NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

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

Complainant,

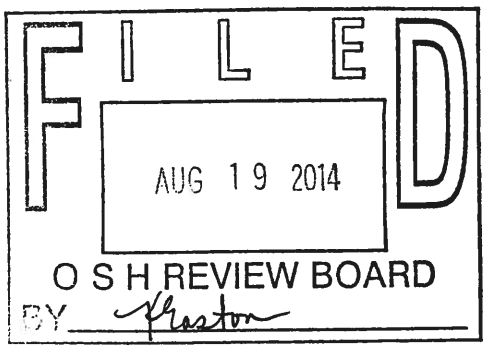
vs.

JOE BENIGNO TREE SERVICE, INC.,

Respondent.

_____/

Docket No. RNO 14-1712



DECISION

This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 9th day of July, 2014, in furtherance of notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations** (OSHA). MR. JOE BENIGNO, appearing on behalf of Respondent, **Joe Benigno Tree Service, Inc.**

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

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

thereto. Citation 1, Item 1, charges a violation of 29 CFR 1910.180(h)(3)(v) as follows:

> No hoisting, lowering, swinging or traveling shall be done while anyone is on the load or hook.

Complainant alleged that an employee was lifted by a Link-Belt HTC 8675 Mobile Crane into two trees at approximate heights of 100 feet. The employee was exposed to hazards such as, but not limited to, falling and struck-by.

The violation was classified as "Serious". The proposed penalty of the alleged violation is in the amount of $1,700.00.

Complainant and respondent stipulated to the admission of documentary and photographic evidence at complainant's Exhibits 1 through 3.

Counsel for complainant presented evidence of the alleged violation, through Compliance Safety and Health Officer (CSHO) Mr. Jake LaFrance. He testified as to his inspection and the citation issued to the respondent employer. He identified Exhibits 1 through 3 in evidence as included in his inspection report and narrative. CSHO LaFrance investigative findings confirmed the worksite to be a **multi-employer construction site** as defined under occupational safety and health law. Bragg Investment Company, Inc. ("Bragg"), was hired as a subcontractor by Joe Benigno Tree Service ("Benigno"), acting as general contractor. Bragg provided crane services and an operator to the Benigno job site located at Incline Village (Lake Tahoe) Nevada. Respondent Benigno was retained by a condominium homeowners association to remove diseased and/or damaged trees from the Lakeshore property areas as mandated and permitted by the Tahoe Regional Planning Agency (TRPA). CSHO LaFrance determined that Bragg lifted Mr. Joe Benigno, as an employee Joe Benigno

Tree Service, to elevations of approximately 100 feet to effectuate tree maintenance and removal work. Mr. Benigno was equipped with a saddle hoist connected to the crane load hook. Mr. LaFrance determined the respondent and Bragg were both **controlling** contractors under OSHA **multiple employer worksite doctrine**.

CSHO LaFrance identified witness statements obtained from Mr. Joe Benigno, employee of Joe Benigno Tree Service, and Mr. Brock Randolph, the crane operator employee of Bragg. Mr. Benigno admitted he had been lifted by the crane to effectuate removal of three trees at the worksite. Mr. Benigno informed CSHO LaFrance that he had been involved in tree maintenance activity at Lake Tahoe for many years and previously worked with various crane companies including recently Connolly Crane. He understood Connelly and Bragg had "variances" from OSHA permitting the lifting of employees on the load hook. Crane operator Randolph also reported he understood his company (Bragg) had a variance to lift employees for the subject work.

CSHO LaFrance testified on the "feasibility" to complete the work task in accordance with the terms of the standard. He testified an aerial lift was utilized to remove some of the trees on the property despite claims that the crane was required because there were buildings in the way, but none shown in the photographic evidence. He testified at Exhibit 1, page 37 as to the Tahoe Regional Planning Agency (TRPA) rules and Mr. Benigno's comments to him during the inspection that it was not possible to utilize an aerial lift on the beach because of TRPA rules. Mr. LaFrance testified that he was told by TRPA that Mr. Benigno merely needed a permit from TRPA to conduct such operations. He further testified the operations were "feasible" in accordance with the standards despite additional comments from Mr. Benigno that a rock wall

prevented access to the trees.

Mr. LaFrance conducted a closing conference with the designated employer representatives and advised the lifting activity was a violation of the referenced OSHA standard. No variance was on file with OSHA. The respondent was not able to produce a variance.

