

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3

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

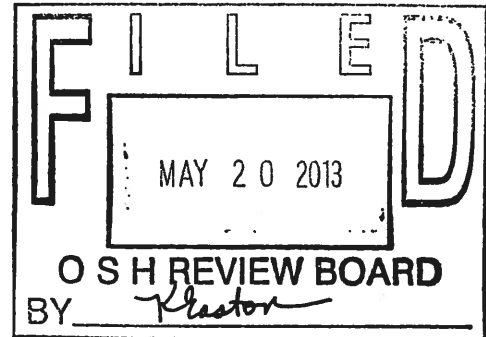
Docket No. LV 13-1624

Complainant,

vs.

10 WESTERN STATES CONTRACTING, INC.,

11 Respondent.



12  
13 **DECISION**

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**  
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 10<sup>th</sup> day of April,  
16 2013, in furtherance of notice duly provided according to law, MR.  
17 MICHAEL TANCHEK, ESQ., counsel appearing on behalf of the Complainant,  
18 Chief Administrative Officer of the Occupational Safety and Health  
19 Administration, Division of Industrial Relations (OSHA); and MR. KEN  
20 MUCHETTE, Safety Professional and MR. TROY SHIOZAWA, Risk Manager,  
21 appearing on behalf of Respondent, **Western States Contracting**; the  
22 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

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

28 In Citation 1, Item 1, referencing 29 CFR 1926.652(a)(1) the

1 complainant alleged respondent employees were exposed to excavation  
2 cave-in hazards while working in an excavation greater than five feet  
3 in depth and without any form of sloping, shoring, or other cave-in  
4 protection in place. The alleged violation was classified as  
5 Repeat/Serious with a penalty proposed in the amount of Thirteen  
6 Thousand Eight Hundred Sixty Dollars (\$13,860.00).

7 In Citation 1, Item 2, referencing 29 CFR 1926.105(3)(b)(1), the  
8 employer was charged with exposing employees to fall hazards while  
9 climbing onto and off a portable extension ladder which did not have  
10 side rails extended three feet above the upper landing surface. The  
11 alleged violation was classified as Serious and a penalty proposed in  
12 the amount of Four Thousand Nine Hundred Fifty Dollars (\$4,950.00).

13 Complainant and respondent representatives stipulated to the entry  
14 of Exhibits prior to the commence of hearing, specifically complainant's  
15 exhibit packet of documents and photos identified as Exhibits 1 through  
16 7. Respondent Exhibit A, B and C were identified respectively as a  
17 revised engineer letter report, photographic Exhibits 1 through 5, and  
18 at an Exhibit C an OSHA interpretation letter.

19 Counsel for the complainant, through Certified Safety and Health  
20 Officer (CSHO) Jimmy Andrews, presented evidence and testimony as to the  
21 violations, classifications and appropriateness of the penalties. Mr.  
22 Andrews identified complainant Exhibits and testified referencing same,  
23 commencing with the narrative report at Exhibit 1. CSHO Andrews was  
24 sent to the respondent worksite on a referral, together with CSHO  
25 Dressler, to inspect an excavation. He observed two employees working  
26 in an unprotected excavation of approximately 20 foot in depth. Some  
27 areas of the excavation had cave-in protection or jacks in place at the  
28 top but not at the bottom area. He identified the respondent employer

1 as Western States Contracting Inc., a construction company in the  
2 business of performing excavation operations to install underground  
3 water and sewer pipes. On June 25, 2012 respondent was installing 40"  
4 diameter concrete sewer pipe on the south side of Silverado Ranch Blvd.  
5 in Las Vegas, Nevada. The excavation was visible from the adjacent  
6 cross-streets of South Decature Blvd. to the east and Lindell Road to  
7 the west.

