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NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

Docket No. RNO 12-1575

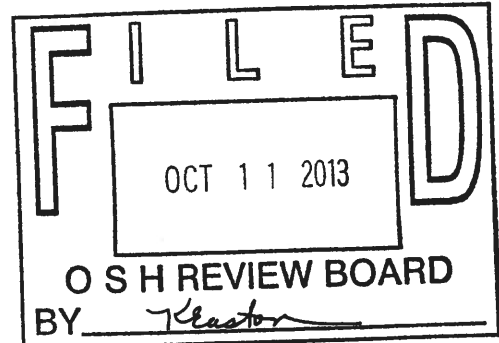
CHIEF ADMINISTRATIVE OFFICER  
OF THE OCCUPATIONAL SAFETY AND  
HEALTH ADMINISTRATION, DIVISION  
OF INDUSTRIAL RELATIONS OF THE  
DEPARTMENT OF BUSINESS AND  
INDUSTRY,

Complainant,

vs.

MARTIN IRON WORKS, INC.

Respondent.



**DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER**

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on December 11, 12 and 13, 2012, and continued on June 12 and 13, 2013, 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 RICK ROSKELLEY, ESQ. and AARON SCHUMWAY, ESQ., appearing on behalf of Respondent, **MARTIN IRON WORKS, INC.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

The complaint filed by the OSHA sets forth allegations of violation of Nevada Revised Statutes as referenced in Exhibit "A" to the complaint, and incorporated herein by reference. The complaint encompasses citations for 120 safety violations of state and federal

1 law. Ninety-four (94) alleged violations were classified by Nevada OSHA  
2 as "**Serious**", defined as "having a substantial probability to cause  
3 death or serious physical harm." Twenty-five (25) alleged violations  
4 were classified as "**Other**" defined as having a direct or immediate  
5 relationship to occupational safety but no probable result of death or  
6 serious physical injury in the event of an accident. The final alleged  
7 violation cited NRS 618.383(2)(b) for failing to establish a safety  
8 committee and classified as "**Regulatory**". Total penalties were proposed  
9 for all alleged violations in the amount of \$69,366.00.

10 This contested matter arises out of a programmed safety inspection  
11 of the Martin Iron Works, Inc. steel fabrication shop located in Reno,  
12 Nevada. Respondent Martin Iron Works has been fabricating and  
13 assembling structural steel and reinforcing steel components in Reno,  
14 Nevada since 1939. The company designs and fabricates custom steel  
15 components in its fabrication facility which are then generally  
16 assembled in the field. The company is a specialty fabricator and does  
17 not produce the same component day after day, but primarily engages in  
18 custom work.

19 The Nevada Occupational Safety and Health Review Board ("Board")  
20 conducted extensive hearings encompassing five days of evidence and  
21 testimony commencing December 11, 2012 and continuing December 12-13,  
22 2012 and June 12-13, 2013.

23 Counsel for complainant and respondent stipulated to the admission  
24 of documentary evidence identified for complainant as Exhibits 1 through  
25 70 and respondent Exhibits A through OO.

26 Certificated Safety and Health Officer ("CSHO") Mark Stewart  
27 ("Stewart") of the Nevada Occupational Safety and Health Administration  
28 ("NVOSHA") conducted the safety inspection and provided photographs and

1 documentary evidence admitted into the record by stipulation.

2 On or about June 14, 2011 CSHO Stewart began a comprehensive  
3 planned safety inspection of the Martin Iron Works shop and conducted  
4 an opening conference with Ms. Patricia Bullentini ("Bullentini"), the  
5 company vice president. CSHO Stewart conducted an extensive "walk  
6 around" inspection over multiple days. During the inspection he was  
7 accompanied by either Martin Iron Works maintenance manager, Mr. Richard  
8 Evans ("Evans"), quality assurance foreman Les Reisenger ("Reisenger")  
9 or shop foreman, Bob Ferguson (deceased January 2012).

10 Counsel for the Chief Administrative Officer presented testimony  
11 and documentary evidence with regard to the alleged violations. He  
12 referenced Exhibits 1 through 70, which included the inspection report,  
13 narrative, opening and closing conferences, worksheets and photographs.  
14 He further identified at Exhibit 1, Page 2, the employees determined  
15 directly exposed to hazardous conditions constituting OSHA violations  
16 and plant-wide employees having constructive exposure (**access**) to  
17 hazards identified at the worksite.

18 CSHO Stewart testified with regard to his inspection and findings  
19 of violation relating to a machine identified as a **Small Ironworker**  
20 serial no. 3427. He cited four violations as specifically referenced  
21 in Exhibit A at Citation 1, Items 1(a), 2(a), 11(a) and 19(a), explained  
22 the grouped penalties proposed and the basis for calculating same in  
23 accordance with the operations manual. He charged violations of NRS  
24 618.375(1) commonly known as the **Nevada General Duty Clause**. He  
25 observed the machine was not equipped with an "anti-repeat feature" on  
26 its full revolution mechanical clutch. Similarly he found no device  
27 such as a cover that would prevent the foot control from being  
28 unintentionally activated by falling materials or accidental contact.

1 He further observed the **Cling Ironworker** to be without point of  
2 operation guarding at Item 11(a) and for the similar exposure at 19(a)  
3 alleging a potential for unguarded contact. The violations were  
4 classified as **Serious** and a penalties proposed for each in the amount  
5 of \$3,272.00 as more particularly alleged at Exhibit A to the complaint.

6 CSHO Stewart testified with regard to violations found relating to  
7 the equipment identified as the **Large Ironworker** serial no. 3697. He  
8 cited violations at Citation 1, Items 1(c), 2(c), 11(f), 14(b) and  
9 19(b), the grouped penalties proposed and the basis for calculating same  
10 in accordance with the operations manual, all as specifically referenced  
11 in Exhibit A to the complaint. He observed the machine was not equipped  
12 with an anti-repeat feature, no device such as a cover which would  
13 prevent the foot control from being unintentionally activated, no point  
14 of operation guarding, exposed fly wheels, and a lack of protection  
15 through unguarded contact. He described the potentials for serious  
16 injury or death resulting from employee exposure to the machine hazards.  
17 He testified with regard to the types of injuries to be sustained by an  
18 employee in the event of an accident.

19 CSHO Stewart testified with regard to his observed violations and  
20 findings relating to the **Cleveland Punch Ironworker**. The machine, like  
21 others in the plant site, was very old with no serial number observable.  
22 He referenced violations at Citation 1, Items 1(b), 2(b), 11(e), 14(a),  
23 15(a) and 18(b), the grouped penalties proposed and the basis for  
24 calculating same in accordance with the operations manual, all as more  
25 particularly referenced in Exhibit A. The machine was not equipped with  
26 an anti-repeat feature, lacked protection such as a cover to prevent the  
27 foot control from being unintentionally activated, exposed fly wheels,  
28 an unguarded drive shaft and unguarded drive gears. The violations were

1 classified as serious. He described the hazard exposure to employees,  
2 the basis for the serious classification and the penalties proposed, all  
3 as more particularly set forth at Exhibit A.

4 CSHO Stewart testified as to violative conditions found with the  
5 **Bersch & Co. Mechanical Power Shear**, serial no. 716\3. He explained the  
6 violations listed at Citation 1, Items 3(a), 11(g), 14(c), 15(b) and  
7 18(c), the grouped penalties proposed and the basis for calculating same  
8 in accordance with the operations manual.

9 Mr. Stewart further testified with regard to the **Kling Angle**  
10 **Cutter**, serial no. 390391. He referenced violations at Citation 1,  
11 Items 3(b), 11(c), and 18(a), the employee exposure basis for a serious  
12 classification and proposed group penalties all as set forth in Exhibit  
13 A.

14 He further testified with regard to his observations and  
15 determination of violation with regard to the **Angle Iron Cutter** located  
16 outside of building no. 1. He identified violations at Citation 1,  
17 Items 11(j) and 14(d). He noted the applicability of the standard to  
18 the violations observed and testified in support of the classification  
19 and potential serious injury or death which could occur to an employee  
20 utilizing same. The penalties were calculated in accordance with the  
21 operations manual and grouped accordingly.

