

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
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6 CHIEF ADMINISTRATIVE OFFICER
7 OF THE OCCUPATIONAL SAFETY AND
8 HEALTH ADMINISTRATION, DIVISION
9 OF INDUSTRIAL RELATIONS OF THE
10 DEPARTMENT OF BUSINESS AND INDUSTRY,

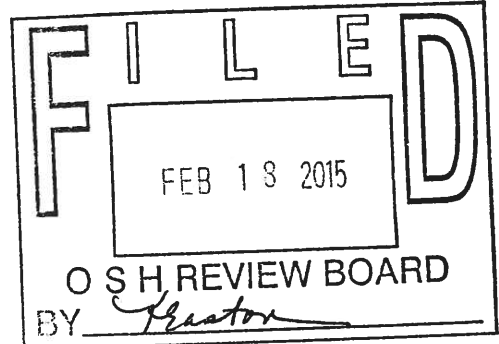
Docket No. RNO 14-1724

Complainant,

10 vs.

11 THOLL FENCE INC.,

12 Respondent.
13 _____/



14 **DECISION**

15 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
16 **REVIEW BOARD** at a hearing commenced January 14, 2015, in furtherance of
17 notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel
18 appearing on behalf of the Complainant, **Chief Administrative Officer of**
19 **the Occupational Safety and Health Administration, Division of**
20 **Industrial Relations** (OSHA). Mr. Tim Rowe, Esq. appearing on behalf of
21 Respondent, **Tholl Fence Inc.**

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

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

27 Citation 1, Item 1, charges a violation of 29 CFR 1926.651(b)(3)
28 which provides in pertinent part:

1 When excavation operations approach the estimated
2 location of underground installations, the exact
3 location of the installations shall be determined
4 by safe and acceptable means.

5 Complainant alleged when excavation operations to auger a two foot
6 diameter hole with a Terex/Reedrill model 30 Auger Drill mounted to an
7 International Truck chassis for placement of a sign post approached the
8 estimated location of underground installations, the exact location of
9 the installations was not determined by a safe and acceptable means.
10 The estimated location of gas lines was improperly marked 3-4 feet south
11 of the dig location. Markings for water lines with an arrow pointing
12 in the direction of the dig location, 15 feet to the east included a
13 marking "hand dig". The "dig ticket" provided by Truckee Meadows Water
14 authority to American Sign & Crane Service stated "the island is full
15 of water pipes and meter boxes hand dig only". The exact location of
16 underground installations was not determined by sufficient hand digging
17 or other means prior to the operation of the auger resulting in the 2
18 inch gas line being struck. A water line was located 3.5 inches below
19 the gas line.

20 The violation was classified as "Serious". The proposed penalty
21 for the alleged violation is in the amount of \$2,677.00.

22 Citation 1, Item 2, charges a violation of 29 CFR 1926.21(b) (2)
23 which provides in pertinent part:

24 The employer shall instruct each employee in the
25 recognition and avoidance of unsafe conditions and
26 the regulations applicable to his work environment
27 to control or eliminate any hazard or other
28 exposure to illness or injury:

29 Complainant alleged the employer did not provide adequate
30 instruction for an employee operating a Terex Reedrill model 330 Auger
31 Drill in the recognition and avoidance of unsafe conditions and the

1 regulations applicable to performing work to excavate in areas where
2 underground installations could be encountered or how they could be
3 avoided. The employee was unaware of the significance of a blue arrow
4 designating and underground water line that was in the direction of the
5 arrow and could be present up to the next marking as much as 50 feet
6 from the arrow. The operator drilled at this location striking a gas
7 line that had been improperly marked resulting in an uncontrolled
8 release of natural gas. A water line was 3.5 inches below the gas line.

9 The violation was classified as "Serious". The proposed penalty
10 for the alleged violation is in the amount of \$2,677.00.

11 Counsel for complainant and respondent stipulated to the admission
12 of evidence identified as complainant's Exhibits 1 and 2, and
13 respondent's Exhibits A and B.