8 Mr. Andrews testified he made contact with workers on the job site  
9 in an effort to identify the foreman who was operating a loader.  
10 Shortly thereafter the operator approached both CSHOs and identified  
11 himself as the foreman and advised that the company superintendent was  
12 on his way to the site. Mr. John Allred, superintendent for the  
13 respondent, arrived and stated "we've got a letter that says this trench  
14 is okay." Mr. Allred presented a document on his cellphone he claimed  
15 to be an engineering report permitting the excavation work with no cave-  
16 in protection. He further advised that another respondent employee was  
17 on his way to the job site to provide an original copy of the engineer's  
18 report. The employee arrived and presented the document, which he  
19 identified as a soils report from AMTI Sunbelt, LLP detailing the soils,  
20 he referenced complainant's Exhibit 7. The report bore the engineer  
21 stamp of Kirby P. Adams, principal engineer for AMTI Sunbelt, LLP.  
22 However the soil classified in the report at the jobsite was **Type A**  
23 which requires trench safety protection before employees can work in the  
24 excavation. The report submitted was dated June 14, 2012.

25 Mr. Andrews testified the report from AMTI Sunbelt, LLP did not  
26 contain any information related to the design of the excavation or  
27 contain any drawings, plans, or schematics for the excavation. During  
28 his interviews, CSHO Andrews spoke with the engineer, Mr. Kirby Adams,

1 who informed him he did not personally conduct the soils sample but  
2 reviewed the work of James Wilson, who is a managing partner for AMTI  
3 Sunbelt, LLP. Mr. Adams said that he did not perform any design work  
4 for the respondent but that his employer, AMTI Sunbelt, LLP, has held  
5 a contract with the company since 2009.

6 CSHO Andrews testified that Mr. James Wilson, the Field Technician  
7 and Partner of AMTI, informed him he conducted a visual inspection of  
8 the excavation in order to perform a soil classification. He further  
9 advised that based upon his visual observation of the excavation, he  
10 determined the soil was Type A but further stated that he did not  
11 perform any design work for the excavation and his company was not asked  
12 to do same.

13 CSHO Andrews requested engineer design plans for the excavation  
14 from Mr. Troy Shiozawa, the Risk Manager for respondent. Mr. Shiozawa  
15 told him that Western States Contracting did not produce a written  
16 design for the excavation because the plan for work at the job site was  
17 to wait for soil classification to be made by AMTI Sunbelt and to dig  
18 the trench vertical walls if the soil classification permitted. Mr.  
19 Shiozawa further informed him that he thought the soil classification  
20 of Type A permitted the employee to dig the trench with vertical walls.  
21 He also informed CSHO Andrews that he was aware of previously disturbed  
22 soil in the area of the water pipe which spanned horizontally in the  
23 trench in which the employees were working. Mr. Shiozawa informed CSHO  
24 Andrews that he discussed the water pipe with John Allred and new it was  
25 there, because the same crew had installed the water pipe last year.

26 Mr. Andrews testified with regard to inspection reports provided  
27 by the employer establishing the measurements for the excavation at 15  
28 feet in depth, 9 feet in width, at the bottom of the trench and 11 feet

1 in width at the top of the excavation. The measurements taken during  
2 the OSHA inspection indicated the excavation was 14 feet in depth, 11  
3 feet in width and the top of the excavation. The slope ratio to the  
4 trench as observed was 1-14 or 85.9 degrees.

5 Mr. Andrews further testified with regard to his observations of  
6 workers exiting the excavation at the west side of the job site using  
7 an aluminum extension ladder to climb from the trench. The ladder did  
8 not extend three feet above the upper landing surface to which the  
9 workers were climbing. The ladder was not secured and no grabbing  
10 device was provided for employees as they exited. He identified Exhibit  
11 4 containing photographs depicting the excavation and specifically the  
12 ladder at photograph number 4.

13 During employee interviews, CSHO Andrews learned the respondent  
14 employees entered the excavation to perform grading work and prepare to  
15 set sections of the concrete pipe. The employees interviewed stated  
16 they were working in the excavation every day grading work was performed  
17 and for a duration of approximately 4 to 6 hours each day. The  
18 employees advised the CSHO that the extension ladder was the only means  
19 of access or egress to the excavation.

20 Employees stated they were concerned about the stability of the  
21 ladder and told the site foreman about their concerns. Mr. Andrews  
22 identified Exhibit 6 as containing the employee interviews in support  
23 of his testimony.