22 CSHO Stewart testified as to the **Alligator Shear**, without serial  
23 number, located at the facility on the southeast outside storage area.  
24 He identified the violations observed in accordance with the applicable  
25 standards. He cited the violations at Citation 1, Items 11(k), 14(e),  
26 18(d) and 19(c), and testified as to the probability for serious injury  
27 or death to employees and calculation of the penalties grouped in  
28 accordance with the operations manual as set forth at Exhibit A.

1 CSHO Stewart testified with regard to the **Pacific Hydraulic Press**  
2 **Brake**, an older machine with no serial number, at Citation 1, Item  
3 11(h). He observed the machine to be without a point of operation  
4 guard, referenced the serious classification, and grouped penalty as set  
5 forth in Exhibit A.

6 At Citation 1, Item 11(d) Mr. Stewart cited he observed a **Marvel**  
7 **Band Saw** and found a violation at the referenced standard based upon  
8 applicability to the subject equipment with a blade guard that was not  
9 adequately adjustable to cover the unused portion of the blade at the  
10 point of operation. He classified the violation as serious based on the  
11 probability of serious injury or death which could occur to the employee  
12 utilizing same and the grouped penalty more particularly identified at  
13 Exhibit A.

14 At Citation 1, Items 11(i), 15(c) and 17, Mr. Stewart observed a  
15 **Band Saw #168** located at facility building 1, without a manufacturer  
16 identification or model number, had no adjustable cover; the fluted  
17 horizontal shaft was unguarded which exposed the belt. Employees were  
18 not protected against ingoing nip points. He classified the violations  
19 as serious based on the probability of serious injury or death to an  
20 employee in the event of an accident while utilizing same in the course  
21 of his employment. He further testified with regard to the calculation  
22 of the penalties in accordance with the operations manual, all as more  
23 specifically set forth in Exhibit A.

24 At facility building number 2, Mr. Stewart observed a **Wellsaw Band**  
25 **Saw** model number 1016 without an adjustable blade guard to cover the  
26 unused portion of the blade. He cited a violation at Citation 1, Item  
27 11(l). He further testified with regard to his classification and  
28 proposed penalty in accordance with the operations manual, more

1 particularly referenced in Exhibit A.

2         At the respondent plant facility in building 1, Mr. Stewart  
3 observed **Two Station Drill Presses**, "manufacture and model numbers  
4 unknown", and cited at Citation 1, Items 11(b), 15(d) and 16, for  
5 violations based upon no proper guard equipment to protect employees  
6 from the hazards of: a rotating chuck and swarf, an unguarded horizontal  
7 drive shaft and unguarded right vertical side shaft. He testified on  
8 the applicable standards, exposure classification and proposed penalties  
9 all as particularly set forth in Exhibit A.

10         On inspecting building 2 at the respondent facility, CSHO Stewart  
11 observed a **Duracraft Drill Press** model PD 22-12 without a guard that  
12 would protect employees from the rotating chuck and swarf. He cited the  
13 violation at Citation 1, Item 11(m), classified same as serious and  
14 proposed a penalty in accordance with the operations manual as set forth  
15 in Exhibit A.

16         At building 3 he noted a **Clausing Drill Press** without a guard to  
17 protect employees from the rotating chuck. He cited the violation at  
18 Citation 1, Item 11(n), and identified the potential for serious injury  
19 or death and explained the proposed penalties in accordance with the  
20 operations manual as set forth in Exhibit A. Mr. Stewart also noted at  
21 building 3 a **Clausing Drill Press**, without model or serial number, on  
22 a mobile cart. The machine was not equipped with a guard to protect  
23 employees from the rotating chuck and swarf. He cited the violation at  
24 Citation 1, Item 11(o), and testified with regard to the proposed  
25 penalties, classification and assessment accordingly.

26         Mr. Stewart testified with regard to a **Toolmaster Pedestal Grinder**,  
27 model number unknown he observed with a guard that did not actually  
28 cover the spindle end. He cited a violation at Citation 1, Items 12(a)

1 and 13(a). He further noted the machine was not equipped with an  
2 adjustable tongue guard in accordance with OSHA requirements. He  
3 referenced the applicable standards, classification and proposed  
4 penalties as particularly set forth in Exhibit A.

5 At Citation 1, Items 12(b) and 13(b), Mr. Stewart observed a **Yuba**  
6 **Pedestal Grinder** without guards to adequately cover the spindle or  
7 adjustable tongue guards. He referenced the applicable standards,  
8 classification and proposed penalties as particularly set forth in  
9 Exhibit A.

10 During his walk around and inspection of the premises, CSHO Stewart  
11 testified as to various and extensive "**housekeeping**" violations. He  
12 observed and photographed garbage, paper products, oily rags, pigeon  
13 droppings, and other debris on the floors, throughout the plant  
14 worksite. He also observed a microwave oven used to store food,  
15 together with welding material. He found flexible cords powering  
16 various types of equipment, both portable and fixed, running across the  
17 floors of the worksite creating tripping hazards. He observed material  
18 stacked in a fashion to create tripping hazards for employees at the  
19 facility site. CSHO Stewart cited respondent at Citation 1, Items 4(a),  
20 (b), (c), (d) and (e). The housekeeping items were extensive and given  
21 the widespread potential for serious injury in the event of an accident  
22 or emergency evacuation, he classified the violations as serious but  
23 grouped the penalties accordingly.

24 Mr. Stewart testified in furtherance of his observations and  
25 photographs on **non-conforming guardrails** located at building 1. He  
26 cited Items 5(a) through (d) at Citation 1, and classified the  
27 violations as serious with a proposed penalty calculated in accordance  
28 with the operations manual. He testified the guardrails did not meet



1 the requirements of the referenced standard. He determined the platform  
2 subject of the guard railing was utilized to periodically service the  
3 overhead cranes used to move steel beams and other large materials in  
4 and out of the shop as needed. The platforms ranged from 7-18 feet  
5 above the ground level and constituted elevated working surfaces subject  
6 to the standard as cited.

7 CSHO Stewart charged a violation at Citation 1, Item 9, for a **lack**  
8 **of employee training** on the proper use of personal protective equipment  
9 (PPE) as required in furtherance of his job duties. He found the  
10 facilities maintenance employee was issued personal fall arrest  
11 equipment but was unable to describe appropriate use and admitted his  
12 lack of training for same. He testified with regard to his  
13 classification of serious and the proposed penalty as set forth in  
14 Exhibit A.

15 On further inspection relating to **personal protective equipment**  
16 **(PPE)**, CSHO Harris noted a violation at Citation 1, Items 20(a) and (b)  
17 for employee failure to use **appropriate eye protection equipment** while  
18 performing torch cutting and welding operations. He referenced the  
19 applicable standards, classification and proposed penalties as  
20 particularly set forth in Exhibit A.

21 Mr. Stewart found and photographed **damaged slings** bearing cuts and  
22 abrasions and lying in flammable areas amongst grease, oil and pigeon  
23 droppings. He referenced the appropriate standard and cited the  
24 respondent at Citation 1, Item 10(a) and (b) as particularly set forth  
25 in Exhibit A.

26 During his inspection Mr. Stewart noted **emergency egress** not  
27 readily apparent or available. At building 3 at the plant facility he  
28 noted the north exit door was locked with a pin, which would require an

1 employee to remove the pin and operate the door to exit in the event of  
2 an emergency. He cited a violation at Citation 1, Item 6 for failure  
3 to comply with the referenced standard which requires that employees be  
4 able to open an exit route door from the inside at all times without  
5 impedance from any obstructing lock or preventative. He referenced the  
6 applicable standards, classification and proposed penalties as  
7 particularly set forth in Exhibit A.

8 At building 2 of the facility, Mr. Stewart cited a violation at  
9 Citation 1, Item 7 after he found no side hinge access doors. He noted  
10 and photographed two access doors which were "barn style" sliding doors  
11 on tracks that did not meet the requirement for a side hinged exit door.  
12 He referenced the applicable standards, classification and proposed  
13 penalties as particularly set forth in Exhibit A.

14 At building 1 CSHO Stewart found **no exit signs** at any of the exit  
15 doors in the building, including the office area on the ground level and  
16 the office area on the upper floor. He noted the two story office area  
17 had few windows and the paths to exit were not normally apparent. He  
18 referenced the applicable standards and cited the violative conditions  
19 at Citation 1, Item 8, classified same serious, and proposed penalties  
20 as particularly set forth in Exhibit A.