14 Complainant presented testimony and documentary evidence to
15 establish the alleged violations. Compliance Safety and Health Officer
16 (CSHO) Christopher Carling testified as to his inspection and the
17 citations issued to the employer. Mr. Carling identified his inspection
18 and narrative report at Exhibit 1, pages 9-12 in evidence and referenced
19 same together with his testimony. On January 29, 2014 a respondent
20 employee operating drilling equipment struck a gas line at a job site
21 in the Reno Town Mall located in Reno, Nevada. The property owner
22 contracted with the American Sign & Crane Service ("American Sign") as
23 general contractor to install a sign and light post at a narrow island
24 of partially landscaped area between access roads leading into the Reno
25 Town Mall west of South Virginia Street in Reno, Nevada. American Sign
26 sub-contracted with the respondent Tholl Fence to drill a 2 foot
27 diameter hole approximately 9 feet deep to accommodate the sign post.
28 American Sign made a call to the USA North's "Call before You Dig"

1 service on January 24, 2014. The Truckee Meadows Water Authority
2 ("Truckee Meadows") performed water utility location services on January
3 27, 2014 and issued a "dig ticket" approving the excavation work. An
4 additional request was sent by American Sign to NV Energy which then
5 contracted with ELM Locating and Utility Service also perform utility
6 location services. The utility location area was marked on the soil,
7 asphalt and curbs with paint colorations as depicted in the photographs
8 stipulated in evidence at Exhibit 1, pages 51 through 61. The
9 respondent employee equipment operator, Mr. Darrell Frederick
10 (Frederick), reported he did not see the "dig ticket", and was unaware
11 of any utility locations other than the markings on the ground curb and
12 asphalt.

13 On the morning of January 20, 2014, Mr. Frederick and American Sign
14 president John Wozniak (Wozniak) met at the job site before commencement
15 of the digging work. Mr. Wozniak reported he and Mr. Frederick noted
16 the markings on the ground area for the gas line and opened manholes to
17 personally evaluate the location of all utilities. They agreed the
18 markings showing the gas line locations were 3 or 4 feet from American
19 Sign selected for the sign post hole to be dug. Mr. Wozniak informed
20 Mr. Frederick on January 28, 2014 that he "hand dug" at the location
21 marked for "hand digging" to determine the exact location of any water
22 line but found nothing. He noted the soil was previously disturbed so
23 advised Mr. Frederick to be "extra careful".

24 CSHO Carling identified the "dig ticket" at Exhibit 2, pages 62 and
25 63 stipulated in evidence. He testified that page 63 provided "the
26 island is full of water pipes and meter boxes hand dig only". Mr.
27 Carling further testified he was informed by Mr. Frederick that he
28 (Frederick) had not seen the dig ticket and was unaware of any utility

1 locations or indications other than the markings on the asphalt. When
2 Mr. Frederick commenced the digging operation, he relied on the markings
3 on the ground and advisories provided by American Sign president
4 Wozniak. He struck a 2 inch gas line causing a rupture and uncontrolled
5 release of natural gas. The gas did not ignite and was shut off during
6 the emergency repair response. A plastic water line located three and
7 one-half inches directly below the gas line was not struck by Mr.
8 Frederick. However during the repair response, the water line was
9 disturbed and began leaking which complicated the corrective action.

10 CSHO Carling testified in support of his issuance of a citation to
11 the respondent for violation at Item 1, as based upon Mr. Frederick's
12 failing to use a ". . . safe and acceptable means to determine the
13 **exact location** of the utility installations in violation of the
14 referenced OSHA standard." He explained that a ". . . safe and
15 acceptable means of determining the exact location of underground
16 utilities includes hand digging or the use of a vacuum truck . . . when
17 the operations approached the identified estimated locations of
18 underground utilities . . . made by the location companies, to meet the
19 specific terms of the standard . . .".