24 On cross-examination, Mr. Andrews testified that he observed  
25 shoring properly set in place in other trenches, but none existed in the  
26 subject trench referenced in the citation for violation. He further  
27 testified that the ladder violation was abated immediately after being  
28 noted during the inspection.

1 Mr. Andrews testified with regard to the hazards observed, exposure  
2 as to the employees, and employer knowledge of the ladder based upon his  
3 interviews with superintendent Allred. He further asked for any reports  
4 on soils classification and reviewed a copy of the engineering letter  
5 provided at complainant's Exhibit 7. He later determined, on  
6 referencing the respondent work history, that a previous violation of  
7 the same standard had been confirmed within the last approximate 5  
8 years. He identified Exhibit 5 as the supporting documentation to  
9 provide the basis for his ultimately citing and classifying the  
10 violation at Citation 1 as **repeat/serious**. He testified the previous  
11 citation was for the same standard and involved respondent employees  
12 working in a trench without cave-in protection.

13 CSHO Andrews testified with regard to the requirements under the  
14 cited standard for adequate cave-in protection and responded to  
15 counsel's inquiry as to whether there were any exceptions to the  
16 required protections mandated. Mr. Andrews testified that there was an  
17 exception if the excavation had been dug in "**stable rock**" and if so  
18 employees could work in an unprotected trench with vertical walls.

19 He further testified that he questioned information provided in the  
20 engineering company letter because he observed loose material rocks in  
21 the soil and could not accept that it was even Type A. The respondent  
22 representatives informed him that it was Type A, and the letter at  
23 Exhibit 7 confirmed same. He testified that he could verify no other  
24 inspections by competent people to establish the materials as anything  
25 to the contrary and further described the severity and probability  
26 ratings based upon dangers observed, and the hazards recognized for  
27 serious injury or death in the event of a cave-in.

28 At Citation 1, Item 2, Mr. Andrews again referenced his narrative

1 report at Exhibit 3 and the photograph at Exhibit 4 depicting an  
2 employee he confirmed to be that of respondent exiting the trench on the  
3 ladder to show the basic violative condition of it not extending three  
4 feet above the top section of the trench. He noted the ladder was  
5 additionally violative because it was not tied down or secured in  
6 accordance with the standard. He testified as to the hazards and  
7 potential injuries that could occur from falling off a ladder at such  
8 height. He also testified as to the employer knowledge of the violative  
9 conditions based upon his interviews of employees and the supervisory  
10 personnel at the job site.

11 The complainant presented additional witness testimony from Mr.  
12 Christen Dressler, CSHO. Mr. Dressler testified that he spoke to Mr.  
13 James Wilson, a part owner of AMTI, the engineering company previously  
14 referenced as identified by Mr. Andrews and confirmed Exhibit 7 as the  
15 engineer's letter dated June 14<sup>th</sup> provided during the inspection. He  
16 testified that the letter was given to the CSHOs at the time of the  
17 inspection by respondent superintendent Allred. He also testified he  
18 felt the letter was ". . . suspect because the so-called engineering  
19 company letter did not include any engineer design for trench protection  
20 . . . just a soil opinion." He further testified, that when later shown  
21 respondent's Exhibit A, a revised engineering letter dated July 17,  
22 2012, which differed from the letter presented at the job site during  
23 the inspection dated June 14, 2012, it raised a question of credibility.  
24 The original letter referenced the soil as "Type A" but the revised  
25 letter at respondent Exhibit A and dated much later, was in the same  
26 form but now identified the same soils materials as "stable rock".  
27 On cross-examination, CSHO Dressler testified he felt the letters  
28 were suspect and the revision made it more so because there was ". . .

1 no engineer design . . . included in the letter." He further testified  
2 that the letter did reflect the potential of vibration in the roadway  
3 which could be ameliorated if the road were closed.

4 Complainant counsel represented testimony under subpoena from  
5 witness Mr. James Wilson. He identified himself as a co-owner of AMTI  
6 Engineering Company. He testified that the letter of June 14 originally  
7 provided at complainant's Exhibit 7, erroneously reflected the soil as  
8 Type A, but the second letter at respondent's Exhibit A, shown as  
9 "revised", correctly stated the material was "**stable rock**". He  
10 testified that he prepared both letters.