21 At Citation 1, Items 21(a) and (b) CSHO Stewart found employee  
22 exposure to dangerous **electrical conditions**. He observed receptacle  
23 outlet with electrical disconnect damage exposing internal electrical  
24 components to contact at Item 21(a) and at Item 21(b). He found an  
25 electrical disconnect with a broken latch which allowed the cover to  
26 remain open which exposed "live" internal parts. He classified the  
27 violations as serious for the potential to cause serious injury and  
28 death.

1 Mr. Stewart noted further **electrical issues** involving **improper**  
2 **grounding paths** during his inspection and issued various citations for  
3 violation at Citation 1, Items 22(a) through (k). Extensive violations  
4 were particularly described at Exhibit A involving various hazards each  
5 subject to evidence and testimony for violation.

6 He additionally found violative **electrical issues** throughout the  
7 plant site and cited extensive safety violations for unprotected  
8 openings in electrical cabinets or boxes at Citation 1, Item 23(a)  
9 through (r). He testified on the probability of serious injury or death  
10 to result from the dangerous conditions for each cited violation.

11 At Citation 1, Item 24, CSHO Stewart cited a violation of the  
12 applicable standard referenced at Exhibit A. He found at building 2 a  
13 480 volt AC **electrical disconnect** that was used to supply power to a  
14 number 4 welder with a supply side wire with a **flexible cord** instead of  
15 properly rated conductors enclosed in conduit. He determined the  
16 violation to be extremely serious with a potential for death given the  
17 large voltage involved in the work process.

18 Respondent counsel conducted cross examination of CSHO Stewart with  
19 regard to each of the Citation 1 violations subject of his testimony  
20 classified as serious and the substantial probability for death or  
21 serious physical harm to result from the conditions. Counsel challenged  
22 the witness on the duplicity of citing various violations for the same  
23 piece of equipment to be unsafe under the general duty clause. Counsel  
24 further challenged CSHO Stewart on the practice and policies of OSHA  
25 prior to 2011 asserting that "housekeeping violations" were regularly  
26 classified as "other than serious". Mr. Stewart admitted that prior to  
27 that time it was an OSHA practice, but explained the hazardous  
28 conditions were so widespread and varied throughout the large plant site

1 they warranted the serious classification. Mr. Stewart responded that  
2 the magnitude of debris and the locations of same where employees worked  
3 with large machinery and welding equipment portrayed an extremely  
4 dangerous worksite and therefore the strong probability for serious  
5 injury and death in the event of an accident or emergency evacuation.

6 On continued cross-examination, counsel referenced the basis for  
7 citing violations of the general duty clause at Citation 1. The witness  
8 responded differentiating the machines by serial number despite  
9 generically identified as "ironworkers." He explained each violative  
10 condition observed, photographed and the basis for classifying the  
11 violations as serious. He testified that his reference to ANSI  
12 supported evidence of recognition because it shows industry by  
13 acceptance consensus, through procedures of the American National  
14 Standards Institute. He testified he did not cite respondent for a  
15 violation of the consensus standard but rather the general duty clause  
16 which is an enforcement standard. He merely utilized ANSI to support  
17 the "recognized" element by the industry as required under the general  
18 duty clause. He further testified on the "**feasible means of abatement**"  
19 element of proof, responding that he contacted various manufacturers who  
20 informed him of retrofitting the old machines including the anti-repeat  
21 feature and anti restart.

22 Counsel inquired with regard to Citation 1, Item 5 on the  
23 requirement for use of guardrails. CSHO Stewart responded his position  
24 was based upon the work areas to be **platforms** which required protection  
25 under the referenced OSHA standard. He noted there were guardrails in  
26 place but they were deficient. Counsel challenged the witness with  
27 regard to the "regular or predictable use of the platforms" to even  
28 require guardrailing as opposed to other protection or no protection at

1 all. Mr. Stewart testified that during his interviews he determined  
2 that maintenance was not often performed but sufficiently "periodic" so  
3 the work surfaces could be considered **working platforms** requiring  
4 appropriate guardrail protection under the cited OSHA standard.

5 At Citation 1, Item 6 counsel inquired and challenged the CSHO as  
6 to why it would take any special knowledge to remove a pin on the door  
7 which was cited by Mr. Stewart for violation. On continued cross-  
8 examination counsel inquired as to why there were not obvious and  
9 realistic means to exit the building which constituted **alternative**  
10 **compliance** and not warrant any violation or a classification as serious.  
11 Mr. Stewart testified that if the large roll-up doors were left open all  
12 the time then admittedly they might be utilized by employees for  
13 emergency exit. But CSHO Stewart testified he could not rely on  
14 potentials for the doors to be open so had no alternative but to  
15 classify and cite the violation as serious. Counsel continued cross-  
16 examination on the exit signs, fire issues and door related violation  
17 as being without any basis for violation due to the **alternate means of**  
18 **compliance** for exiting throughout the substantially open sided building.

19 At Citation 1, Item 9 cross-examination, Mr. Stewart responded that  
20 when interviewing Mr. Evans ("Evans") on the use of harness training,  
21 Evans reported that ". . . he had not been trained by anyone . . ."  
22 Mr. Stewart further responded that Ms. Bullentini, the company vice  
23 president, told him ". . . we must have missed it . . ."

24 At Citation 1, Item 10, CSHO Stewart responded to questioning on  
25 the slings being in storage and not in use and testified they were  
26 ". . . available for use . . . at any time . . . and were not marked per  
27 the standard . . . as out of service." He testified that ". . . any  
28 employee might simply pick up the sling and utilize it without realizing

1 it is defective and an accident could result in substantial injury or  
2 death given the type, size and weight of the equipment subject of work  
3 at the job site . . . ."

4 At Citation 1, Item 11(a) through (o) counsel conducted extended  
5 cross-examination on the various sub-items challenging the duplicitous  
6 nature of the allegations and lack of any substantial probability for  
7 serious injury or death to result from a potential accident. Mr.  
8 Stewart testified that all the violative conditions at Item 11 were in  
9 plain view, obvious, dangerous and could have easily been corrected by  
10 a responsible employer. He testified that **employer knowledge** can be  
11 constructive where widespread violative conditions as obvious as those  
12 depicted by the photographic exhibits in evidence.

13 Counsel continued specific item cross-examination of each  
14 violation. At Citation 1, Item 20(a) and (b), counsel challenged the  
15 witness regarding the standard requirement for eye shades for welder  
16 **helpers** as opposed to the actual welders themselves. The witness  
17 testified with regard to the OSHA table reference as to eye protection  
18 based upon levels of potential exposure. Counsel challenged the witness  
19 as to a classification of serious versus other and any consideration  
20 given toward the violative conditions being merely due to employee  
21 misconduct. Mr. Stewart testified he saw other instances that were  
22 violations but admitted that the levels and work tasks of each employee  
23 involved in the operation might warrant different usage or a less  
24 stringent requirement for eye shade protection.

25 Counsel further inquired as to Citation 1, Item 22(a) through (k),  
26 and Item 23(a) through(r). Counsel challenged the witness with regard  
27 to classification of serious as to the various violations and examined  
28 the witness as to each. The witness responded that some of the

1 violations were indeed technical. He did not open each electrical box  
2 to test for voltage; some of the violations while classified as serious  
3 were less dangerous than others. He was questioned with regard to each  
4 of the sub-items cited. He testified that "path to ground" creates a  
5 serious condition for severe shock or death by electrocution and is  
6 appropriately subject of a serious classification. He further testified  
7 that the violations were in plain view so **employer knowledge** clear, and  
8 exposure by **access in a zone of danger** is appropriate for a citation  
9 under enforcement guidelines.

10 At Citation 1, Item 23, Mr. Stewart responded to various questions  
11 with regard to the seriousness of the violations. He testified that  
12 "missing knockouts" were not "closed" so debris could enter and  
13 contaminate the wires to short out or create various types of hazardous  
14 dangerous electrical conditions.