20 Mr. Carling testified on his understanding and interpretation of
21 the purpose and intent of the cited OSHA standard. He identified and
22 explained the industry requirements under the "Call Before You Dig"
23 protocol of the Common Ground Alliance and the information made
24 available by NV Energy. He referenced Nevada Revised Statutes (NRS) at
25 Chapter 455 governing excavations and high voltage lines. He identified
26 statutory summaries from his investigative report in evidence. The
27 report quoted subsection 1 of the statute to require "Except as
28 otherwise provided in subsection 2, the person **responsible for an**

1 **excavation** . . . shall, before using any mechanical equipment, determine
2 the **exact location** of a subsurface installation . . . affected by the
3 excavation . . . by excavating with hand tools or by any other method
4 agreed upon by the person **responsible for the excavation** . . . and **the**
5 **operator** with the approximate location of the subsurface installation
6 as designated by markings made in accordance with NRS 455.133 . . .".
7 (emphasis added)

8 Mr. Carling testified the gas lines were incorrectly marked by the
9 location service companies giving the equipment operator a reasonable,
10 but false, assumption there were no gas lines within 2 feet of the
11 designation on either side of the markings. Digging is considered safe
12 outside the 24 inches by the industry as a "zone of tolerance". He
13 testified the location of the water lines were designated by a blue
14 arrow and marked for "hand dig". Mr. Carling testified the visual
15 inspection performed by Messrs. Frederick and Wozniak before the digging
16 operations failed to take into proper consideration the "hand dig"
17 requirements indicated by the blue arrow for water line location. He
18 testified the respondent employer and operator did not determine the
19 "**exact location**" of underground utilities by "**safe and acceptable means**
20 . . . when the excavation operations approached the **estimated locations**
21 as indicated by the blue arrow water line markings and "hand dig only"
22 designations painted on the asphalt and noted in the dig ticket. He
23 further testified the hand digging performed and reported by Mr. Wozniak
24 was insufficient to identify the "**exact location**" of underground
25 installations to satisfy respondents compliance with the standard.
26 (emphasis added)

27 CSHO Carling testified with regard to the serious classification
28 and the potential injuries from the recognized hazards of explosion

1 and/or fire.

2 At Citation 1, Item 2, referencing 29 CFR 1926.21(b)(2), CSHO
3 Carling cited the employer for failing to provide adequate instructions
4 to its employee operating the auger digging equipment. He testified
5 equipment operator, Frederick, reported he had been trained by senior
6 employees and the Operating Engineer's Local 3. He identified himself
7 as a mechanic with backup operator duties and ". . . for months worked
8 continuously as an equipment operator." Mr. Carling testified employee
9 Frederick told him he had not received formal underground utility
10 training such as that provided by NV Energy or available from the Nevada
11 branch of the Common Ground Alliance. He determined Mr. Frederick had
12 not received "adequate instruction and recognition in avoidance of
13 unsafe conditions." Mr. Carling referenced the interview statement
14 provided at Exhibit 1, pages 14 through 17. He testified that while Mr.
15 Frederick was aware of the "tolerance zone" indicated by the markings
16 as consisting of 2 feet (24 inches) on both sides, he had not been
17 trained to understand the meaning of the blue arrow designation next to
18 the markings for hand digging. He concluded Mr. Frederick was
19 inadequately instructed or trained on recognition and avoidance of
20 unsafe conditions, nor instructed on the regulations applicable to his
21 work environment to control or eliminate hazards. He testified Mr.
22 Frederick and other employees on the worksite were exposed to the
23 recognized hazards from striking underground utilities with powered
24 equipment under circumstances where hand digging or other safe means
25 were required.

26 On cross-examination CSHO Carling testified there was no OSHA
27 requirement for Mr. Frederick to take NV Energy, Common Ground Alliance,
28 or other training courses. He further testified Mr. Frederick was a

1 journeyman employee so there was no requirement he work under a
2 supervisor. Mr. Carling admitted he did not observe the excavation
3 while it was open or in damaged condition, but rather inspected the site
4 and conducted his investigation the day after the incident when the line
5 had been repaired and area backfilled. He testified there was no
6 requirement for hand digging if the utilities were located outside the
7 tolerance zone which he described as 2 feet or 24 inches on each side
8 of the estimated utility site locations. He testified there would be
9 no potential or basis to cite for serious injury if the more shallower
10 water line had been hit compared to the gas line strike which could
11 result in serious injury or death from an explosion or fire. Mr.
12 Carling testified his interpretation of the standard is that the
13 respondent employer, through its operator, cannot rely on the markings
14 or instructions made by others but must personally determine the "**exact**
15 **location** . . . of the utilities . . .".