11 On cross-examination, Mr. Wilson testified the second letter was  
12 provided because the first letter was simply his error. He testified  
13 the initial letter should have shown the material to be "stable rock".

14 Complainant rested its case and respondent presented witness and  
15 documentary testimony.

16 Mr. John Allred identified himself as the superintendent of  
17 respondent, Western States Contracting underground division. He  
18 testified that at the start of the job he arranged for an engineering  
19 inspection by AMTI to examine and certify the soils in the trench. He  
20 was originally told by the engineering company that the material to be  
21 subject of excavation was "stable rock". He further testified the  
22 material was clearly stable rock, because his machinery could not cut  
23 through it and he had to continually replace the saw blades. Mr. Allred  
24 responded to further counsel testimony stating that in order to prevent  
25 any vibration occurring the adjacent road was closed during the  
26 construction efforts.

27 On cross-examination Mr. Allred testified he was initially ". . .  
28 told on the phone by the engineers the material was solid rock . . ."



1 He believed therefore that prior to actually commencing work the  
2 material was safe to excavate with vertical walls and required no other  
3 cave-in protection. He said other excavation areas on the job site were  
4 shored because different trenches were composed of different soils  
5 materials.

6 On re-direct, Mr. Allred testified that when he saw the ladder  
7 during the walk-around inspection with the CSHO he immediately removed  
8 it. He further explained that depending on the depth of the trench  
9 where he employees were working, the access/egress ladder is continually  
10 moved and often equipment is in the way working in the area but it  
11 should not have been utilized at the depth where it was observed by he  
12 and the CSHO and now subject of violation at Citation 1, Item 2. Mr.  
13 Allred responded to continued questioning and reconfired that ". . . he  
14 was told on the phone before the engineer letter was received at the job  
15 site or requested that the materials in the subject excavation area were  
16 stable rock and he relied on the phone call. When he noted the  
17 different opinion in the Exhibit 7 letter he requested it be revised."

18 At conclusion of respondent's case, the parties presented closing  
19 argument.

20 Complainant presented closing argument asserting the burden of  
21 proof had been established to prove violations at both Citation 1, Item  
22 1 and Item 2. He argued the elements of violation were supported by the  
23 testimony and evidence presented as to the depth of the trench, the  
24 hazards associated with employees working in the trench, the exposure  
25 of employees in the trench as observed by the CSHO and confirmed by  
26 photographs during the inspection. Counsel further argued that  
27 respondent's reliance on a second revised letter from the engineering  
28 company was misplaced because the photos at complainant's Exhibit 4, and

1 indeed respondent's Exhibit B, clearly showed ". . . the material was  
2 not cemented" and could not have been stable rock, but rather the Type  
3 A soil initially determined and confirmed by the first letter from AMTI.  
4 Counsel further argued that respondent's current position on the trench  
5 soils materials was simply not supportable given the photos in evidence,  
6 the first engineer letter provided to OSHA dated June 14, 2012, and then  
7 a very suspect revised version, and the unreliable testimony of  
8 superintendent Allred that he was informed through only a phone call  
9 that construction could move forward in the unprotected trench. The  
10 standard requires protection of the subject excavation based upon the  
11 undisputed confirmed measurements, the depth at which respondent  
12 employees were working, the exposure to employees, and potential  
13 hazards. The stable rock exception in the standard, as provided for in  
14 29 CFR 1926.652(a)(1), et seq. was not met specifically, there was no  
15 direct engineer analysis, no competent report, nor a design as  
16 specifically required in the standards to permit reliance by the  
17 respondent to safely allow workers in the trench without shoring or  
18 other recognized cave-in protection. Counsel asserted that the  
19 statement by AMTI co-owner Wilson, who is not an engineer, that there  
20 was simply an error, just ". . . doesn't seem right for a company in  
21 this business . . .". He further argued the violation was classified  
22 as a **repeat**, and proven by the documentation at Exhibit 5, and for which  
23 there was no rebuttal proffered by the respondent.

