

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3  
4

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

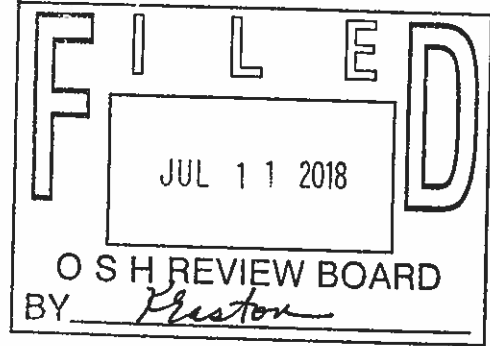
Docket No. LV 18-1912

Complainant,

vs.

11 BMC WEST, LLC, dba  
12 SELECTBUILD NEVADA, INC.,

Respondent,



13  
14 DECISION

15 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**  
16 **HEALTH REVIEW BOARD** at a hearing commenced on the 14<sup>th</sup> day of March  
17 2018, in furtherance of notice duly provided according to law, MS.  
18 SALLI ORTIZ, ESQ., counsel appearing on behalf of the Complainant,  
19 **Chief Administrative Officer of the Occupational Safety and Health**  
20 **Administration, Division of Industrial Relations (OSHA)**; and MR. RICK  
21 ROSKELLEY, ESQ., appearing on behalf of Respondent, **BMC West, LLC, dba**  
22 **Selectbuild Nevada, Inc., the NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
23 **REVIEW BOARD** finds as follows:

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

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

1 Citation 1, Item 2, charges a violation of 29 CFR 1926.452(c)(4),  
2 which provides:

3 29 CFR 1926.452(c)(4). Where uplift can occur  
4 which would displace scaffold end frames or  
5 panels, the frames or panels shall be locked  
6 together vertically by pins or equivalent means.

7 NVOSHA alleged:

8 On the southeast side of the Rockpointe jobsite,  
9 located at 10197 West Reno Avenue, #36, Las  
10 Vegas, NV 89148, employees were applying stucco  
11 to a new residence while working from a three-  
12 tiered fabricated frame scaffold that were (sic)  
13 not fully joined together vertically by pins or  
14 equivalent means. On the day of the inspection,  
15 wind gusts were approximately 31 mph contributing  
16 to potential uplift. The employees were exposed  
17 to a fall hazard of approximately 7 to 15 feet to  
18 the ground below, which could result in broken  
19 bones and up to death.

20 The violation is classified "Serious." The penalty proposed in  
21 the amount of FOUR THOUSAND FOUR HUNDRED DOLLARS (\$4,400.00).

22 Complainant and respondent stipulated to the admission of  
23 documentary evidence identified as complainant Exhibits 1 and 2; and  
24 respondent Exhibits identified as Tabs 1 through 11.

25 Both counsel waived opening statements.

26 FACTS

27 A referral inspection was conducted on or about February 23, 2017  
28 by NVOSHA which resulted in the issuance of Citation 1, Item 2 as  
referenced.

The essential facts providing the basis for the citation were  
undisputed. Two respondent employees were observed working from a  
three-tiered fabricated frame scaffold while applying stucco to a  
newly constructed residential home. The CSHO observed and  
photographed a lack of **locking pins** on scaffolding as depicted in  
photographic Exhibit 1, page 65, 72A, 73A, 74, 75 and 76. There were

1 no other trades on the site.

2 It was further undisputed that the referenced citation requires  
3 scaffold end frames or panels be locked together vertically by pins  
4 or equivalent means **only** where uplift can occur which would displace  
5 scaffold end frames or panels.

6 The CSHO determined there were wind gusts on the property of  
7 approximately 31 mph that contributed to a potential for uplift which  
8 required the use of **locking pins**. There were no other conditions  
9 referenced, alleged, or cited to cause potential uplift.

10 The respondent contends the cited standard does not specify wind  
11 or any other particular conditions which require a mandatory duty for  
12 an employer to "pin scaffolding." The sole criteria under the cited  
13 standard is that vertical pins or equivalent means shall be utilized  
14 **when an uplift can occur to cause displacement**. The respondent  
15 position is that neither wind nor any other conditions existed at the  
16 site to require pinning or any other equivalent means to protect  
17 employees because there was no potential of uplift. The respondent  
18 identified witnesses to testify in support of the position including  
19 the project safety manager and a scaffolding expert engineer.