16 On continued cross-examination with regard to training, CSHO
17 Carling testified the responses and interview statements provided by Mr.
18 Frederick were inadequate to support evidence of training or
19 instructions on the safety requirements of the standard. Mr. Frederick
20 did not understand what he needed to do when approaching the location
21 of underground utilities during a dig. The designations for "hand dig
22 only" were to be strictly followed by the equipment operator. The
23 standard does not permit ". . . complete reliance on determinations made
24 by others."

25 On redirect examination, Mr. Carling testified that had Mr.
26 Frederick called appropriate authorities and obtained a copy of the "dig
27 ticket" he would have known there were ". . . lots of lines in the
28 island dig location . . . and realized hand digging was required." CSHO

1 Carling further testified ". . . applicable Nevada statutes require only
2 an estimate of utility locations but the OSHA standard requires finding
3 the exact location . . .". He testified the OSHA interpretation of the
4 standard, notwithstanding the utility company's marked estimate of line
5 locations and advice of the general contractor or any others, is that
6 ". . . the operator performing the dig must himself find the exact
7 location . . .".

8 At conclusion of the complainant evidence and testimony, counsel
9 for respondent presented the defense.

10 Mr. Darrell Frederick identified himself as the mechanic/operator
11 employee of respondent involved in the citations. He met with Mr.
12 Wozniak before commencing the digging. Mr. Wozniak informed him that
13 he personally hand dug the area and found nothing within 2 foot (24
14 inches) of the marked locations and told it was okay to dig. Mr.
15 Wozniak advised him to be careful because nothing was found in the
16 designated location areas. He testified that he proceeded carefully but
17 struck the gas line. Mr. Frederick testified that he broke the gas line
18 at a depth of about 2-1/2 feet, but observed no water line below or near
19 the gas line. He testified the areas marked by the utility location
20 services are recognized in the industry and followed by him and any
21 companies performing digging type services. He was trained by OSHA,
22 MSHA, his union and other operators on how to read the markings made by
23 utility service companies. He dug approximately "30,000 holes . . . and
24 never struck a utility line . . .". The respondent safety rules permit
25 mechanical digging in the tolerance zone, and he understood when hand
26 digging was required. He relied on Mr. Wozniak's advice that no
27 additional hand digging was required. He testified on his belief that
28 the incident occurred due to mistake markings by the companies

1 conducting the location service examination.

2 Mr. Frederick questioned the testimony of CSHO Carling that he did
3 not know what the blue arrows meant, and testified he understood the
4 markings and arrows. He again referenced his extensive experience in
5 digging without striking utilities and reviewed his background and
6 training in the industry as an operator performing the subject work
7 including reading markings provided by utility service companies.

8 On cross-examination Mr. Frederick testified he had never seen the
9 dig ticket at Exhibit 2, page 63. He explained that had he read the
10 information in the dig ticket reflecting the island area subject of the
11 dig was ". . . full of utility lines, (he) would not have proceeded with
12 the mechanical digging in the overall area . . .". He also testified
13 that based upon my training "I thought it was the responsibility of the
14 contractor (American Sign) . . . to determine the exact location of
15 underground utilities . . .".

16 On redirect examination, Mr. Frederick testified he ". . . never
17 makes underground utility line locations . . . (and) instructed by his
18 supervisors that it is the contractor's . . . job . . . (he) proceeds
19 to dig as instructed and based upon the markings . . .". He further
20 testified that he uses his experience and judgment when "approaching"
21 estimated location areas and if he finds there to be something unusual
22 he either proceeds very carefully and slowly with his mechanical
23 operation or would refuse to do the work.