24 Counsel argued that at Citation 1, Item 2, the ladder violation was  
25 clear, obvious, unrefuted and apparent. There was no defense offered.  
26 The burden of proof was met. He acknowledged respondent did abate the  
27 condition immediately when it was noted, however that is expected under  
28 occupational safety and health law and is not an excuse, mitigation or

1 any basis for relief from violation. .

2 Respondent representative presented closing argument. He asserted  
3 the standard specifically provides that employees must be protected in  
4 an excavation ". . . except when working in stable rock . . .". He  
5 argued that superintendent Allred called AMTI engineering company and  
6 was told that the material was stable rock and that he could proceed.  
7 Mr. Allred testified that he personally determined the material to be  
8 solid rock because of the intensive cutting requirements where he ". . .  
9 wore out a lot of saw blades . . .". Mr. Wilson, the AMTI owner,  
10 testified the material was stable rock from the outset and he explained  
11 the confusion of two engineer letters to be simply his error when the  
12 letter report was typed and prepared. He testified that he "revised his  
13 letter . . . three days later . . .".

14 Counsel argued at Citation 1, Item 2, that the ladder was initially  
15 in a fixed, tied off position when employees were on the safe side  
16 working on the trench. He said the ladder was moved from time to time  
17 but only noticed at the depth observed by the CSHOs and photographed  
18 during the inspection.

19 Counsel reasserted that the soils materials in the photos might  
20 appear to be loose but were not, ". . . rather simply the debris that's  
21 left after the big cutting saws remove the stable rock and . . . just  
22 like a chainsaw cutting wood . . . leaves shards of wood . . .".  
23 Counsel argued that the engineer letters are better proof than looking  
24 at photos of debris from cuttings. He further asserted that the  
25 exception in the standard and the OSHA interpretation letter referenced  
26 by identification at the time of the hearing, all reflected that  
27 respondent employees were working safely in vertical walls cut into  
28 stable rock, and therefore no protection was required under the

1 standard. Counsel asserted the respondent witnesses were credible and  
2 asked that Citation 1, Item 1 be dismissed, and that at Citation 1, Item  
3 2, be at best reclassified to "other than serious" based upon the facts  
4 and explanation as to circumstances giving rise to the apparent  
5 violative condition. He concluded by arguing the OSHA interpretation  
6 letter must be followed which provides that an employer can have  
7 employees working in a trench so long as the safety, based upon the  
8 solid rock material, is assured by a professional engineer; and that the  
9 engineer and respondent superintendent Allred had a right to rely upon  
10 the AMTI letter and the Federal OSHA interpretation letter, and the  
11 specific exception in the very standard which was cited.

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

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

17 All facts forming the basis of a complaint must be  
18 proved by a preponderance of the evidence. *Armor*  
*Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958  
19 (1973).

20 **To prove a violation of a standard**, the Secretary  
21 must establish (1) the applicability of the  
22 standard, (2) the existence of noncomplying  
23 conditions, (3) employee exposure or access, and  
24 (4) that the employer knew or with the exercise of  
reasonable diligence could have known of the  
25 violative condition. See *Belger Cartage Service,*  
*Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
26 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  
27 (No. 76-1408, 1979); *American Wrecking Corp. v.*  
*Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.  
2003).

28 A respondent may rebut allegations by showing:

1. That the standard was inapplicable to the situation at issue;

1           2.    That the situation was in compliance; or lack  
2                   of access to a hazard. See, *Anning-Johnson*  
3                   Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690  
                  (1976).

4           A "serious" violation is established in accordance with NRS  
5 618.625(2) which provides in pertinent part:

6                   . . . a serious violation exists in a place of  
7                   employment if there is a substantial probability  
8                   that death or serious physical harm could result  
9                   from a condition which exists or from one or more  
10                  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.

11          A "repeat" violation is established if based upon a prior violation  
12 of the same standard, a different standard, or general duty clause, if  
13 the present and prior violation is substantially similar.