15 Complainant counsel resumed presentation of evidence and testimony  
16 with regard to Citation 2, which referenced various items of violation  
17 classified as "**other than serious**" and which reflected **no proposed**  
18 **penalties**. Mr. Stewart referenced complainant exhibits in evidence,  
19 including his narrative report and photographs taken at the time of the  
20 inspection. Mr. Stewart testified as to ladder rung clearances at Items  
21 1(a) and (b), holes in the forklifts at Item 2(a) through (d), missing  
22 forklift dataplate at Item 3, fixed machinery anchoring issues at Items  
23 4(a) and (b) and the sub-items at Items 5(a), (b), 6, and 7. He  
24 identified the violative conditions, the applicability of the standard  
25 and his basis for citing the violations as **other** due to the **direct or**  
26 **immediate relationship to occupational health and safety**. He found **no**  
27 **basis for serious violation classifications due to the lack of**  
28 **probability for death or serious injury to result in the event of an**

1 **accident.**

2 Counsel continued direct examination of CSHO Stewart with regard  
3 to Citation 2, Items (a) through (i), involving flexible cord strain  
4 relief. He testified on the facts and his basis for each sub-item  
5 violation as identified and referenced on the complaint.

6 Mr. Stewart concluded his direct examination and testified on  
7 Citation 3, a regulatory violation based upon the lack of a respondent  
8 safety program.

9 CSHO Stewart testified during cross-examination as to each of the  
10 violations focusing on the **classifications** for **serious, other and de**  
11 **minimis**. In response to questioning from counsel he explained the  
12 classification for **de minimis** as based upon **no immediate, direct,**  
13 **relationship between the violative condition and occupational safety and**  
14 **health**. He testified that based on his observations, interviews, and  
15 photographic exhibits the violations were appropriately classified as  
16 **other** in accordance with the operations manual and his own judgment.  
17 He found a **direct relationship of the violative conduct and occupational**  
18 **safety and health**.

19 Mr. Stewart testified that at Citation 3, there was no dispute that  
20 a safety committee did not exist. He was told by Ms. Bullentini that  
21 she understood under the law none was required when the employee level  
22 fell below 25. After a reduction in force based on a down turn in the  
23 economy, the employee level was reduced and was never increased when  
24 employees were rehired to a greater number.

25 At the conclusion of complainant's case, respondent presented  
26 testimony and evidence. Mr. Richard Evans identified himself as the  
27 foreman and safety officer of respondent. He described the plant safety  
28 history and his role as foreman after the death of a long-standing



1 employee. Mr. Evans testified at Citation 1, Items 6, 7 and 8,  
2 involving the exit doors and exit signs subject to previous testimony.  
3 He explained the **alternate means of egress** available in the instance of  
4 fire, the employee understanding of the work area for exiting in the  
5 event of an emergency and the lack of any violative conditions relating  
6 to same. He further testified with regard to the extensive electrical  
7 violations and machine guarding. Mr. Evans identified the ironworker  
8 machines as being very old but reliable and never subject of any serious  
9 violation or injuries to employees. He further testified that he had  
10 no specific training in fall protection, not formally qualified as a  
11 safety professional, but with many years experience in the industry.  
12 He continued his testimony on the plant configuration, the conditions  
13 of the premises, and the open configuration of the side and roof  
14 structures. He explained the fabrication of large steel as not lending  
15 itself to the conditions of what might be expected at a closed in  
16 facility. He testified the Item 6 violation involving removal of a pin  
17 to unlock the door should not have been cited. He explained the pin is  
18 **only** used to lock the door **after business hours**. There could be no  
19 employee hazard existent during any work hours. He identified the doors  
20 located in the middle of the shop and equal distance to both open ends  
21 of the building so as not to impede exit for any employee.

22 Mr. Evans further testified at Item 8, on lack of any potential  
23 confusion by employees for exiting during an emergency because all were  
24 well acquainted with the facility and the equal distance of the exit  
25 doors from any location.

26 In response to questions relative to the general duty clause  
27 violations, Mr. Evans explained the ironworker machines, both large and  
28 small, are utilized for only limited specialty work. He further

1 testified there was no danger of death nor any potential serious injury  
2 in the working conditions as it was not possible for an employee to  
3 place his body between the material and the machine points of operation.  
4 He responded there was no employee exposure to even a hand entering the  
5 working parts of the machines based upon the use of "strippers" which  
6 impede the employee from exposing his hand to the operating areas. He  
7 testified the small ironworker provides no possibility of an employee  
8 injury at the cutting area because the point of operation was on the  
9 opposite side of the machine from where the employee stands. He  
10 testified there has never been an employee injured by either contacting  
11 or operating the ironworker machines in the past six years of his  
12 employment. He never observed an employee exposed to a point of  
13 operation while engaged in the work effort. He explained the anti-  
14 repeat feature as being unnecessary and not required because the foot  
15 pedal on the machines makes only a single cut or punch after it is  
16 depressed. He further testified that equipping the old machines with  
17 an anti-repeat feature would be economically infeasible and cost the  
18 company approximately \$100,000 to \$300,000 to modify each unit. He  
19 testified that once the pedal is depressed the action is not immediate  
20 and the clutch must engage and activate the function therefore there is  
21 no realistic way to accidentally activate the cutting operation and  
22 cause an employee injury.

23 Mr. Evans continued his testimony with regard to each alleged  
24 violation. He testified the guarding requirements at 11(f) and 14(b)  
25 were not applicable because, for example, there would be no room for the  
26 employee to physically get close enough to the fly wheel to cause any  
27 injury. The employee must stand on the opposite side of the point of  
28 operation, which is approximately four feet away and therefore there is

1 no hazard exposure. He further testified the "anti-repeat" mechanism  
2 is not appropriate because there is no repeat feature for the type of  
3 work being done as it is "one off" such that after a single cut or  
4 function the process is complete until the next fabrication is  
5 effectuated.

6 During direct examination as to violations at Item 20 relating to  
7 eye protection, Mr. Evans testified the company issued proper eye  
8 protection to all employees engaged in welding or torch/cutting work.  
9 He further testified the company safety plan requires the use of  
10 appropriate eye protection and all employees are expected to comply.

11 Mr. Evans continued direct testimony with regard to violations  
12 referenced at Citation 2. He testified to the lack of dangerous  
13 conditions described in any of the alleged violations, including the  
14 operational aspects of the ladder at Items 2(a) and (b), and the holes  
15 drilled in the forklift which did not constitute any impairment to the  
16 integrity or safe operation of the equipment. The lack of data plate  
17 at Item 3 does not endanger employees and has no effect on safety or  
18 health because everyone in the manufacturing plant is aware of the  
19 specification data and familiar with the equipment. He further explained  
20 a lack of any safety and health dangers regarding the remaining  
21 violations stating they were very minor, most outside the knowledge of  
22 the employer and merely incidental in nature.

23 Mr. Evans testified finally on direct examination with regard to  
24 Citation 3, Item 1, stating that no safety committee was required  
25 because there were only 16 employees at the time of inspection prior to  
26 a recent rehiring, and the current level only 25 therefore outside the  
27 minimum legal requirement.

28 On cross-examination the complainant questioned the witness

1 testimony on opinions for minimally dangerous classifications and  
2 challenged his support for same. Counsel focused on the extent of any  
3 dangerous conditions involved with the ironworker machines and focused  
4 inquiry on the feasibility of retrofit and/or correction of the cited  
5 violative conditions.

6 At the conclusion of respondent's case, both complainant and  
7 respondent presented closing arguments.

8 Complainant asserted there were extensive **serious** violations  
9 existent at the plant and **other** violations for which complainant had met  
10 its burden of proof. He referenced the exhibits in evidence which  
11 included narrative reports, witness statements, and photographs all  
12 establishing the cited violative conditions. He asserted the violative  
13 conditions were proven to be serious and in most instances unrebutted.  
14 Counsel argued the **general duty clause** violations were established by  
15 a preponderance of the evidence and an appropriate basis for the  
16 citations because the machines were so old that OSHA has not developed  
17 any specific standards for such dated equipment. He argued the ANSI  
18 standard is an appropriate reference guide for **recognition** by the  
19 industry. He asserted that the video exhibit in evidence clearly  
20 demonstrates the direct employee **hazard exposure** as well as  
21 **constructively** showing a "**zone of danger**" where employees could  
22 accidentally come in contact with the machine points of operation by  
23 passing by or near same while working in the plant environment.