At the conclusions of complainant's case respondent elected to waive the presentation of any witness testimony on documentary evidence. Mr. Benigno stated he intended to rely on closing argument and legal positions asserted in the companion case before the Board in docket RNO 14-1714, Bragg Investment Company, dba Bragg Crane Service.

Complainant counsel presented closing argument and asserted the facts of the case were undisputed and involved only an issue of whether lifting an employee at the end of the crane load was permitted in accordance with the standard. Counsel argued the respondent did not follow ANSI nor California standards which require other safety requirements be met as a threshold before utilizing a crane to lift an employee by attachment to the crane load or hook. The respondent was required to demonstrate a lack of **feasibility** or **greater hazard.**

Counsel referenced the **multi-employer worksite doctrine** and argued that established case law, including Nevada, recognizes "hazard exposure" to employees is established regardless of the actual employer if caused by either a general or subcontractor based on a determination of the **controlling employer** at the worksite. In the present case, the Bragg Crane operator made its employer a **controlling** employer because he was in control of the lifting operation with an employee attached to the end of the hook. The respondent Joe Benigno Tree Service is also considered a **controlling employer** because Mr. Benigno himself gave instructions to the crane operator to conduct the lifting operations.

Mr. Benigno was an employee of his own company and the subject individual being lifted by the crane. Accordingly, regardless of the worksite doctrine relative to Bragg Crane in the companion case, Mr. Benigno instructed that he be lifted at the end of the hook and exposed himself as an employee of his own company thereby making his company legally responsible in accordance with the citation.

Respondent presented closing argument. Counsel argued Nevada OSHA should not have cited him under the subject facts because he did not violate the established OSHA or his own company safety procedures. He argued it was not "safe" to climb a disease damaged tree. He understood from his previous work at Lake Tahoe that the area crane companies had "variances" from strict compliance with the OSHA standard. He followed all the safety procedures and addressed the damaged tree removals after determining it was both unsafe and infeasible to remove such large trees under the standard provisions. Mr. Benigno asserted that for many years he worked with Connelly Crane and other crane companies hiring them as subcontractors when work required he or his men be lifted by crane to access very tall damaged trees in the Lake Tahoe area. He understood there was either a variance or enforcement policy of OSHA to permit man lifting by crane under certain circumstances and asserted those had been established by the evidence presented here and in the companion case before the board identified as Bragg Crane, docket no. RNO 14-1714. Mr. Benigno requested the citation, violation and penalties be dismissed because there was no violation.

In reviewing the facts, testimony, exhibits and arguments of counsel, the Board is required to measure same against the established applicable law developed under the Occupational Safety and Health Act as adopted in the State of Nevada.

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

> In all proceedings commenced by the filing of a notice of contest, the **burden of proof** rests with the Administrator.
>
> All facts forming the basis of a complaint must be **proved by a preponderance** of the evidence. See *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶ 16,958 (1973).
>
> To establish a prima facie case, the Secretary (Chief Administrative Officer) must prove 1) the cited standard applies; 2) the requirements of the standard were not met; 3) employees were exposed to or had access to the violative condition; 4) the employer knew or, through the exercise of reasonable diligence could have known of the violative condition; 5) there is substantial probability that death or serious physical harm could result from the violative condition (in a "serious" violation case). See *Bechtel Corporation*, 2 OSHC 1336, 1974-1975 OSHD ¶ 18,906 (1974); *D.A. Collins Construction Co. Inc., v. Secretary of Labor*, 117 F.3d 691 (2nd Cir. 1997). (Emphasis added)

A respondent may rebut allegations by showing:

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

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

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

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

A "non-serious" charge of violation is established upon a preponderance of evidence in accordance with NRS 618.645 and recognized

applicable law.

NRS 618.465 provides in pertinent part:

> ". . . The Administrator may prescribe procedures for the issuance of a notice in lieu of a citation with respect to: (a) Minor violations which have no direct or immediate relationship to safety or health; . . ." (emphasis added)

> "Where **no direct or immediate relationship between the violative condition and occupational health or safety,** the citation should be re-designated as a ***de minimis*** **violation without penalty.** *Chao v. Symms Fruit Ranch, Inc.*, 242 F.3d 894 (9th Cir. 2001). If a direct or immediate relationship does exist but there is still no probability of death or serious physical injury, then an "other-than-serious" designation is appropriate. *Pilgrim's Pride Corp.*, 18 O.S.H. Cases 1791 (1999). (emphasis added) *Owens-Corning Fiberglass Corp. v. Donovan*, 659 F.2d 1285, 10 OSH Cases 1070 (5th Cir. 1981) (fiberglass itch).