20 The issue presented to the Review Board on this appeal is to  
21 determine whether there was preponderant evidence of wind or other  
22 contributing factors to require protection under the cited standard  
23 against a cause for uplift and potential displacement of the  
24 scaffolding. The cited standard 29 CFR 1926.452(c)(4) **does not**  
25 **specify** conditions for pinning, including winds. NVOSHA enforcement  
26 relegates scaffold pinning to a determination by the employer or  
27 through a qualified **competent person** as defined under occupational  
28 safety and health law.

DISCUSSION

1  
2 Counsel for the Chief Administrative Officer presented witness  
3 testimony and documentary evidence with regard to the alleged  
4 violations. Certified Safety and Health Officer (CSHO) Mr. Mark  
5 Nester, who conducted the inspection and reporting, is no longer  
6 employed by NVOSHES. Mr. Jamal Sayegh was identified as the OSHES  
7 supervisor who originally reviewed the evidence, citation process and  
8 now the responsible complainant witness to testify in support of the  
9 violation. He described his experience and background, including  
10 between 200 and 300 investigations; and one and one-half years as  
11 supervisor, overseeing between 150 and 200 cases. Mr. Sayegh  
12 identified complainant's Exhibits 1 and 2, stipulated in evidence and  
13 referenced the specific reportings and photographs during the course  
14 of his testimony.

15 At Citation 1, Item 2, Mr. Sayegh testified with specific  
16 reference to the inspection narrative report, violation worksheets and  
17 photographs. He referenced the CSHO narrative report at Exhibit 1,  
18 pages 15-17 and testified as to the inspection and findings. (Tr.  
19 page 23) At Exhibit 1, page 16 the CSHO reported finding a lack of  
20 scaffold **locking pins** "in some spots." The respondent foreman of  
21 scaffolding reported the company does not use pins everywhere (because  
22 of no uplift) but they do have locking pins in some spots. The CSHO  
23 report confirmed there were "no other trades on the site nor were  
24 there any employees working below the scaffold crew." Exhibit 1, page  
25 16.

26 Mr. Sayegh testified from Exhibit 1, page 28 identified as the  
27 violation worksheet for Citation 1, Item 2, 29 CFR 1926.452(c)(4).  
28 He described the basis for the classification of **Serious** and the

1 potential serious injuries or death that could result due to a fall  
2 from the scaffolding height. He confirmed **employer knowledge** through  
3 the supervisory personnel, specifically Mr. Ziul Bayardo, the company  
4 safety manager, who referenced there were no pins because there was  
5 "no uplift". (Exhibit 1, page 21) Mr. Sayegh referenced the interview  
6 statement at Exhibit 1, page 22 by foreman Mr. Marco Cruces,  
7 identified as a "**competent person**" in scaffold erection under  
8 occupational safety and health law. In support of the complainant  
9 burden of proof for employer knowledge, Mr. Sayegh testified from  
10 Exhibit 1, referencing pages 30-31. He noted at page 30, paragraph  
11 3, the foreman of scaffolding, Mr. Cruces, reported he was a **competent**  
12 **person** and checked everything and determined "we don't use pins  
13 everywhere - no uplift." Mr. Sayegh further confirmed at page 30 that  
14 the employer had actual and constructive knowledge based on the  
15 investigation interviews reflecting that foreman Mr. Mario Gomez, was  
16 working from the scaffolding where pins were not present; and as a  
17 supervisory employee foreman, has the authority to correct problems.

18 Mr. Sayegh testified the primary cause of the citation for uplift  
19 was based upon the inspector reporting 30 mph winds on the day of the  
20 inspection. Mr. Sayegh explained severity, probability and gravity  
21 factor to support the citation in accordance with the OSHES operations  
22 manual.