14          A violation is considered a repeat violation:

15                   If, at the time of the alleged repeat violation,  
16                   there was a Commission final order against the  
17                   employer for a substantially similar violation.  
18                   *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (no. 16183,  
19                   1979). A prima facie case of substantial  
20                   similarity is established by a showing that the  
21                   prior and present violations were for failure to  
22                   comply with the same standard. *Superior Electric*  
23                   *Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597,  
                  1996). *Robert B. Reich, Secretary of Labor, United*  
                  *States Department of Labor v. D.M. Sabia Company*  
                  *and Occupational Safety and Health Review*  
                  *Committee*, 90 F.3d 854 (1996); *Caterpillar, Inc. v.*  
                  *Alexis M. Herman, Secretary of Labor, and*  
                  *Occupational Safety and Health Administration,*  
                  *Respondents and United Auto Workers, Local 974,*  
                  *Intervenors*, 154 F.3d 400 (1998).

24                   A repeated violation may be found based on a prior  
25                   violation of the **same standard, a different**  
26                   **standard, or the general duty clause**, but the  
27                   **present and prior violations must be substantially**  
28                   similar. *Caterpillar, Inc.*, 18 OSH Cases 1005,  
                  1006 (Rev. Comm'n 1997), *aff's*, 154 F.3d 400, 18  
                  OSH Cases 1481 (7<sup>th</sup> Cir. 1998); *GEM Indus., Inc.*, 17  
                  OSH Cases 1861, 1866 (Rev. Comm'n 1996). OSHA may  
                  generally establish its prima facie case of  
                  substantial similarity by showing that the prior

1 and present violations are of the same standard.  
2 The employer may rebut that showing by establishing  
3 that the violations were substantially different.  
4 Where the citations involve different standards,  
5 OSHA must present "sufficient evidence" to  
6 establish the substantial similarity of the  
7 violations. A similar showing must be made if the  
8 citations involve the same standard but the  
9 standard is broadly worded. Repeated violations  
10 are not limited to factually identical occurrences.  
11 Provided that the hazards are similar, minor  
12 differences in the way machines work or in the size  
13 and shape of excavations will usually not lead to  
14 a finding of dissimilarity. In general, the key  
15 factor is whether the two violations resulted in  
16 substantially similar hazards. It is not necessary,  
17 however, that the seriousness of the hazard  
18 involved in the two violations be the same.  
19 Rabinowitz, Occupational Safety and Health Law, 2<sup>nd</sup>  
20 Ed. 2008 at pp. 230-231. (emphasis added)

21 The board finds a preponderance of substantial evidence to support  
22 a finding of violation at Citation 1, Item 1, referencing 29 CFR  
23 1926.652(a)(1). The complainant established all the elements of  
24 violation by a preponderance of evidence to prove a prima facie case of  
25 violation.

26 The respondent defense in rebuttal of the prima facie finding turns  
27 on whether it satisfied an **exception** in the cited standard, 29 CFR  
28 1926.652(a)(1) to permit employees to work in the excavation without  
shoring or other recognized employee protection because the materials  
were "**stable rock**". Reliance upon the exception must be supported by  
competent evidence to rebut the evidence of violation. The standard  
requires support for an exception be confirmed through a report of a  
licensed engineer as set forth in 29 CFR 1926.652(b)(3)(iii).

29 The two engineer letters in evidence were contradictory and failed  
30 to satisfy the respondent's burden of proof that an exception existed  
31 to permit employees to work in an unprotected trench. The engineer  
32 letter in evidence at complainant's Exhibit 7 dated **June 14, 2012** and

1 the revision letter at respondent's Exhibit A dated **July 17, 2012** were  
2 **neither competent nor credible evidence.**

3 During the OSHA inspection, the AMTI letter first produced at  
4 complainant's Exhibit 7 (June 14, 2012) clearly identified the soils as  
5 **Type A** and not **stable rock**. The letter was not signed by a licensed  
6 engineer. The letter revision at respondent's Exhibit A (July 12, 2012)  
7 identified the material as **stable rock** but was also not signed by a  
8 licensed engineer. Neither letter was signed by the engineering  
9 company, nor most importantly a **licensed engineer**. Only a stamp  
10 impression purporting to be that of Mr. Kirby Adams appears on both  
11 letters, but without signature to validate the stamp to evidence a  
12 bonafide engineering opinion.