The testimonial, documentary and stipulated evidence established the facts of violation and applicability of the cited standard. Respondent was the employing general contractor of employee Joe Benigno and instructed that he be lifted by crane to perform tree maintenance and removal work. Mr. Benigno was an employee of his own company, exposed to the recognized hazards of being lifted at the end of the load hook. He was in **control** of the worksite as interpreted under occupational safety and health law. Under the facts in evidence the respondent general contractor as well as the subcontractor Bragg Crane providing the crane operator and services, are both **controlling employers** for the purposes of satisfying the elements of employee hazard exposure. Under well established Occupational Safety and Health Law,

> "... liability is imposed ... on a contractor who **creates a hazard or who has control over the condition on a multi-employer worksite ...**". See, *Brennan v. OSHRC (Underhill Construction Corp.)*, 513 F.2d 1032 (2nd Cir. 1975). The commission and courts have recognized that protection from hazard exposure to employees is the responsibility of the

> employer and confirmed that ". . . policy is best effectuated by placing responsibility for hazards on those who create them."

The Board finds complainant established a prima facie case by preponderant evidence of the recognized elements to satisfy the burden of proof for a violation. The standard was **applicable** to the facts in evidence because a respondent employee was lifted by a crane at the end of the load hook. The **non-complying conditions** were proven and admitted. **Employee exposure** was both proven and admitted. The evidence of **employer knowledge** was unrebutted. (*See Bechtel Corp, supra* at pg. 7) The employer president admitted he knew of the violative conditions prohibiting employee lifting but understood, under the existent conditions, the violation would be treated as **de minimis** and without penalty.

The subject contested matter turns on the evidence and affirmative defense to rebut the preponderant proof of any **serious** classification violation and penalty based upon **administrative notice** of the enforcement policy and **deviation letters** issued February 2005 and 2006 by the Chief Administrative Officer of the Occupational Safety and Health Administration.

NRS 233B.123(5) provides:

> Notice may be taken of **judicially cognizable facts** and of **generally recognized technical** or scientific facts **within the specialized knowledge of the agency**. Parties **must be notified either before or during the hearing**, or by reference in preliminary reports or otherwise, of the material noticed, including any **staff memoranda or data**, and they must be afforded an opportunity to contest the material so noticed. The experience, technical competence and specialized knowledge of the agency may be utilized in the evaluation of the evidence.

An enforcement policy had been established by Nevada OSHA in 2005 and 2006 by granting **deviation letters** to at least two area crane

service companies (Smith and Connelly). While the **deviation letters** do not constitute **variances** they do establish and confirm an enforcement practice and policy from the Chief Administrative Officer of the Nevada OSHA state plan. The employee lifted by the crane, Mr. Joe Benigno, is also the owner of the respondent general contractor, and accustomed to working with Connelly Crane and other area crane companies. He understood the man lifting by crane practice was permissible under certain conditions, although incorrectly identified the allowable deviation from strict standard enforcement as a "variance". Enforcing a serious violation against a tree service company conducting the same working practices as those granted deviation authority does not result in fair and equal application of the OSHA standards or law. Area tree service contractors working in conjunction with crane operators involved in similar specialty tree maintenance/removal work commonly existent in the Lake Tahoe area through the TRPA environmental management bi-state compact are entitled to be fairly and equally governed by OSHA.

The CAO deviation letters include, by reference, certain prerequisite conditions from the CAL OSHA regulations. The deviation letters were vague and difficult to interpret for reliance. However the facts and testimony in evidence demonstrate that Benigno removed only three of the twelve trees at the site through the extraordinary method of employee lifting at the end of the crane load hook. The other trees were removed by feasible safe methods recognized by OSHA. This undisputed evidence permits lawful inference that prerequisite assessments were made with regard to feasibility, greater hazards, and the other safety criteria incorporated through reference, specific or implicit in the deviation letters. Clearly it would have been much easier for all of the twelve trees at the site to be removed through use

of the crane access. That was not done; and demonstrates the employer was following the appropriate guidelines and circumstances to analyze and study the particular site conditions and only responsibly effectuate as needed the deviation principles. The overall worksite and employer PPE and practices were not found unsafe.