23 On cross-examination Mr. Sayegh testified there was no citation  
24 or allegation for anything other than wind to potentially cause uplift  
25 and displacement of the scaffolding. The CSHO did not report  
26 equipment operations near the scaffolding. He confirmed the only  
27 issue is wind sufficient to displace scaffolding without pins. He  
28 testified not all of the scaffolding was missing locking pins; and the

1 citation based only on the scaffolds observed and photographed by the  
2 CSHO. Mr. Sayegh explained the need of a force strong enough to lift  
3 the scaffolding out of position, referencing a dictionary definition  
4 for "displacement." He testified "stacking pins" were in place. He  
5 further testified that locking pins are not used everywhere, but only  
6 as required if conditions for uplift are found at the site.

7 Mr. Sayegh testified as to the "Safety Standards for Scaffolding  
8 in the Construction Industry" referencing respondent Tab 11, page 293,  
9 sections 3 and 4 regarding the use of locking pins. He testified that  
10 stacking pins are always required but not at issue because none were  
11 found to be missing in this case. He identified and testified as to  
12 Tab 11, page 240, as a final OSHA guidance rule. He reviewed Tab 11,  
13 page 267 from the OSHA guidance and testified it provides  
14 ". . .locking pins are only required where uplift forces are strong  
15 enough to displace the scaffolding . . . such as hoist use . . ." On  
16 questioning he responded that there is no reference to any guidance,  
17 rules or standards for wind as a cause for uplift and displacement.  
18 Tr. pages 40-41.

19 Counsel referenced Tab 11, page 258 as a different OSHA standard  
20 directing no work on scaffolds during storms or high winds unless a  
21 competent person determines its safe. Mr. Sayegh testified he agreed  
22 there is no problem for employee work on scaffold during wind as such,  
23 just needs competent person to okay. Tr. page 42.

24 On continued questioning as to evidence of wind, Mr. Sayegh  
25 responded to a question whether the evidence of wind speed was from  
26 an airport location approximately 15 miles from the construction site.  
27 Mr. Sayegh testified "correct." In referencing the graph at Exhibit  
28 1, page 37 Mr. Sayegh agreed it only shows wind at 20 mph. Mr. Sayegh

1 responded to a question from counsel that - there's no evidence of  
2 anything close to 31 mph at the job site. Mr. Sayegh testified he  
3 agreed.

4 Counsel referenced pictorial evidence at respondent's Tab 2 of  
5 the job site on the day of the inspection. He noted flags depicted  
6 around the subject work site property appeared to be standing still  
7 and asked whether - it looks as if there was no wind whatsoever. Mr.  
8 Sayegh responded "correct."

9 Counsel referenced Tab 2, pages 113 and 114, as photographs  
10 depicting maybe only a slight breeze, but the flags flat so there  
11 could be no potential for wind uplift. He asked: there are no flags  
12 standing so the CSHO had no showing of winds capable of displacement?  
13 Mr. Sayegh responded that "There is wind, that's all I can tell you  
14 by looking at the flag." When asked the question "OSHA provides no  
15 guidance on wind gust speed for uplift, does it?" Mr. Sayegh  
16 testified "no."

17 On further recross-examination, Mr. Sayegh was asked when the  
18 scaffolding is tied to the building, it gives it more strength against  
19 collapse; to which he testified "yes."

20 Mr. Sayegh confirmed there was no employer contest as to Citation  
21 1, Item 1.

22 Respondent offered witness testimony from Mr. Kent Barber who  
23 identified himself as a Nevada licensed structural engineer. He  
24 referenced Tab 9, his CV and qualification as an engineer expert for  
25 scaffolding. Mr. Barber testified there was a lack for potential  
26 uplift when planks are not tied to the scaffold structure unless  
27 speeds reach 64 mph. Tr. pages 73-74. He further testified there were  
28 no wind tests provided at the site by NVOSHA; rather only a weather

1 station cell phone reference for winds nearby. He testified from his  
2 investigation that the maximum wind on the day of the inspection was  
3 18 miles per hour, with maximum gusts of approximately 13 mph. He  
4 testified there was no evidence, nor could he find any report of winds  
5 at the job site on the day of the inspection to create a potential for  
6 uplift, or cause potential displacement of the scaffolding.