24 Mr. Steven Applebaum identified himself as the president of
25 respondent and described the company operations. He referenced a
26 "customer dig" as an order for subcontractor work and includes a
27 requirement the customer obtain the underground line locations from the
28 professional service companies. He further testified the respondent

1 does not typically locate lines although operators are trained in
2 locating underground utilities. Mr. Applebaum testified company
3 operator training is provided by OSHA, MSHA, the union, in-house
4 discussions, tailgate meetings and from professional trainer services.
5 He described the company "call before you dig" compliance policy and the
6 added training provided to operator/employees directly from NV Energy
7 trainers who instruct on line location and digging operations. He
8 testified ". . . line location is encountered on a daily basis . . . and
9 employees are trained appropriately". Respondent has never before been
10 cited for failure to locate lines, but hit lines from time to time when
11 mismarked by the location companies.

12 On cross-examination, Mr. Applebaum responded to questions on how
13 he ensures subcontracted customer digs are compliant with underground
14 digging protocols. He testified the company assures customers employ
15 a recognized location company, mark the ground in appropriate areas and
16 be in possession of a "dig ticket" from the utility company. He further
17 testified that if respondent contracts directly with a land owner and
18 therefore solely responsible for performing a dig then he obtains the
19 dig ticket and advises the operators of the findings. Employees are
20 instructed to observe the ground markings and assume they are correct
21 using their knowledge and experience rather than personally perform
22 exact utility locations.

23 At the conclusion of evidence and testimony, complainant presented
24 closing argument. Counsel asserted the basis for the violation to be
25 respondent and operator employee failure to do nothing more than show
26 up and dig a hole in complete reliance upon the statements of the
27 general contractor and what was marked on the ground. Counsel argued
28 the OSHA standard requires more. The equipment operator must verify the

1 "exact location" of the utilities rather than rely on the "estimates of
2 the utility location" rendered by the location service companies.
3 Counsel argued that had respondent or the operator simply looked at the
4 "dig ticket" that would have changed how the digging operation
5 proceeded. The operator testified that had he seen the dig ticket, he
6 would not have dug as instructed. Mr. Frederick testified the soil was
7 disturbed, he knew American Sign only dug a small area, he hit something
8 at approximately 2 feet, but thought it was a rock so continued on and
9 ruptured the gas line. Dig ticket examination is a reasonable way to
10 comply and be safe under the OSHA standard. Both American Sign and
11 respondent, including its operator, had previous knowledge that areas
12 could be mismarked; yet they did nothing different to be safe as
13 required by the standard. Merely accepting a "strangers word that
14 everything is okay . . . is not enough to comply with the specific
15 requirement of the standard. "When excavation operators approach an
16 **estimated** location of underground installations, . . . the **exact**
17 location must be determined . . .".

18 Counsel asserted the citation for lack of compliance with
19 instructional training was established through the testimony of Mr.
20 Carling who reported the responses made by Mr. Frederick at the time of
21 the inspection. She asserted respondent could have easily used a vacuum
22 truck after Mr. Frederick noted disturbed soil, or hand dug the area and
23 been safe. However operator Frederick did not demonstrate sufficient
24 training to identify the unsafe conditions which would have resulted in
25 compliance.

26 Respondent presented closing argument. Counsel argued the standard
27 is indeed specific but there was no requirement respondent do what OSHA
28 claims by its citation making it incumbent upon an equipment operator

1 to determine the exact location of underground lines before commencing
2 mechanical digging in the tolerance zone. Nevada Revised Statutes
3 governs the industry and addresses the requirements of digging
4 companies, operators, and utility companies. It is the utility company
5 the law requires locate and mark its underground installations. That's
6 the burden under Nevada law. It requires only approximate estimated
7 locations, and defines an allowance at 24 inches outside either side as
8 a tolerance zone. There was no legal duty of the respondent to do more
9 when operating within the tolerance zone. It is not the respondent's
10 fault the area was mismarked, particularly because the general
11 contractor, Mr. Wozniak, assured he hand dug the area himself and found
12 it okay to commence the mechanical operations. The location companies
13 mismarked the line location and showed it well outside the tolerance
14 zone. Even the "hand-dig blue arrow" markups were erroneous, and would
15 have not prevented the incident. The recognized requirements of the
16 industry are clear under both NRS and the OSHA standard. Nevada Law
17 directs the utility company to estimate the locations and mark the site.
18 The estimated locations allow for an industry recognized defined
19 tolerance zone. Any "exact location" is to be determined by the general
20 contractor responsible for requiring the work, not the digging
21 subcontractor or its equipment operator. Here the utility location
22 markings were admitted by OSHA to be incorrect. When the operator
23 commenced work in the tolerance zone a strike occurred. The actual
24 location of the gas line was in the tolerance zone. The OSHA standard
25 cannot be interpreted in conflict with Nevada Revised Statutes to create
26 an additional burden on the respondent subcontractor and its equipment
27 operator.

