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,

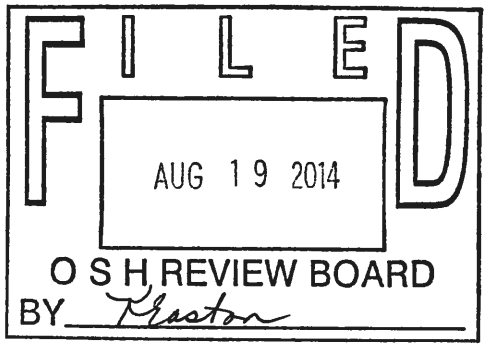
vs.

BRAGG INVESTMENT COMPANY, dba BRAGG CRANE SERVICE,

Respondent.

_____/

Docket No. RNO 14-1714



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. ROBERT PETERSON, ESQ., appearing on behalf of Respondent, **Bragg Investment Company, dba Bragg Crane Service.**

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 $1,530.00.

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

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. Respondent provided crane services and an operator to the Benigno job site located at Incline Village (Lake Tahoe) Nevada. 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 Bragg to be a **controlling** contractor 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 a "variance" from OSHA permitting the lifting of employees on the load hook and crane operator Randolph also reported he understood his company (Bragg) had a variance to lift employees for the subject work.

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.

On cross-examination, CSHO LaFrance testified that a former Nevada OSHA Chief Administrative Officer (CAO) had previously issued directive or "deviation" letters to two area crane companies permitting man lifting by crane under certain conditions to effectuate tree maintenance or removal services. He further testified the deviation letters were not "variances" and had been rescinded on January 15, 2014. He testified the deviation letters provided that OSHA would recognize employee lifting by crane under certain limited conditions but treat any technical violations of the standard as *de minimis* and without penalty.

He testified the letters were irrelevant to the subject citation because they were rescinded; and even if not rescinded the respondent did not comply with the incorporated CAL OSHA code requirements including analysis for use of other approved **feasible** means to effectuate the work. On cross-examination Mr. LaFrance identified the Smith Crane deviation letter dated February 22, 2006 and similarly the undated Connelly Crane letter. He further identified and testified with regard to Exhibits D, E and F. Exhibit D is a letter dated February 6, 2014 from the current OSHA CAO rescinding the previous deviation letter to Smith Crane. Similarly Exhibit E is a rescission dated February 5, 2014 of the Connelly Crane deviation letter. CSHO LaFrance further testified to Exhibit F identified as a January 14, 2014 letter from NV OSHA to Joe Benigno Tree Service denying an application for a variance seeking allowance for lifting employees by crane.

On continued cross-examination Mr. LaFrance admitted the respondent inspection occurred on **November 14, 2013** and a determination for citation made which ultimately issued on January 31, 2014. He further confirmed the deviation letters were in existence during the time of the inspection and had not been rescinded until **January 15, 2014.** He testified the deviation letters would not have applied to the respondent, rather only to those specific companies to which they were issued.

Counsel questioned CSHO LaFrance as to why the letters had not been referenced at the time of inspection and citation rather than only recently produced after request for the hearing. He testified the deviation letters applied only to Connelly and Smith crane companies and required following certain procedures to determine a lack of feasibility, greater hazard or unsafe conditions prior to

implementation.

CSHO LaFrance testified on cross-examination that twelve trees were removed at the subject work site, but only three done through use of the crane man lifting procedure. The remaining trees were removed and otherwise addressed by approved OSHA methods including utilization of an aerial platform lift.

At the conclusions of complainant's case respondent presented witness testimony from Mr. Gary Phillips. Mr. Phillips testified he was responsible for the job as a salesman and the respondent company contact person for Mr. Randolph working as the crane operator at the time of inspection.

Mr. Brock Randolph identified himself as the crane operator involved in the subject citation. He testified that he understood use of the crane to lift an employee was permitted by OSHA for tree service removal if there was no other recognized safe way to conduct the work. He described the alternative to include exposures to greater hazard and lack of feasibility. If a tree is not safe to climb then the tree service companies must use cranes to get closer to the top. He testified that he took his instructions at the site from Mr. Joe Benigno, the general contractor, and the employee lifted on the end of the hook to perform the described work.

At the conclusion of the presentation of evidence and testimony the parties provided closing argument.

Complainant counsel 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 or on the load hook was permitted based upon OSHA deviation letters or policy. Counsel argued the deviation letters were not variances, and very specific as to allowable work and conditions.

