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RICHARD G. CAMPBELL, JR.
Nevada Bar No. 1832
KAEMPFER CROWELL
50 West Liberty St., Suite 700
Reno, Nevada 89501
Telephone: (775) 852-3900
Facsimile: (775) 327-2011
Email: rcampbell@kcnvlaw.com

Attorney for Petitioner PELICAN, LLC

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PELICAN, LLC,

Petitioner,

vs.

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

Respondent.

Case No.: CV18-01776

Dept.: 15

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the above-entitled Court entered an **ORDER AFTER HEARING** on the 24th day of June, 2019. A copy of said Order is attached hereto and made a part hereof.

DATED this 8th day of July, 2019.

KAEMPFER CROWELL
By:/s/ *Richard G. Campbell, Jr.*
RICHARD G. CAMPBELL, JR. (SBN 1832)
50 West Liberty St., Suite 700
Reno, Nevada 89501
Telephone: (775) 852-3900
Email: rcampbell@kcnvlaw.com
Attorney for Petitioner PELICAN, LLC

KAEMPFER CROWELL
50 West Liberty Street, Suite 700
Reno, Nevada 89501

CERTIFICATE OF SERVICE

I certify that I am an employee of Kaempfer Crowell, I am over the age of 18 and on July 8, 2019, I electronically filed the foregoing **NOTICE OF ENTRY OF ORDER** with the Clerk of this Court by using the ECF system which will send a notice of electronic filing to the following interested parties:

Salli Ortiz, Division Counsel
State of Nevada
Department of Business and Industry Division of Industrial Relations

Donald C. Smith, Senior Division Counsel
State of Nevada
Department of Business and Industry Division of Industrial Relations

Further, I certify that I served the foregoing on the party identified below, by placing an original or true copy thereof in a sealed envelope, postage prepaid, and placed for collection and mailing in the United States Mail at Reno, Nevada on July 8, 2019, addressed as follows:

Charles R. Zeh, Esq.
Law Offices of Charles R. Zeh
50 W. Liberty Street, Suite 950
Reno, NV 89501
Attorneys for Nevada Occupational Safety and Health Review Board

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 8th day of July, 2019.

/s/ Cheryl F. Brimm
An employee of Kaempfer Crowell

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Jacqueline Bryant
Clerk of the Court
Transaction # 7336356

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PELICAN, LLC,

Petitioner,

vs.

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

Respondents.

_______________________________________/

Case No. CV18-01776

Dept. No. 15

ORDER AFTER HEARING

Before this Court is Petitioner Pelican, LLC's ("Pelican") Petition for Judicial Review of a final order of the Nevada Occupational Safety and Health Review Board ("Review Board"). On April 26, 2019, this Court heard oral arguments. This Court has reviewed the record of appeal and all moving papers as well as the arguments made during the hearing; it now finds and orders as follows:

I. Relevant Facts and Procedural History

Pelican is a limited liability company with offices in Reno, Nevada. Pelican owns and operates an apartment complex known as Bella Largo Apartments, located at 1600 Airport Road, Carson City, Nevada. In 2016, Pelican began a construction project to build

additional units on the existing Bella Largo complex. Pelican managing member, Behrouz Ben Farahi, was involved in property management for Bella Largo and was the general contractor for construction of the new apartments.

At all times relevant to the present matter, Pelican was a contractor licensed by the Nevada State Contractor's Board, with a classification of "general building." Mr. Farahi is the qualified manager for purposes of Pelican's contractor's license.

On August 25, 2015, Pelican hired ADL Construction, Inc. ("ADL") as a subcontractor to complete framing and installation of windows for the Bella Largo construction project. ADL agreed to "furnish all services, labor, supervision, materials, tools, equipment, supplies, applicable taxes and anything else necessary to perform" the required framing and installation. In its subcontractor agreement with Pelican, ADL also acknowledged it would "be responsible for jobsite requirements," including "minimum safety standards" as defined by the Occupational Health and Safety Administration (OSHA). Should ADL violate such safety requirements, the agreement provided Pelican "may immediately issue a stop work order and require that [ADL] immediately cause its employee who violated the requirement to be removed from the jobsite."