28 At Citation 1, Item 2, counsel asserted there was no evidence that

1 Mr. Frederick was not trained or instructed. Mere interpretations of
2 interview responses by the CSHO with no supporting evidence cannot
3 establish a legal basis to find a violation. The sworn testimony of
4 both Messrs. Frederick and Applebaum confirmed Mr. Frederick was trained
5 and received appropriate instructions for the drilling operation work.
6 Mr. Frederick testified as to his experience and training for
7 recognition and avoidance of unsafe conditions and the regulations
8 applicable. Notwithstanding the assumptions made by CSHO Carling, Mr.
9 Frederick testified he knew what the blue arrows markings indicated and
10 that his digging operations put him in compliance with the 24 inch
11 tolerance zone. He had no reason to hand dig in the area based upon
12 both the markings and the advisories by general contractor Wozniak who
13 confirmed he had already performed the hand dig requirement prior to
14 commencement of the work. The testimony of Mr. Frederick was credible
15 and demonstrated to the board that he was appropriately trained.

16 In reviewing the facts, documents and testimony in evidence
17 together with the arguments of the parties the Board must measure same
18 against the established law developed under the Occupational Safety and
19 Health Act (OSHA), Code of Federal Regulations (CFR) and Nevada Revised
20 Statutes (NRS).

21 . . . All federal occupational safety and health
22 standards which the Secretary of Labor promulgates,
23 modifies or revokes, and any amendments thereto,
24 shall be deemed Nevada occupational safety and
25 health standards unless the Division, in accordance
26 with federal law, adopts regulations establishing
27 alternative standards that provide protection equal
28 to the protection provided by those federal
occupational safety and health standards. (NRS
618.295(8))

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

1 All facts forming the basis of a complaint must be
2 proved by a **preponderance of the evidence**. The
3 decision of the hearing examiner shall be based
4 upon a consideration of the whole record and shall
5 state all facts officially noticed and relied upon.
6 It shall be made on the basis of a preponderance of
7 reliable and probative evidence. 29 CFR 1905.27(b).
8 *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD
9 ¶16,958 (1973). *Olin Construction Company, Inc. v.*
10 *OSHARC and Peter J. Brennan, Secty of Labor*, 525
11 F.2d 464 (1975).

7 To prove a violation of a standard, the Secretary
8 must establish (1) the **applicability** of the
9 standard, (2) the existence of **noncomplying**
10 **conditions**, (3) **employee exposure** or access, and
11 (4) that the **employer knew** or with the exercise of
12 reasonable diligence could have known of the
13 violative condition. See *Belger Cartage Service,*
14 *Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
15 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
16 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC
17 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
18 (No. 76-1408, 1979); *American Wrecking Corp. v.*
19 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
20 2003). (emphasis added)

15 A respondent may rebut allegations by showing:

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

22 A "serious" violation is established upon a preponderance of
23 evidence in accordance with NRS 618.625(2) which provides in pertinent
24 part:

25 . . . a serious violation exists in a place of
26 employment if there is a **substantial probability**
27 **that death or serious physical harm could result**
28 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)

1 To sustain a serious violation at Citation 1, Item 1, complainant
2 must initially prove, among other elements, the existence of **non-**
3 **complying conditions** for which the **cited employer is responsible**. The
4 weight of evidence does not support a finding of violation.