24 Counsel argued the fire safety violations were particularly  
25 important, notwithstanding the large open ends of the plant facility.  
26 The violations posed a serious hazard given the potential for fire in  
27 the steel fabrication facility where cutting and welding were regularly  
28 underway in unkept premises with extensive housekeeping violations. He

1 argued the video CD in evidence clearly demonstrated the cited  
2 violations by the operators engaged in the work process.

3 Counsel asserted Mr. Evans is not a qualified safety representative  
4 and without training, understanding or qualifications under the  
5 Occupational Safety and Health Act.

6 Counsel argued the extensive lack of equipment guarding safety was  
7 deplorable, and all of the violations in plain view.

8 Counsel asserted that many employees were walking around the plant  
9 passing through **zones of danger** with **access** to the hazardous machinery  
10 and various violative conditions as alleged and proven through the  
11 specific testimony and evidence in the record. He asserted the  
12 respondent had no legal defense nor asserted any recognized claims for  
13 relief to most of the violations charged and cited.

14 Respondent presented closing argument. Counsel referenced the  
15 Statement of Position and Amended Statement of Position filed with the  
16 Board on behalf of respondent referencing the applicable law and  
17 argument to support the testimony and documentary evidence in defense  
18 and rebuttal to the violations charged. He argued a lack of evidence  
19 for the special elements of proof needed to establish general duty  
20 clause violations as opposed to those for specific standard violations.  
21 He further referenced the statutory definition of **serious** violations and  
22 the legally recognized distinctions between "**other**" and "**de minimis**"  
23 elements for proof. Counsel asserted the defenses of employee  
24 misconduct, lack of employer knowledge, and inapplicability of standards  
25 were subject of preponderant proof in direct and cross examination  
26 respondent witness testimony. Counsel asserted that for **specific**  
27 **codified standard** violations, the complainant must prove under its  
28 statutory burden of proof that **violative conditions existed** to which

1 respondent employees were **exposed**, and each cited standard **applicable**  
2 to the facts. He further argued that because there was no specific  
3 standard adopted with regard to those violations brought under the  
4 general duty clause, the required element of **recognized hazard** under the  
5 NRS 618.375(1) was not proven. Further, there must also be proof by a  
6 preponderance of evidence that any violative conditions are **likely to**  
7 **cause or causing death or serious physical harm to employees**. He  
8 asserted that at best the alleged **other** violations should be  
9 reclassified as **de minimis**; and the **serious** violations, subject of  
10 respondent evidence, reduced to **other** if not dismissed or modified to  
11 a **de minimis** violative classification. He asserted there was no lawful  
12 basis for using ANSI to prove the **recognition** element to support an OSHA  
13 violation because it is "not law . . . but merely a . . . safety  
14 consensus guideline . . ." Counsel further urged that while admitting  
15 the exit sign deficiencies in furtherance of the alleged violations  
16 referenced at Citation 1, Item 8, they were merely technical and clearly  
17 not serious. All plant employees knew where and how to exit the  
18 facility because the ends of the buildings were completely open to the  
19 outside. In the event of an emergency, **exit paths** were clearly visible.  
20 He argued the Board could find a technical "exit" violation but if so  
21 it should be reclassified as de minimis based upon the facts in evidence  
22 and common sense. Similarly, the citation for a locking pin in an exit  
23 door was at best de minimis because it was easy to open and abundant  
24 alternate means of compliance in existence through the open sided  
25 building.

26 Counsel further argued the "housekeeping violations" should not be  
27 considered **serious** because in no way could the Board find the necessary  
28 legal proof element for "substantial probability of serious injury or

1 death . . . to result from an accident . . .” Counsel also argued the  
2 specific fall hazard standards were not particularly cited for lack of  
3 fall protection but only the guardrail standard which was incorrect,  
4 inappropriate, inapplicable, and not a basis for finding a violation  
5 under occupational safety and health law. Counsel concluded by arguing  
6 the major failure in the complainant’s case involved the **general duty**  
7 **clause** violations. There was no preponderant proof of the element of  
8 **recognition** in the industry nor the **likely to cause serious injury or**  
9 **death element**. Complainant unsuccessfully attempted to show the  
10 **recognition element** by reliance upon ANSI standards because there was  
11 no specific standard in existence to support a violation. He further  
12 argued there was no “**feasibility**” established from the evidence to prove  
13 any realistic means to modify the ironworker machines and therefore  
14 additional failures in the burden of proof.

15 The Board in reviewing the facts, documentation, and testimony must  
16 measure the weight of credible evidence under the established applicable  
17 law developed under the Occupational Safety & Health Act.

18 Complainant alleged violations of occupational safety and health  
19 law under both specific codified standards as incorporated by reference  
20 from the Code of Federal Regulations (CFR) and Nevada Revised Statute  
21 618.375(1).

22 **NRS 618.375(1)** commonly known as the “**General Duty Clause**” provides  
23 in pertinent part:

24 “. . . Every employer shall:

25 1. Furnish employment and a place of employment  
26 which are free from **recognized hazards** that are  
27 **causing or are likely to cause death or serious**  
28 **physical harm to his employees . . .**” (emphasis  
added)

In citing an employer under the General Duty

1 Clause, it is necessary to prove the existence of  
2 a **recognized hazard** as mandated by the statute;  
3 whereas citing an employer under a **specific**  
4 **standard** does not carry such a requirement because  
5 Congress has, in codification, adopted the  
6 recognition of (certain) hazards for the particular  
7 industry. To establish a violation of the General  
8 Duty Clause, the **complainant must do more than show**  
9 **the mere presence of a hazard.** The General Duty  
10 Clause, ". . . obligates employers to rid their  
11 workplaces **not of possible or reasonably**  
12 **foreseeable hazards, but recognized hazards . . ."**  
13 *Whitney Aircraft v. Secretary of Labor*, 649 F.2d  
14 96, 100 (2<sup>nd</sup> Cir. 1981). (emphasis added)  
15 "The elements of a **general duty clause** violation  
16 identified by the first court of appeals to  
17 interpret Section 5(a)(1) have been adopted by both  
18 the Federal Review Commission and the courts in  
19 subsequent cases. The court in *National Realty and*  
20 *Construction Co., Inc. v. OSHRC*, 489 F.2d 1257  
21 (D.C. Cir. 1973), listed **three elements that OSHA**  
22 **must prove to establish a general duty violation;**  
23 the Review Commission extrapolated a fourth element  
24 from the court's reasoning: (1) a **condition or**  
25 **activity** in the workplace presents a **hazard to an**  
26 **employee;** (2) the condition or activity is  
27 **recognized** as a hazard; (3) the hazard is causing  
28 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 (6<sup>th</sup> 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 (5<sup>th</sup> 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 (8<sup>th</sup>  
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 (5<sup>th</sup> Cir. 1980); *Magma*  
*Copper Co. V. Marshall*, 608 F.2d 373, 7 OSH Cases  
1893 (9<sup>th</sup> 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, 2<sup>nd</sup> Ed., page 91. (emphasis added)

When the Secretary has introduced evidence showing  
the existence of a hazard in the workplace, the



1           **employer may, of course, defend by showing that it**  
2           **has taken all necessary precautions to prevent the**  
3           **occurrence of the violation.** *Western Mass. Elec.*  
          Co., 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981).  
          (emphasis added)

4           To prove a violation of a **specific** standard, (as opposed to the  
5 **general duty** clause) the Secretary must establish:

6           (1) the **applicability** of the standard, (2) the  
7           existence of **noncomplying conditions**, (3) **employee**  
8           **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*  
9           *Cartage Service, Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC  
10           1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No.  
11           76-1948, 1979); *Harvey Workover, Inc.*, 79 OSAHRC  
12           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).

13          A respondent may rebut allegations by showing:

- 14           1.    The standard was **inapplicable** to the situation  
15                   at issue;
- 16           2.    The situation was in **compliance**; or lack of  
17                   access to a hazard. *See, Anning-Johnson Co.*,  
18                   4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

19          In all proceedings commenced by the filing of a notice of contest,  
20          the **burden of proof rests with the Administrator.** (NAC 618.788(1)).

21           All facts forming the basis of a complaint must be  
22           proved by a preponderance of the evidence. *Armor*  
23           *Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958  
24           (1973).