7 On cross-examination Mr. Barber testified the wind direction was  
8 not relevant.

9 Respondent offered witness testimony from Mr. Ziul Bayardo who  
10 identified himself as the safety manager for respondent. He explained  
11 his background, experience and qualifications for the position. Tr.  
12 pages 79-80. Mr. Bayardo testified on respondent employee training  
13 for scaffolding work and hazard recognition. He further testified the  
14 respondent position is that scaffolding must be pinned whenever  
15 employees use a hoist. The company has never had a previous citation  
16 for scaffolding violation, despite 16-17 years of operations. The job  
17 site was approximately 14 and one-half miles from the CSHO reported  
18 wind location on February 23, 2017. Mr. Bayardo testified he  
19 performed an inspection on the scaffolding on the same day as the CSHO  
20 investigation. He testified on the subject day there was no problem  
21 wind at the job site. Mr. Bayardo testified that based on his  
22 experience of 15-17 years in the industry, locking pins are only  
23 needed if there's a possibility of uplift and in his opinion it would  
24 have to exceed 20 mph, or be caused by other equipment contacting the  
25 scaffolding. He further responded to questions that if the wind was  
26 substantial on that date, the CSHO would have directed the employees  
27 come down from the scaffolding. Tr. pages 89-90.

28 On continued direct examination, Mr. Bayardo testified the



1 pictorial exhibits depicted the flags around the project showed no  
2 evidence of wind.

3 Respondent offered witness testimony from Mr. Luke Griffis who  
4 identified himself as a licensed Nevada professional engineer expert  
5 in scaffolding. He testified as to respondent Tab 11, page 293, and  
6 explained locking pins or equivalent means are only required to  
7 prevent uplift. He further testified the standard does not list  
8 specific conditions or requirements for the use of locking pins; and  
9 that OSHA relies on the opinion of a qualified **competent person**  
10 trained to identify anything that might cause or contribute to an  
11 uplift. He further testified that OSHA does not require locking pins  
12 on all scaffolds. He responded to a question as to ". . . would it  
13 be physically possible for a wind gust of 31 miles per hour to create  
14 an uplift in this scaffolding? Mr. Griffis answered "no." Tr. pages  
15 105-106.

#### 16 APPLICABLE LAW

17 The Board is required to review the evidence and recognized legal  
18 elements to prove violations under established occupational safety and  
19 health law.

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

22 NAC 618.788 (NRS 618.295) In all proceedings  
23 commenced by the filing of a notice of contest,  
the burden of proof rests with the Chief.

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

26 NRS 233B(2) "Preponderance of evidence" means  
27 evidence that enables a trier of fact to  
28 determine that the existence of the contested  
fact is more probable than the nonexistence of

1 the contested fact.

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

16 A respondent may rebut allegations by showing:

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

23 NRS 618.625 provides in pertinent part:

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

A "**competent person**" is defined as "one who is  
capable of identifying existing and predictable  
hazards in the surroundings or working conditions  
which are unsanitary, hazardous, or dangerous to  
employees, and who has authorization to take  
prompt corrective measures to eliminate them" [29  
CFR 1926.32(f)].

29 The **burden of proof** to confirm a violation rests with OSHA under  
30 Nevada law (NAC 618.788(1)); but after establishing same, **the burden**  
31 **shifts to the respondent to prove any recognized defenses**. See *Jensen*  
32 *Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶ 23,664 (1979). Accord,

1 Marson Corp., 10 OHSHC 2128, 1980 OSHC 1045 ¶ 24,174 (1980).

2 The Board in reviewing the facts, documentation, testimony and  
3 other evidence must measure same against the established applicable  
4 law developed under the Occupational Safety & Health Act.

5 ANALYSIS

6 At Citation 1, Item 2, referencing 29 CFR 1926.452(c)(4), the  
7 Board finds the complainant did not meet the required burden of proof  
8 under occupational safety and health law to establish a violation.  
9 The undisputed photographic and factual evidence reflected the  
10 respondent did not equip some of its scaffolding with **locking pins** on  
11 the day of the inspection. The further undisputed evidence is that  
12 the standard does not provide specific criteria or conditions as to  
13 when locking pins are required. The testimony and evidence from both  
14 complainant and respondent witnesses support the employer position  
15 that requirement for utilizing locking pins is left to determination  
16 made only when conditions reflect a potential for "uplift and  
17 displacement." The causes for providing locking pins or other  
18 equipment protection to the scaffolding are subject of decision by  
19 qualified individuals recognized as **competent persons** under  
20 occupational safety and health law. Here the evidence and testimony  
21 clearly established that some of the recognized conditions considered  
22 for requiring the use of locking pins on scaffolding include, but are  
23 not limited to, using a hoist to lift materials to the scaffold,  
24 relying on a forklift to operate near the scaffolding to lift  
25 materials to the operating platform when employees are working, and  
26 various other conditions. The preponderant evidence and testimony  
27 reflect consideration of wind as a potential factor for uplift, would  
28 be limited to only extremely high velocities. The citation and