5 This Board cannot reasonably interpret the cited standard, under
6 the facts in evidence, to require the equipment operator to personally
7 find the **exact location** of underground utilities. The terms of the
8 standard for "**safe and acceptable means**" of exact utilities location did
9 not place a special burden upon the equipment operator nor, without
10 other substantial evidence, the employer respondent. A reasonable
11 interpretation of the intent of the OSHA standard to assure safe and
12 acceptable means of exact utility locations includes consideration of
13 parallel Nevada law under Chapter 455 and recognition of industry
14 practice. The statutory scheme of the applicable Nevada Revised
15 Statutes and incorporated Federal OSHA regulations (standards) must be
16 interpreted together. Underground utility location is primarily
17 relegated to the utility providers or professional utility location
18 service companies. The intent of the law is to place responsibility on
19 the most knowledgeable centralized authority with the sophisticated
20 equipment needed to **safely** determine underground utility line locations.
21 Similarly, a general contractor in **control** of a **multi-employer** job site
22 and/or who **directs** subcontractor work has a particular duty under
23 established occupational safety and health law to assure compliant
24 worksite safety practices.

25 Industry policy, practice and statutory authority permit reliance
26 upon the most appropriate designated parties to analyze, review and
27 safely permit the vast number of digging operations and underground
28 excavations that occur throughout the state of Nevada on a daily basis.

1 The responsibilities of land owners, general contractors and
2 subcontractors are established, codified, defined through case law,
3 and/or industry recognized. Utility companies have the primary
4 responsibility in conjunction with general contractors (or land owner
5 if no contractor) in **control** of the work site to locate the underground
6 utilities and enable written excavation authorization from the utility
7 provider under a "dig ticket". The applicable law and recognized
8 industry practice, without substantial factual evidence to the contrary,
9 generally allows an equipment operator and his subcontractor employer
10 to reasonably rely upon utility service company ground markings **and**
11 **controlling** general contractor instructions.

12 Here the undisputed substantial evidence established numerous
13 location errors by the utility service company. The restrictive
14 notations for "hand digging" and other ground markings for the
15 underground utility locations were unequivocally misleading or
16 erroneous.

17 Credible testimonial evidence established the operator did not
18 simply proceed to mechanically dig without caution or care. After
19 noting the markings, operator Frederick met with Mr. Wozniak, the
20 general contractor representative in **control** of the job site and digging
21 work who informed him he hand dug the designated area and found nothing.
22 The respondent operator proceeded cautiously, as admonished by Mr.
23 Wozniak, demonstrating reasonableness and training. He performed his
24 mechanical digging operations in the non restricted areas of the defined
25 "tolerance zone".

26 There was no preponderant evidence upon which to find the
27 subcontractor respondent or operator employee could **reasonably foresee**
28 the utility location service company ground marking designations were

1 erroneous or the general contractor instructions incorrect.

2 The undisputed errors in the utility service company's markings,
3 and failure of **exact location** by the **controlling** general contractor who
4 authorized the operator to proceed with mechanical digging cannot here,
5 without preponderant evidence, create an added duty or liability upon
6 the operator or respondent subcontractor. The facts in evidence
7 established the project was a multi-employer worksite as defined through
8 occupational safety and health law.

9 A citation will be vacated if the cited
10 employer on a **multi-employer worksite**:

11 1. Did not create or control the allegedly
12 violative condition (such that it could not
13 realistically correct the condition); and

14 2. Either:

15 a. Took reasonable alternative protective
16 measures; or

17 b. Did not know, nor with the exercise of
18 reasonable diligence could have known, of the
19 *hazardousness* of the cited condition. *Dun-Par*
20 *Engineered Form Co. v. Marshall*, 676 F.2d
21 1333, 10 OSH Cases 1561 (10th Cir. 1982);
22 *Electric Smith Inv. v. Secretary of Labor*, 666
23 F.2d 1267, 10 OSH Cases 1329 (9th Cir. 1982);
24 *DeTrae Enters. Inc. v. Secretary of Labor*, 645
25 F.2d 103, 9 OSH Cases 1425 (2^d Cir. 1980);
26 *Bratton Corp. V. OSHRC*, 590 F2d 273, 7 OSH
27 Cases 1004 (8th Cir. 1979).