The Board concludes the respondent should be held accountable for the violative conduct governed by the cited standard but under the deviation policy letters existent at the time of the violative conduct, notwithstanding the later rescission which occurred some three months after the inspection and determination of violation. In reaching this conclusion, the Board does not condone, authorize, or effectuate a variance nor establish any precedent affecting or limiting future enforcement of the cited standard. Neither does the ruling include determinations with regard to **infeasibility or greater hazard.** The conclusion merely confirms a requirement for fair and reasonable application of the then existing Nevada OSHA enforcement practices, guidance letters and policies under the specific facts in evidence.

The Board finds proof of violation by a preponderance of evidence, but no serious classification based upon the principles of the deviation letters and policy existent at the time of the inspection. The facts in evidence before the Board warrant reliance upon the terms, spirit and intent of NRS 618.465 to reclassify the violative conduct as **de miminis and minor.**

> "The (Federal) Commission has long asserted that it may characterize a violation as ***de minimis.***" Occupational Safety and Health Law, 3rd Ed., 2013, Bloomberg/BNA, page 187. Citing *General Electric Co.* 3 OSHC 1031, 1040, Rev. Comm'n 1975. The First, Third, Fifth and Ninth Circuits have upheld the Commission's authority to characterize a violation as *de minimis*. *Chao v. Symms Fruit Ranch Inc.*, 242 R.3d 894, 19 OSHC 1337 (9th Cir. 2001);

Donovan v. Daniel Constr. Co., 396, F.2d 818, 10 OSHC 2188 (1st Cir. 1982); *Reich v. OSHRC (Erie Coke Corp.)*, 998 F.2d 134, 16 OSHC 1241 (3d Cir. 1993); *Phoenix Roofing Inc. V. Dole*, 874 F.2d 1027, 14 OSDC (5th Cir. 1989).

It is reasonable under the particular facts in evidence to find the violative conduct **"de minimis"** and without penalty, dismiss the serious classification and reclassify the **minor** infraction in conformance with the directive of the Chief Administrative Officer in effect at the time of the inspection and findings of violative conduct.

The Federal courts recognize the exclusive authority of the Commission (Board) to assess or adjust penalties.

> If an employer contests the Secretary's proposed penalty, the Review Commission has **exclusive** authority to assess the penalty, the Secretary's penalty is considered merely a proposal. Relying on the language of Section 17(j), the Commission and courts of appeal have consistently held that it is for the Commission to determine, **de novo**, the **appropriateness of the penalty** to be imposed for violation of the Act or an OSHA standard. (Emphasis added)
>
> The Review Commission therefore is not bound by OSHA's penalty calculation guidelines. The Commission evaluates all circumstances.
>
> "The Commission . . . may reduce or eliminate a penalty by **changing the citation classification or by amending the citation** . . .". *See Reich v. OSCRC (Erie Coke Corp.)*, 998 F.2d 134, 16 OSH Cases 1241 (3d Cir. 1993) (emphasis added)

The Board decision recognizes the previous CAO policy in place at the time of inspection on the same job site relating to both the subject and companion case at Bragg Investment Company, docket no. RNO 14-1714. The rescission letters in evidence in the companion case and subject to **administrative notice** clearly established a cancellation date as of February 2014. Respondent employer Benigno, as well as Bragg, are on notice accordingly. Any future conduct by the respondent or others

similarly situate in violation of the standard must be governed in accordance with the specific terms of the referenced standard and current enforcement policies of Nevada OSHA in full recognition of rescission of the previous deviation principles. Unless there is either formal reissuance of a deviation from enforcement policy for application to all qualified employers in the similar industry, or variance granted to particular employers in accordance with the normal processes proscribed, the published enforcement standards must be followed.

The Board finds as a matter of fact and law the cited respondent violative conduct **under the particular facts in evidence particularly the CAO deviation letter policy** was "de minimis and **minor**". The cited violation is confirmed as de minimis and the serious classification dismissed as well as the proposed penalty in recognition of the enforcement policy for the subject violation governed by the deviation letter enforcement practice and policy in existence at the time of the violative conduct.

Based upon the above and foregoing, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR 1910.180(h)(3)(v) and the proposed penalty is denied.

The Board directs the **Respondent, JOE BENIGNO TREE SERVICE, INC.** to prepare and submit proposed Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel within twenty (20) days from date of decision. After five (5) days time for filing any objection, the final Findings of Fact and Conclusions of Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and Conclusions of Law signed by the

Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

DATED: This 19th day of August 2014.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JOE ADAMS, Chairman