25          Complainant provided substantial evidence and testimony by a  
26          preponderance to meet the burden of proof under **NRS 618.375(1) the**  
27          **general duty clause** violations, namely Citation 1, Items 1(a), (b), (c),  
28          2(a), (b), (c), 3(a), and (b). The evidence, video and pictorial  
          exhibits satisfy the elements of violation by a preponderance of  
          evidence. The legal duty of respondent was to protect against known,

1 foreseeable, non-extreme or, **recognized hazards** as defined by or  
2 developed under applicable occupational safety and health law.

3 "A condition may be **recognized** as a [recognized  
4 hazard] only when the evidence shows that it is  
5 commonly known by the public in general or in the  
6 cited employer's industry as a hazard of such  
7 type." *Consolidated Engineering Co., Inc.*, 2 OSHC  
8 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)

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

13 Established case law emanating from the Federal  
14 Courts of Appeal requires that the dangerous  
15 potential of a condition or activity must **actually  
16 be known either to the particular employer or  
17 general in the industry**. See, *Usury v. Marquette  
Cement Mfg. Co.*, 568 F.2d 902, at page 910 (2<sup>nd</sup> Cir.  
1977). The question of whether a hazard is  
18 recognized goes to the **knowledge of the employer**,  
19 or if it lacks actual knowledge of the hazard, then  
20 to the **standard of knowledge in the industry**. It  
21 **is an objective test**. See, *Southern Ohio Building  
Systems v. OSHRC*, 649 F.2d 556, 558 (6<sup>th</sup> Cir. 1981).  
22 To establish the knowledge of the industry, the  
23 chief administrator is required to carry the burden  
of proof. See, *Magma Cooper Co. v. Marshall*, 608  
F.2d 373, 377 (9<sup>th</sup> Cir. 1980) citing *Brennan v.  
Smoke-Craft, Inc.*, 530 F.2d 843, 845 (9<sup>th</sup> Cir.  
1976). The conduct of the alleged wrongdoing  
24 employer must be judged against the standards and  
25 customs of the relevant industry. *S & H Riggers &  
Erectors, Inc. v. OSHRC*, 659 F.2d 1273 (5<sup>th</sup> Cir.  
1981). Rabinowitz, *Id.* (emphasis added)

26 Once the existence of a recognized hazard has been  
27 demonstrated, OSHA must prove that the hazard is  
28 "**causing or likely to cause death or serious  
physical harm to the employees**." 29 U.S.C.  
§654(a)(1) (NRS 618.375(1)).

The statute's language does not require  
the Secretary to show that an accident  
is likely but rather that *if* an accident

1 were to occur, death or serious physical  
2 harm would be the likely result . . . .  
3 Where an occupational illness can result  
4 from exposure to a chemical compound,  
5 the Secretary is not required to prove a  
6 substantial probability that an exposed  
7 employee will contract the disease but  
8 only that the death or serious physical  
9 harm is likely if the disease does  
10 occur. *Beverly Enters.*, 19 OSH Cases  
11 1161, 1188 (Rev. Comm'n 2000).

7 Thus, in *Walden Healthcare Center*, the Commission's  
8 analysis of the "causing or likely to cause death  
9 or serious physical harm" element focused not only  
10 on the low probability of the transmission of the  
11 hepatitis B virus through employee contact with the  
12 blood of nursing home residents but on the serious  
13 effects of hepatitis B if contracted.

11 This element of Section 5(a)(1) has been given  
12 essentially the same reading as that given to the  
13 Act's definition of a "serious" violation - one  
14 where "there is a substantial probability that  
15 death or serious physical harm could result.  
16 Deference will generally be accorded the Review  
17 Commission's determination of whether an accident  
18 would result in death or serious physical harm.  
19 Thus, as the *National Realty* court explained, if  
20 "evidence is presented that a practice could  
21 eventuate in serious physical harm upon other than  
22 a freakish or utterly implausible concurrence of  
23 circumstances, the Commission's expert  
24 determination of likelihood should be accorded  
25 considerable deference by the courts.

19 16 OSH Cases 1052, 1060-61 (Rev. Comm'n 1993). In  
20 *Beverly Enterprises*, the Commission found that this  
21 element of a general duty clause violation was met  
22 because lower back pain can have a significantly  
23 debilitating effect on employees. The employer had  
24 argued that lower back pain was a symptom and not  
25 an injury, but, the Commission stated, serious  
26 physical harm can be found without showing a  
27 pathological anatomic change. 19 OSH Cases at 1190  
28 & n.63. 29 U.S.C. §666(k). See, *Pratt & Whitney  
Aircraft Div. v. Secretary of Labor*, 649 F.2s 96,  
98, 9 OSH Cases 1554 (2d Cir. 1981); *Gearheart-Owen  
Indus.*, 10 OSH Cases 2193, 2199 (Rev. Comm'n 1982).  
*National Realty and Constr. Co., Inc. v. OSHRC*, 489  
F.2d 1257, 1265 N.33, 1 OSH Cases 1422 (D.C. Cir.  
1973). *Accord, Titanium Metals Corp. v. Usery*, 579  
F.2d 536, 543, 6 OSH Cases 1873 (9<sup>th</sup> Cir. 1978) ("In  
applying the 'likely to cause' element of the  
general duty clause, it is improper to apply

1 mathematical tests relating to the probability of  
2 a serious mishap occurring . . . given the Act's  
3 prophylactic purpose to prevent employee injuries."  
(Citations omitted) Rabinowitz Occupational Safety  
and Health Law, 2008, 2<sup>nd</sup> Ed., pages 98-99.

4 The **recognized hazardous conditions** were readily apparent and in  
5 plain view at the worksite facility. The respondent had knowledge, or  
6 with the exercise of reasonable diligence, should have known of the  
7 hazards as a member of the steel fabrication industry. The very old  
8 equipment in daily use presented dangers likely to cause serious injury.  
9 The element was depicted in the photographs, described in witness  
10 testimony, and readily observable through common prudence or by anyone  
11 working in a fabrication facility. Further, while an ANSI standard is  
12 not an enforcement standard, it may be relied upon as a reference to  
13 supporting evidence of recognition by consensus in the steel industry.  
14 Reasonable person observations of the old time worn "ironworker"  
15 machinery, the position of the employees operating the equipment, and  
16 un rebutted testimony of employee **access** to the **zones of danger**, provide  
17 direct evidence and supporting legal inferences to establish the  
18 elements of violation.

19 The identified hazards were **preventable** based upon the CSHO  
20 testimony; and there were **feasible** means to modify the equipment, albeit  
21 at substantial cost. The reasonableness of that cost must be measured  
22 by the respondent long continuous of business operations since 1939.  
23 The respondent plant operation over many years can be the subject of a  
24 legal inference of both economic and practical **feasibility**. The cost  
25 estimates subject of CSHO Stewart testimony, while expensive, could  
26 reasonably either eliminate or substantially reduce the hazards  
27 identified and depicted in the evidence. Further, the evidence  
28 demonstrated the dangerous and hazardous conditions as subject of

1 testimony, photographs and documentation to be readily **foreseeable**.  
2 There was a preponderance of evidence that if an accident occurred  
3 involving the violations cited, those were likely to cause at least  
4 serious physical harm to an employee(s). Given the nature of the  
5 equipment described and photographed together with the supporting  
6 testimony for the potential loss of fingers, hands, or limbs, there was  
7 preponderant evidence and a lawful basis for inference to support the  
8 seriousness of the dangers and potential result of any accident to  
9 likely cause serious harm but not death to employees.

10 The Board finds violations at Citation 1, Items 1(a), (b), (c),  
11 2(a), (b), (c), 3(a), and (b) and confirms the classifications as  
12 serious. However the Board finds a reduction in the proposed grouped  
13 penalties from \$3,272,.00 for each item to \$1,000.00 for each item at  
14 a total of \$3,000.00.