28 The Board notes that while it would appear prudent to require "dig
tickets" be reviewed and "signed off" by **all parties** involved in such
operations, it is not within the jurisdiction of this board to rewrite
the Federal OSHA standard, Nevada statutory law, or recognized industry
practices to expand enforcement parameters under a specific standard.

At Citation 1, Item 2, there was no preponderant evidence to
support a finding of violation for lack of instruction or training. The
Applebaum and Frederick testimony at the hearing was credible. Mr.

1 Carling's testimony was also credible; but reflected what he interpreted
2 as reported to him at the time of his brief inspection, on the day after
3 the incident. The CSHO testimony was not clear, convincing nor
4 corroborated. Without impeachment of the respondent witnesses
5 testimony, or preponderant evidence, credible sworn respondent witness
6 testimony must be given due weight. It is incumbent upon the
7 **complainant to meet the burden of proof to establish a violation.**

8 . . . The **Secretary's obligation** to demonstrate the
9 alleged violation by **a preponderance of the**
10 **reliable evidence** of record **requires more than**
11 **estimates, assumptions and inferences** . . . [t]he
12 Secretary's reliance on mere conjecture is
13 insufficient to prove a violation . . . [findings
14 must be based on] 'the kind of evidence on which
15 responsible persons are accustomed to rely in
16 serious affairs.' *William B. Hopke Co., Inc.*, 1982
17 OSAHRC LEXIS 302 *15, 10 BNA OSHC 1479 (No. 81-206,
18 19820 (ALJ) (citations omitted). (emphasis added)

14 When the Secretary has introduced evidence showing
15 the existence of a hazard in the workplace, the
16 employer may, of course, defend by showing that it
17 has taken **all necessary precautions to prevent the**
18 **occurrence of the violation.** *Western Mass. Elec.*
19 *Co.*, 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981).
20 (emphasis added)

18 The preponderant evidence demonstrates the respondent employer was
19 in compliance with terms of the standard.

20 The well established "**plain meaning rule**", requires this Board
21 review and interpret specific standards for violative conduct in
22 accordance with a **fair, reasonable and plain meaning.**

23 *Caminetti v. United States*, 242 U.S. 470, 485, 37
24 S.Ct. 192, 194, 61 L.Ed. 442 (1917) (citations
25 omitted). It is a long established rule that,
26 absent ambiguity, a statute's plain meaning
27 controls, and no further analysis is permitted.
28 *State Farm Mut. Auto. Ins. Co. v. Commissioner of*
Ins., 114 Nev. 535, 540, 958 P.2d 773, 736 (1998).

27 The board finds no preponderance of evidence to meet the burden of
28 proof to establish violations of the cited standards. The facts,

1 testimony and documentary evidence demonstrate the respondent was in
2 compliance with the applicable specific standards governing occupational
3 safety and health.

4 It is the decision of the Nevada Occupational Safety and Health
5 Review Board that no violations of Nevada Revised Statutes did occur as
6 to Citation 1, Item 1, 29 CFR 1910.651(b)(3) nor Citation 1, Item 2, 29
7 CFR 1926.21(b)(2). The violations, serious classifications and proposed
8 penalties are denied.

9 The Board directs the **Respondent, Tholl Fence, Inc.** to submit
10 proposed Findings of Fact and Conclusions of Law to the NEVADA
11 OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD and serve copies on opposing
12 counsel within twenty (20) days from date of decision. After five (5)
13 days time for filing any objection, the final Findings of Fact and
14 Conclusions of Law shall be submitted to the NEVADA OCCUPATIONAL SAFETY
15 AND HEALTH REVIEW BOARD by prevailing counsel. Service of the Findings
16 of Fact and Conclusions of Law signed by the Chairman of the NEVADA
17 OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD shall constitute the Final
18 Order of the BOARD.

19 DATED: This 18th day of February 2015.

20 NEVADA OCCUPATIONAL SAFETY AND HEALTH
21 REVIEW BOARD

22 By /s/
23 JOE ADAMS, Chairman