**
5 **supervisors**); taken **reasonable steps to discover**
6 **violations of those work rules**; and **effectively**
7 **enforced those work rules** when they were violated.
8 *New York State Electric & Gas Corporation*, 17 BNA
9 OSHC 1129, 1195 CCH OSHD ¶ 30,745 (91-2897, 1995).
10 (Emphasis added)

11 Although there is a similar doctrine of **supervisory**
12 **misconduct**, some cases characterize it not as an
13 affirmative defense but as a rebuttal of the
14 imputation to the employer of the supervisor's
15 knowledge. The Commission has stated that
16 **involvement by a supervisor in a violation is**
17 **"strong evidence that the employer's safety program**
18 **was lax."** "Where a supervisory employee is
19 involved, the proof of unpreventable employee
20 misconduct is **more rigorous and the defense is more**
21 **difficult to establish since it is the supervisors'**
22 **duty to protect the safety of employees under their**
23 **supervision."** *Daniel Constr. Co.*, 10 OSH Cases
24 1549, 1552 (Rev. Comm'n 1982). *Consolidated*
25 *Freightways Corp.*, 15 OSH Cases 1317, 1321 (Rev.
26 Comm'n 1991). *Seyforth Roofing Co.*, 16 OSH Cases
27 2031 (Rev. Comm'n 1994). Rabinowitz Occupational
28 Safety and Health Law, 2008, 2nd Ed., page 157.
(Emphasis added)

" . . . (A) supervisor's knowledge of deviations
from standards . . . is properly imputed to the
respondent employer. . ." *Division of Occupational*
Safety and Health vs. Pabco Gypsum, 105 Nev. 371,
775 P.2d 701 (1989).

It is well settled that the **knowledge, actual or**
constructive, of an employer's supervisory
personnel will be imputed to the employer, unless
the employer establishes **substantial grounds** for
not doing so. *Ormet Corp.*, 14 BNA OSHC 2134, 1991-
93 CCH OSHD ¶ 29,254 (No. 85-531 1991). The
Commission held that once there is a prima facie
showing of employer knowledge through a supervisory
employee, the employer can rebut that showing by
establishing that the failure of the supervisory
employee to follow proper procedures was
unpreventable. In particular, the employer must
establish that it had relevant work rules that it
adequately communicated and effectively enforced.
Consolidated Freightways Corp., 15 BNA OSHC 1317,
1991-93 CCH OSHD ¶ 29,500 (No. 86-531, 1991).
(Emphasis added)

1 **Competent person** means one who is capable of
2 identifying existing and predictable hazards in the
3 surroundings or working conditions which are
4 unsanitary, hazardous, or dangerous to employees,
5 and who has **authorization to take prompt corrective**
6 **measures to eliminate them.** 29 CFR 1926.32(f)
7 (Emphasis added)

8 **Employer knowledge, foreseeability, and lack of safety enforcement**
9 **by supervisory personnel prevents reliance upon the defense of**
10 **unpreventable employee misconduct to relieve respondent of liability.**

11 Two respondent employees engaged in violative conduct, one the employer
12 designated **competent person**. This action is strong evidence that the
13 respondent safety program was deficient. The defense of unpreventable
14 employee misconduct and the burden of proof to satisfy same is
15 **substantial** under applicable law. There was insufficient evidence to
16 establish the defense and rebut the proof of violation.

17 The board finds the testimony of CSHO Sayegh, the interview
18 statements taken at the job site at Exhibit 2, and the photographs at
19 Exhibit 4, establish violations of the citations. Mr. Francisco Chavez
20 was the company designated **competent person** and vested with **supervisory**
21 **personnel** status for the respondent. He failed to remove an employee(s)
22 from the excavation. His violative conduct is imputed to the respondent
23 employer.

24 The weight of evidence corroborates the CSHO testimony that
25 employee Santillanes was working inside the excavation without the
26 required safety protection and in full view of Mr. Chavez, the competent
27 person. The work area was a multi-employer worksite. Evidence and
28 testimony established that notwithstanding Mr. Santillanes working
inside the excavation, Mr. Chavez, the competent person, directly
violated 29 CFR 1926.651(k)(2) by failing to remove the employee from
the trench, which was not protected with a recognized cave-in protection

1 system. The testimonial evidence corroborated by the photographs
2 support a finding of **ineffective enforcement** of the company safety rules
3 by Mr. Chavez when he saw them violated. Mr. Chavez's presence and
4 violative conduct as a supervisory employee, negates the ability of
5 respondent to rely upon the defense of unpreventable employee
6 misconduct. The testimony and evidence demonstrated the trench as
7 photographed initially upon the arrival of Mr. Sayegh was backfilled and
8 benched approximately one hour later, notwithstanding his (Mr. Sayegh)
9 instructions to cease work. The unrebutted testimony of egregious
10 conduct was compounded by denial of general contractor superintendent
11 Stevens that the trench was ever in an unprotected condition. The
12 evidence demonstrates a lack of good faith compliance with OSHA safety
13 standards. Although the denials of Mr. Stevens cannot be directly
14 attributed to the respondent here without the testimony of Mr. Chavez,
15 it further erodes any reasonable inferences for support of respondent
16 reliance upon the defense of unpreventable employee misconduct.

17 While the Nevada Occupational Safety and Health Review Board has
18 adopted the expanded employee misconduct defense to include supervisory
19 employees, the facts and weight of evidence are insufficient to meet
20 respondent's burden of proof to rebut the prima facie case of violation.

21 It is the decision of the Nevada Occupational Safety and Health
22 Review Board that a violations of Nevada Revised Statutes did occur as
23 to Citation 1, Item 1, 29 CFR 1926.651(k) (2) and Citation 1, Item 2, 29
24 CFR 1926.652(a) (1). The violations were properly classified as serious.
25 The proposed penalties are reduced in accordance with the Nevada
26 Operations Manual to reflect an adjustment in the monetary amount by 20%
27 with respect to each violation. The penalties are confirmed in the
28 amount of TWO THOUSAND EIGHT HUNDRED DOLLARS (\$2,800.00) as to Citation