15 The Board confirms serious violations at Citation 1, Items 4(a),  
16 (b), (c), (d) and (e). Citation 1, Item 4 and the sub-items reference  
17 extensive "housekeeping violations" which have historically been  
18 classified as **other than serious** due to a lack of a substantial  
19 probability death or serious physical harm could result in the event of  
20 an accident. However due to the pervasive and plant-wide grossly unkept  
21 premises, the cited hazards warrant the serious classification as likely  
22 to cause serious injuries to employees in the event of an accident such  
23 as a fire where emergency evacuation requires a "clutter free" pathway.  
24 The Board confirms same. However the penalty is modified and reduced  
25 to a total of \$1,500.00. A subsequent inspection should not be the  
26 basis for finding a repeat violation of the foregoing violations.  
27 However upon any additional inspection(s) thereafter, if the premises  
28 are found in a grossly unkept condition, there is no further prohibition

1 against citing a repeat violation in accordance with established  
2 occupational safety and health law. The Board in reducing penalties  
3 does not minimize the importance of the violation and need for  
4 correction but recognizes the facility is a steel fabrication plant and  
5 by necessity open to the outside.

6 The Board finds no violation at Citation 1, Item 5(a), (b), (c) and  
7 (d) and the proposed penalty is dismissed. The facts, evidence and  
8 testimony demonstrated the **inapplicability** of the standard to the facts  
9 in evidence. A violation might have been correctly cited under the fall  
10 arrest standards, subject to evidence and proof requirements.

11 The Board finds a violation at Citation 1, Item 6, but modifies the  
12 classification to *de minimis* with zero penalty. The door pin could  
13 easily be removed and the operation readily addressed by any employee  
14 in the event of emergency. The evidence and testimony did not **establish**  
15 **any direct or immediate relationship between the violative conditions**  
16 **and occupational safety or health.**

17 The Board finds no violation at Citation 1, Item 7 and dismissed  
18 the proposed penalty. The sliding doors instead of "hinged" doors  
19 satisfied the intent of the standard through **alternate** compliance.

20 The Board finds and confirms a serious violation at Citation 1,  
21 Item 8 for lack of required exit signage. While the conditions of the  
22 premises and the defensive position proffered by respondent were  
23 meaningful, the Board must confirm a violation given the dangers that  
24 could occur in the steel fabrication plant where welding, cutting and  
25 other elements occur which are susceptible to fire. However there was  
26 substantial evidence of extensive alternative exits and pathways  
27 throughout the plant and in plain view. The cited violation was  
28 mitigated by evidence of **alternate compliance**. The penalty is modified

1 and reduced to \$500.00 based upon mitigating evidence of alternative  
2 compliance.

3 The Board finds a violation at Citation 1, Item 9 based upon the  
4 preponderance of substantial evidence, confirms the classification of  
5 Serious and proposed penalty at \$3,272.00.

6 The Board finds a serious violation at Citation 1, Item 10(a) and  
7 (b) based upon the preponderance of substantial evidence, confirms a  
8 classification of serious, and the proposed penalty of \$1,963.00.

9 The Board finds violations at Citation 1, Items 11(a), (b), (c),  
10 (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), and (o), based  
11 upon the preponderance of substantial evidence, confirms the  
12 classification of serious and the proposed penalty of \$3,272.00.

13 The Board finds violations at Citation 1, Item 12(a) and (b), based  
14 upon the preponderance of substantial evidence, confirms the  
15 classification of serious and the proposed penalty of \$1,963.00.

16 The Board finds a violation at Citation 1, Item 13(a) and (b),  
17 based upon the preponderance of substantial evidence, modifies the  
18 classification to "Other" and reduces the penalty to zero. While a  
19 hazard, the lack of tongue guarding did not create a probability of  
20 serious injury or death.

21 The Board finds a violation at Citation 1, Item 14(a) through (e)  
22 and 15(a) through (d), based upon the preponderance of substantial  
23 evidence, confirms the classifications as serious but reduces the  
24 grouped penalties for both to \$1,000.00 each. While hazardous, the  
25 probability of serious injury from the conditions was limited due to  
26 evidence of the operation.

27 The Board finds a violation at Citation 1, Item 16, based upon the  
28 preponderance of evidence, confirms a classification of Serious but no

1 additional penalty as same was grouped with Item 15.

2       The Board finds a violation at Citation 1, Item 17, based upon the  
3 preponderance of evidence and the classification of serious, however the  
4 penalty is **increased** from that proposed at \$1,963.00 to a total of  
5 \$3,272.00. The unguarded pulley assembly was approximately 31" from the  
6 floor near and in close proximity to the operator and other employees  
7 with **access** to the hazardous condition in passing through the **zone of**  
8 **danger**. The increased penalty is reasonable and appropriate from the  
9 evidence which demonstrated higher levels of gravity than as assessed  
10 by NVOSHA.

11       The Federal courts recognize the exclusive authority of the  
12 Commission (Board) to assess, raise, lower or adjust penalties.

13       If an employer contests the Secretary's proposed  
14 penalty, the Review Commission (Board) has  
15 exclusive authority to assess the penalty; the  
16 Secretary's penalty is considered merely a  
17 proposal. Relying on the language of Section  
18 17(j), the Commission and courts of appeal have  
19 consistently held that it is for the **Commission**  
20 **(Board) to determine, de novo, the appropriateness**  
21 **of the penalty to be imposed for violation** of the  
22 Act or an OSHA standard. (Emphasis added)

23       The Review Commission therefore is not bound by  
24 OSHA's penalty calculation guidelines. The  
25 Commission evaluates all circumstances of a  
26 violation in light of the four factors prescribed  
27 by Section 17(j) of the Act in determining what  
28 penalty, if any, should be assessed. The Review  
Commission has held that the criteria to be  
considered cannot always be given equal weight and  
that no single factor is controlling in assessing  
penalties. Nevertheless, the **gravity of a**  
**violation continues to be the primary factor the**  
**Commission considers** when determining the  
appropriate penalty. Rabinowitz Occupational Safety  
and Health Law, 2008, 2<sup>nd</sup> Ed., pages 248-150, citing  
cases, *U.S. Ladish Malting Co.*, 135 F.3d 484, 18  
OSH Cases 1133 (7<sup>th</sup> Cir. 1998); *Reich v. Arcadian*  
*Corp.*, 110 F.3d 1192, 17 OSH Cases 1929 (5<sup>th</sup> Cir.  
1997) (citing 29 U.S.C. §§666(j), 659(a), 659(c));  
*Bush & Burchett Inc. V. Reich*, 117 F.3d 932, 939,  
17 OSH Cases 1897, 1903 (6<sup>th</sup> Cir.), cert. denied,



1 118 S. Ct. (1997). *Quality Stamping Prods. Co.*, 16  
2 OSH Cases 1927 (Rev. Comm'n 1994); *Hern Iron Works*  
3 *Inc.*, 16 OSH Cases 1619 1621-23 (Rev. Comm'n 1994)  
4 (Commission gives no substantial deference to  
5 OSHA's proposed penalty assessment); *Roberts*  
6 *Pipeline Constr. Inc.*, 16 OSH Cases 2029, 2030  
7 (Rev. Comm'n 1994), *aff'd*, 17 OSH Cases 1633 (7<sup>th</sup>  
8 Cir. 1996) (unpublished opinion); *Bomac Drilling*,  
9 9 OSH Cases 1681 (Rev. Comm'n 1981); *Delaware & H.*  
10 *Ry.*, 8 OSH Cases 1252 (Rev. Comm'n 1980); *P.A.F.*  
11 *Equip. Co.*, 7 OSH Cases 1209 (Rev. Comm'n 1979),  
12 *aff'd*, 637 F.2d 741 (10<sup>th</sup> Cir. 1980); *Long Mfg. Co.,*  
13 *N.C., Inc. v. OSHRC*, 554 F.2d 903, 5 OSH Cases 1376  
14 (8<sup>th</sup> Cir. 1977); *Clarkson Constr. Co. v. OSHRC*, 531  
15 F.2d 451, 3 OSH Cases 1880 (10<sup>th</sup> Cir. 1976); *Dan J.*  
16 *Sheehan Co. v. OSHRC*, 520 F.3d 1036, 3 OSH Cases  
17 1573 (5<sup>th</sup> Cir. 1975), *cert. denied*, 424 U.S. 965  
18 (1976); *California Stevedore & Ballast Co. v.*  
19 *OSHRC*, 517 F.2d 986, 3 OSH Cases 1174 (9<sup>th</sup> Cir.  
20 1975). *Caterpillar Inc.*, 18 OSH Cases 1005, 1010  
21 (Rev. Comm'n 1997), *aff'd*, 154 F.3d 400, 18 OSH  
22 Cases 1481 (7<sup>th</sup> Cir. 1998); *National Eng'g &*  
23 *Contracting Co.*, 18 OSH Cases 1075, 1082 (Rev.  
24 Comm'n 1997), *aff'd*, 181 F.3d 715 (6<sup>th</sup> Cir.), *cert.*  
25 *denied*, 120 S. Ct. 578 (1999); *Pentecost*  
26 *Contracting Corp.*, 17 OSH Cases 1953 (Rev. Comm'n  
27 1997); *Pepperidge Farm Inc.*, 17 OSH Cases 1993,  
28 2013 (Rev. Comm'n 1997); *Hern Iron Works Inc.*, 16  
OSH Cases 1619, 1624 (Rev. Comm'n 1994). *Valdak*  
*Cor.*, 17 OSH Cases 1135, 1137-38 & n.5 (Rev. Comm'n  
1995), *aff'd*, 73 F.3d 1466, 17 OSH Cases 1492 (8<sup>th</sup>  
Cir. 1996) (while not exceeding the Secretary's  
proposed penalty, the Commission noted that the Act  
"places no restrictions on the Commission's  
authority to raise or lower penalties within those  
limits"). (emphasis added)