1 allegation reflect there was only one condition upon which the  
2 citation was based, namely a wind determined by the CSHO to be at  
3 approximately 31 mph. However there was no **competent evidence that**  
4 **any wind existed at the job site on the day of the inspection.** The  
5 CSHO relied upon a telephone "app" for weather reporting at an airport  
6 facility approximately 15 miles from the job site. The undisputed  
7 pictorial evidence provided by respondent at Tab 2, demonstrates  
8 several advertisement flags on poles at the project were flat or limp  
9 to support respondent witness testimony that there was no wind at the  
10 job site on the day of the inspection.

11 Professional engineer expert witness Griffis testified the  
12 standard does not specifically require uplift protection from winds  
13 nor does it require locking pins utilized on all scaffolding. The  
14 company safety representative testified there was no wind issue at the  
15 job site on the day of inspection. The existent company safety policy  
16 is for employees not to work from scaffolding if winds reached even  
17 approximately 20 mph. Respondent simply did not use locking pins on  
18 the scaffolding because there were no wind or other conditions  
19 presented. The complainant did not offer competent evidence of any  
20 wind velocity nor at the 31 mph alleged in the citation. The  
21 unconfirmed cell phone weather report was neither competent,  
22 compelling, nor preponderant upon which this Board could rely to  
23 support a violation. Further, the CSHO wind report was not credible  
24 given the complainant's own photographs at Exhibit 1, pages 69 and 69A  
25 showing flags hanging down.

26 Notably, in this case, the construction site was not classified  
27 as a **multi-employer work site.** With such classification, the Review  
28 Board has recognized competent evidence of additional potential causes

1 for uplift. These include, but not limited to, equipment operated by  
2 other employer employees in proximity to the scaffolding. Such multi-  
3 employer/employee conduct could potentially result in a strike to the  
4 scaffold and cause uplift. Depending upon the work site facts and  
5 conditions, multi-employer/employee presence on a work site could  
6 warrant required use of locking pins. Here there was **no multi-  
7 employer/employee evidence to require utilization of locking pins.**

8 Without preponderant evidence to prove each required element for  
9 the burden of proof, notably the existence of non-complying  
10 conditions, and employee exposure or access to hazardous conditions,  
11 there can be no violation.

12 The Board concludes, based upon the evidence as a matter of fact  
13 and law, the cited violation at Citation 1, Item 2 must be dismissed  
14 based upon a failure of preponderant evidence to meet the statutory  
15 burden of proof to establish the cited violation. Further, the  
16 preponderant evidence offered by respondent confirmed the work site  
17 was in compliance.

18 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
19 **REVIEW BOARD** that no violation of Nevada Revised Statutes did occur  
20 as to Citation 1, Item 2, 29 CFR 1926.452(d)(4), and the proposed  
21 classification and penalty denied.

22 The Board directs counsel for the **Respondent**, Chief  
23 Administrative Officer of the Occupational Safety and Health  
24 Administration, to submit proposed Findings of Fact and Conclusions  
25 of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and  
26 serve copies on opposing counsel within twenty (20) days from date of  
27 decision. After five (5) days time for filing any objection, the  
28 final Findings of Fact and Conclusions of Law shall be submitted to

1 the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD by prevailing  
2 counsel. Service of the Findings of Fact and Conclusions of Law  
3 signed by the Chairman of the NEVADA OCCUPATIONAL SAFETY AND HEALTH  
4 REVIEW BOARD shall constitute the Final Order of the BOARD.

5 DATED: This 29 day of June 2018.

6 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
7 REVIEW BOARD

8 By:   
9 STEVE INGERSOLL, CHAIRMAN

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28