13 Mr. Allred testified he was originally told by the engineering  
14 company through a phone call, when initially laying out the job, and  
15 prior to seeing any engineering report letters that the soils materials  
16 were stable rock so the excavation did not require cave-in protection  
17 and he could commence work. However he relied merely on a phone call  
18 to support the position for safety reliance at that time. He made no  
19 test or analysis himself nor did he refer to any company representative  
20 or **competent person** to do so.

21 After the OSHA inspectors arrived on the site and during  
22 interviews, including that of Risk Manager Shiozawa, it is reasonable  
23 to infer from the evidence and testimony that both Mr. Shiozawa and Mr.  
24 Allred may have misconstrued the initial AMTI letter because it clearly  
25 identified the materials as Type A. It may also be inferred they paid  
26 little attention to the fact the letter was not signed, particularly by  
27 an engineer. It is further reasonable to infer from the evidence they  
28 may have been under a mistaken impression based upon their statements

1 given to the CSHOs at the time of the inspection identifying material  
2 as Type A that it was a stable rock designation. They possibly did not  
3 realize the problem until later when respondent Exhibit A was produced;  
4 but at a time and under circumstances that demonstrate a lack of  
5 credibility.

6 Mr. Wilson testified he is a co-owner of AMTI but not a licensed  
7 engineer. Respondent's Exhibit A is virtually the exact letter as  
8 furnished at complainant's Exhibit 7, but with a simple change  
9 identifying the material to be "stable rock" as opposed to "Type A  
10 soil". Further, the letters were not signed by either Mr. Wilson, the  
11 director of the company (a non-engineer), nor Mr. Kirby Adams, (a  
12 purported licensed engineer) whose stamp impression was on the letter  
13 but also without signature.

14 The board **must take administrative notice of applicable Nevada law**  
15 **at NAC 625.610(4):**

16 Each (engineer) licensee **shall validate a stamp or**  
17 **seal by signing his or her name legibly in opaque**  
18 **ink across the face of the impression made by the**  
19 **stamp or seal, entering the date of stamping or**  
20 **sealing and the date of expiration of his or her**  
21 **license, unless such information is included in a**  
22 **stamp or seal pursuant to subsection 3. The name**  
23 **of the licensee, the particular discipline in which**  
24 **the licensee is licensed and the license number of**  
25 **the licensee must be legible. Except as otherwise**  
26 **provided in NRS 427A.755, the licensee may not use**  
27 **a stamp to produce his or her signature. (emphasis**  
28 **added)**

23 Further, the board notes **NRS 625.565(3)** which provides in pertinent  
24 part, regulations and penalties governing the conduct of professional  
25 engineers in the state of Nevada:

26 **It is unlawful for a professional engineer to sign**  
27 **or stamp any plan, specifications or reports that**  
28 **were not prepared by the professional engineer or**  
**for which he or she did not have responsible charge**  
**of the work. (emphasis added)**



1           There was no evidence or testimony that Mr. Adams examined the  
2 soils materials, or exercised **control** of the examination conducted by  
3 Mr. Wilson, or any other company representative. There was no evidence  
4 the soils samples were brought before Mr. Adams for analysis or study  
5 prior to his unsigned stamp appearing on the AMTI letters, neither in  
6 the initial letter at Exhibit 7 under date of June 14, nor the  
7 subsequent letter under date of July 17. Notably there is no signature  
8 by the engineer on the letters or over his purported engineer stamp.  
9 Furthermore, CSHO Andrews testimony and narrative report at Exhibit 1  
10 as to his interview of Mr. Adams regarding his (Adams) limited  
11 involvement was un rebutted.

12           The Federal OSHA interpretation letter at respondent Exhibit C  
13 regarding the exceptions set forth in the cited standard does not  
14 support the respondent defensive position for allowing employees to work  
15 in an unprotected trench.

16           The revised AMTI unsigned letter does not constitute **competent**  
17 **evidence** of an engineer report, analysis and/or design to satisfy the  
18 exceptions noted in the standard.