"The Commission (Board) . . . 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 a violation at Citation 1, Item 18(a), (b), (c) and  
(d) based upon the preponderance of evidence, confirms the  
classification of serious but reduces the penalty to \$1,000.00.

The Board finds a violation at Citation 1, Item 19(a), (b) and (c),  
based upon the preponderance of evidence, confirms the classification  
of other, but reduces the penalty to \$500.00.

1 The Board finds a violation at Citation 1, Item 20(a) and 20(b),  
2 based upon the preponderance of evidence, confirms the classifications  
3 of other, but reduces the proposed grouped penalty to \$500.00.

4 The Board finds a violation at Citation 1, Item 21(a) and (b),  
5 based upon the preponderance of evidence and confirms the classification  
6 of sub-item (b) with the proposed penalty of \$3,272.00 but reduces the  
7 classification of sub-item (a) to de minimis with no penalty.

8 The Board finds a violation at Citation 1, Item 22(a) through (k)  
9 based upon the preponderance of evidence, confirms the classification  
10 of serious and proposed penalty of \$3,272.00.

11 The Board finds a violation of Citation 1, Item 23(a) through (r),  
12 based upon the preponderance of evidence, however modifies the  
13 classification for sub-items (a) through (q) to de minimis with a zero  
14 penalty, confirms the classification as to sub-item (r) as serious but  
15 reduces the proposed penalty to \$1,000.00.

16 The Board finds a violation at Citation 1, Item 24, based upon the  
17 preponderance of evidence, confirms the classification of serious and  
18 proposed penalty of \$2,618.00.

19 The facts, testimony and preponderance of evidence at Citation 2  
20 established violations classified as "other", all proposing no  
21 penalties. The Board finds and confirms from the documentary and  
22 testimonial evidence "other" violations and zero penalties for Citation  
23 2, Items 1(a) and (b), 4(a) and (b), 5(a) and (b), and 7(a), (b), (c)  
24 and (d).

25 The Board finds a preponderance of evidence and confirms violations  
26 but reclassifies same from "other" to "de minimis" and zero penalties  
27 as to Citation 2, Items 2(a), (b), (c) and (d), 3, 6, and Item 8(a)  
28 through (i).

1 At Citation 3, Item 1, the Board finds and confirms the cited  
2 regulatory violation and zero penalty.

3 "Where **no direct or immediate relationship between**  
4 **the violative condition and occupational health or**  
5 **safety**, the citation should be re-designated as a  
6 **de minimis** violation without penalty. *Chao v.*  
7 *Symms Fruit Ranch, Inc.*, 242 F.3d 894 (9<sup>th</sup> Cir.  
8 2001). If a **direct or immediate relationship does**  
9 **exist but there is still no probability of death or**  
10 **serious physical injury**, then an "other-than-  
11 serious" designation is appropriate. *Pilgrim's*  
12 *Pride Corp.*, 18 O.S.H. Cases 1791 (1999).

13 A de minimis violation is one with "no direct or  
14 immediate relationship to safety or health." There  
15 is no penalty or required abatement for a de  
16 minimis violation. When OSHA determines that a  
17 violation is de minimis, it does not issue a  
18 citation but may verbally notify an employer of  
19 such a violation. Since no citation is issued, de  
20 minimis violations are not subject to context or  
21 appeal and are not used in future proceedings to  
22 establish a history of prior violation.

23 A violation is not de minimis merely because only  
24 minor injuries are likely. Nor does the brevity of  
25 employee exposure to a hazard make a violation de  
26 minimis. Violations have, however, been  
27 characterized as de minimis where the likelihood of  
28 an accident was remote and any injuries would have  
been minor. The Commission has also found  
inconsequential deviations from a standard's  
requirements to be de minimis but has generally  
rejected arguments that recordkeeping violations  
are de minimis.

69 U.S.C. §658(a). *General Carbon v. OSHRC*, 860  
F.2d 479, 487, 13 OSH Cases 1949, 1955 (D.C. Cir.  
1988); *John H. Quinlan*, 17 OSH Cases 1194 (Rev.  
Comm'n 1995). FIRM ch III, C.2.g, OSH Rep. (BNA)  
[Reference File] 77:0186. *Blocksom & Co.*, 11 OSH  
Cases 1255, 1261 n.15 (Rev. Comm'n 1983). *National*  
*Indus. Constructors*, 10 OSH Cases 1081, 1095 (Rev.  
Comm'n 1981). *Brock v. L.R. Willson & Sons*, 773  
F.2d 1377, 1386 n.9, 12 OSH Cases 1499 (D.C. Cir.  
1985); *Whiting-Turner Contracting Co.*, 13 OSH Cases  
2155, 2156 (Rev. Comm'n 1989); *H.H. Hall Constr.*  
*Co.*, 10 OSH Cases 1042, 1047 (Rev. Comm'n 1981).

*Hood Sailmakers*, 6 OSH Cases 1206, 1208 (Rev.  
Comm'n 1977). The Commission's authority to  
characterize violations as de minimis in nature has  
generally been upheld. *Chao v. Symms Fruit Ranch*,

1 Inc., 242 F.3d 894, 19 OSH Cases 1337 (9<sup>th</sup> Cir.  
2 2001) (collecting cases). *Bechtel Power Corp.*, 10  
3 OSH Cases 2001, 2009 (Rev. Comm'n 1982); *Alamo*  
4 *Store Fixtures*, 6 OSH Cases 1150, 1151 (Rev. Comm'n  
5 1977). Compare *Kohler Co.*, 16 OSH Cases 1769 (Rev.  
6 Comm'n 1994) (improper recording of injuries as  
7 first-aid cases is not de minimis since  
8 recordkeeping requirements play crucial role in  
9 maintaining safe workplaces), and *El Paso Crane &*  
10 *Rigging Co.*, 16 OSH Cases 1419, 1429 (Rev. Comm'n  
11 1993) (in absence of evidence that employer had  
12 actually examined injury log to ensure accuracy,  
13 failure to certify not de minimis), with *American*  
14 *Airlines, Inc.*, 17 OSH Cases 1552 (Rev. Comm'n  
15 1996) (where other identifying information was  
16 given, failure to include worker's job title was de  
17 minimis).

18 The penalty reductions and/or reclassifications ordered by the  
19 Board are based upon the weight of substantial evidence but do not  
20 minimize the importance of the safety hazards or dangerous conditions  
21 established by the evidence or inherent in the violations confirmed.  
22 The reasonable and appropriate modifications are intended to urge  
23 respondent relegate the funds saved from penalties to full correction  
24 of the cited conditions and overall work place safety.

25 The Decision herein shall constitute Final Findings of Fact and  
26 Conclusions of Law pursuant to NAC 618.836 and deemed a **Final Order** of  
27 the Nevada Occupational Safety and Health Review Board.

28 DATED: This 11th day of October, 2013.

NEVADA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW BOARD

/s/

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JOE ADAMS, CHAIRMAN