The letters were only guidance on what Nevada OSHA would do if the employers to whom the deviation letters were issued were required to remove trees under certain necessitous conditions then subject to a de minimis violation. Counsel argued the letters did not apply to respondent Bragg, but restricted to Connelly and Smith and then only if they met the threshold incorporated CAL OSHA requirements. Counsel asserted if Connelly or Smith had undertaken the same activity as Bragg without meeting the threshold conditions they would have been similarly cited. Counsel further asserted the deviation letters were irrelevant for Bragg because they were rescinded, not valid nor a recognized defense in the subject action.

Counsel referenced the **multi-employer worksite doctrine** and argued that established case law, including Nevada, recognizes that even a subcontractor crane operator at a job site is considered a **controlling employer** because the operator is in **control** of whatever is at the end of the load hook. Accordingly, the subcontractor is liable for employee hazard exposure regardless of the actual employer of the lifted employee.

Respondent presented closing argument. Counsel argued that Nevada OSHA can't have it both ways . . . they told Connelly and Smith in the '05-'06 letters they could conduct jobs in a certain way without serious citation, but then discriminated against Bragg and Benigno by citing them for engaging in the same conduct. Counsel asserted that OSHA realized in November of 2013 when they conducted the inspection that they had a problem citing Bragg and Benigno but rather than respecting their own deviation letters to Connelly and Smith they simply rescinded those deviation letters and apparently their policy, but not until February 2014, long after determinations of violations and citations

were in process. From the Benigno witness statement it appears that for years he worked with Connelly Crane doing the same work, so OSHA permitted certain employers to deviate from the standard and not others. Counsel asserted that basic fairness requires OSHA not be allowed to single out the respondent here for violation. OSHA's conduct to issue a citation and then try to "clean it up" by rescinding the deviation letters for everyone simply cannot be tolerated under the law. Counsel argued the CPL relied upon by OSHA is vague at best; and even ANSI doesn't appear to prohibit the cited conduct as long as a determination is made that the work cannot be safely or reasonably performed in any other acceptable manner. The vagueness of the CPL, the deviation letters and the principles involved are too difficult for an employer to comprehend or face violation. Of the twelve trees involved, only three were removed in the restricted method showing the respondent was only following instructions to remove certain trees where no other safe or feasible means existed.

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, while not the employer of the general contractor employee exposed to the hazards of being lifted at the end of the load hook, was a subcontractor in charge of the lifting process and vested with **control** as interpreted under occupational safety and health law. Under the facts in evidence, the respondent subcontractor as well as the general contractor were both "controlling employers" for the purposes of satisfying the element of employee hazard exposure. Respondent crane operator Randolph was in **control** of the lifting operation and acting with knowledge and authority of Bragg. 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. The **non-complying conditions** were proven and admitted. **Employee exposure** was both proven and admitted. The evidence was

unrebutted that the employer knew of the violative conditions prohibiting employee lifting albeit understood the violation would be de minimis. (*See Bechtel Corp, supra* at pg. 7)

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 the enforcement policy and deviation letters in evidence at respondent Exhibits A through G.

Clearly 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 tree maintenance service general contractor, and accustomed to working with Connelly Crane. He understood the man lifting by crane practice was permissible under necessary conditions, although incorrectly identified the allowable deviation from strict standard enforcement as a "variance". Enforcing a serious violation against a crane service company conducting the same activities as those granted deviation authority does not result in fair and equal application of the OSHA standards or law. Area crane operators involved in the 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 terms of the CAO deviation letters adopted by reference certain conditions in CAL OSHA regulations. The deviation letters were vague and difficult to interpret formal conditions for reliance. However the

facts and testimony in evidence demonstrate that Bragg only removed three of the twelves trees at the site through the extraordinary method of lifting an employee at the end of the load hook. The other trees were removed by feasible safe methods recognized by OSHA. This undisputed evidence permits lawful inference that an assessment was made with regard to feasibility, greater hazards, and the other criteria, specific or implicit in the deviation letters as incorporated through reference. Clearly it may 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 responsibly effectuate the deviation principles.

The Board concludes the respondent should be held accountable for the violative conduct governed by the cited standard but under the deviation 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 future enforcement for determinations with regard to **infeasibility or greater hazard.** The conclusions merely confirm a requirement for fair and reasonable application of the OSHA enforcement practices and policies under the specific facts in evidence.

The Board finds proof of violation by a preponderance of evidence, but no serious violation based upon the principles of the deviation letters in existence at the time of the violative conduct. 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"**, dismiss the serious citation 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 in reaching the decision to recognize the previous CAO policy applies only to this case and the particular facts in evidence. The rescission letters were effectuated as of February 2014 and the employers duly notified accordingly. Any future conduct by the respondent or others similarly situated in violation of the standard must be governed in accordance with the specific terms of the standard and enforcement policy of Nevada OSHA in full recognition of rescission of the previous deviation policy. Unless there is either 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 for same 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, BRAGG INVESTMENT COMPANY, 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