19           The testimony of Mr. Wilson, the AMTI co-owner was equivocal and  
20 lacked reasonable explanation of the conflicting engineer report/letters  
21 to warrant credibility.

22           The testimony of Mr. Allred, the company superintendent, reflected  
23 confusion as to the process or understanding for work in various soils  
24 conditions and failed to provide a reasonable basis for credibility.

25           The two contradictory AMTI letters, the timing of presentation to  
26 OSHA, and lack of an engineer signature all measured against the CSHOs  
27 testimony and evidence in the record particularly the photographs  
28 produced by both the respondent and complainant (Exhibit B and Exhibit

1 4 respectively) depict excavation materials not of **stable rock** but  
2 rather **loose rock formations and non-cemented soils**.

3 Respondent representative argued that what was observed by the  
4 CSHOs and depicted in photographs was material typically left after  
5 heavy cutting through rock with a saw. Yet observations of the stones  
6 at complainant Exhibit 4, photo 2 showing the sidewall, photograph 3 the  
7 overall slough pile, photograph 4 the area of the excavation where an  
8 employee is utilizing the ladder, and respondent Exhibit B photo time  
9 dates of 11:36, 12:47, 12:48 simply do not depict solid or **stable rock**  
10 material, but rather corroborate the other evidence of loose material  
11 more typical of Type A, which was that identified in the first purported  
12 engineer letter (June 14) and subject of reference by Mr. Shiozawa to  
13 the CSHO in the Exhibit 1 narrative report.

14 The board is certainly aware and sensitive to the impact upon an  
15 employer of a serious violation. When it is additionally classified as  
16 **repeat/serious**, any contested case requires a focused review to assure  
17 fairness to the employer but also continued recognition that  
18 occupational safety and health law is principally about employee safety  
19 in the workplace. While this board regrets the effects of a repeat/  
20 serious violation on any Nevada employer, it must weigh all the evidence  
21 and render a fair and impartial determination in this or any contested  
22 case. This includes evidence of credibility, weight and legal competence  
23 of the evidence presented. In this case, the testimony and observations  
24 of two CSHOs, the reports and statements obtained during the inspection  
25 interviews, the photographic exhibits and the initial AMTI letter (June  
26 14) support a finding the materials were not composed of **stable rock**,  
27 and did not permit an exception to the cited trench protection standard.  
28 The respondent representatives may have initially misconstrued the Type

1 A designation and believed they could allow their employees to safely  
2 work within the excavation. It is reasonable to infer from the evidence  
3 they may have relied on the initial letter provided by AMTI at  
4 complainant's Exhibit 7 and believed at the time Type A soil was  
5 equivalent to stable rock. During the inspection, they appeared to have  
6 realized the error and later produced a revised report on the condition  
7 of the material. However, **neither the first letter nor the second**  
8 **letter met the requirements or exceptions in the standard to permit**  
9 **employees to work safely within the excavation.**

10 The board finds a preponderance of evidence for violation at  
11 Citation 1, Item 1, confirms the classification of repeat/serious and  
12 approves the proposed penalty of \$13,860.00.

13 The board further finds a preponderance of un rebutted evidence to  
14 confirm a violation, at Citation 1, Item 2. The only defense proffered  
15 was argument seeking mitigation in reduction of the classification and  
16 penalty. However the board can find no support in mitigation for such  
17 an obvious violation; particularly when the ladder used for ingress and  
18 egress was in an excavation of substantial depth and narrow width. Use  
19 of the ladder did not meet any of the criteria of the standard thereby  
20 exposing employees to the potential for serious injury or death. The  
21 violation, penalties of \$4,950.00 and classification are confirmed.

22 It is the decision of the Nevada Occupational Safety and Health  
23 Review Board that violations of Nevada Revised Statutes did occur as to  
24 Citation 1, Item 1, 29 CFR 1926.652(a)(1). The classification of  
25 "Repeat/Serious" is appropriate and affirmed. The proposed penalty is  
26 confirmed in the amount of Thirteen Thousand Eight Hundred Sixty Dollars  
27 (\$13,860.00).

28 At Citation 1, Item 2, 29 CFR 1926.1053(b)(1) the proposed