On November 2, 2016, Nevada OSHA ("NV OSHA") initiated an inspection of the Bella Largo construction worksite based upon an anonymous report of safety violations by ADL. Robert Gillings, a Safety Specialist for NV OSHA, performed the inspection. During his walkthrough of the worksite, Mr. Gillings observed three extension cords plugged into a four-plex electrical outlet located in the laundry room of an existing apartment building, from which ADL workers were powering their tools. They were not using a ground fault circuit interrupter (GFCI) or an assured grounding conductor program with the extension cords, creating an increased risk of fire and electrocution. In addition, Mr. Gillings noted the extension cords extended across an active driveway, requiring vehicles to drive over them and exposing them to damage.

Mr. Gillings interviewed ADL employees regarding the extension cords. They indicated the cords had been plugged into the laundry room for approximately one

month. ADL foreman Luis Perez stated ADL had requested Mr. Farahi supply a generator to provide electrical power for the construction project. However, Mr. Farahi responded he did not want to rent a generator and instructed ADL to run any electrical cords across the parking lot to the laundry room. ADL owner Alfonzo Martinez confirmed he was provided with similar instructions from Mr. Farahi.

Mr. Gillings interviewed Mr. Farahi both during his inspection walkthrough and during a subsequent closing conference on November 29, 2016. During the walkthrough, Mr. Farahi indicated he visited the worksite every day for approximately two to three hours at a time. During both interviews, Mr. Farahi stated all subcontractors were in charge of their own safety. While Mr. Farahi had the authority to stop work in the event of a safety violation, he relied on subcontractors to "control their own areas." During the Review Board hearing, Mr. Farahi testified ADL requested he supply them with a generator to power their tools.[1] However, he stated ADL did not articulate any concern about a potential safety hazard when he instructed them to plug extension cords into an existing apartment. Further, he testified he was not personally aware such use of extension cords might pose a safety hazard.

On January 12, 2017, NV OSHA issued a Citation and Notification of Penalty, citing Pelican for violations of 29 CFR 1926.404(b)(1)(i) and 29 CFR 1926.405(a)(2)(ii)(I). Both violations were classified as serious, and resulted in a total penalty of $3,000.00. On February 3, 2017, Pelican contested the citation. On February 27, 2017, NV OSHA filed a complaint with the Review Board, which Pelican answered.

A hearing was held before the Review Board on November 8, 2017. NV OSHA presented the testimony of Mr. Gillings, NV OSHA Safety Supervisor Jake La France, and Bella Largo Owner Representative Israel Tellez. It also offered photographs of the alleged violations as exhibits. Pelican presented testimony of Mr. Farahi. On January 18, 2018, the

[1] Mr. Farahi initially testified ADL employees asked him for "power," but never specifically requested a generator. However, on cross-examination, he clarified, "they said we needed more power, and I said we have it in these locations. They said we would like to get a generator here because we get more power. And I said no, we have all these other power sources you can go to."

Review Board confirmed the citations and approved the total penalty of $3,000.00. On August 14, 2018, the Review Board filed its Findings of Fact, Conclusions of Law and Final Order.

On August 29, 2018, Pelican filed the present Petition for Judicial Review. Pelican challenged the Review Board's final order, arguing it was made upon unlawful procedure; affected by errors of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the record; and arbitrary and capricious or characterized by abuse of discretion. Its two primary arguments in support of these bases were that the evidence on record failed to support the conclusions that Pelican: (1) was a controlling employer; and (2) had the requisite knowledge of the cited OSHA violations.

II. Principles of Law and Analysis

Standard of Review

A party to an administrative proceeding who is aggrieved by the final decision of an agency in a contested case is entitled to judicial review of the decision. See NRS 233B.130(1). Judicial review of a final decision of an agency must be confined to the record. NRS 233B.135(1)(b). The burden of proof is on the party attacking or resisting the decision to show it is invalid. NRS 233B.135(2). The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced for any reason set forth in NRS 233B.135(3)(a)-(f). The central question for the court is "whether the [administrative] board's decision was based on substantial evidence." State Indus. Ins. System v. Kweiss, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992) (quoting State, Emp. Sec. Dep't v. Weber, 100 Nev. 121, 124, 676 P.2d 1318, 1320 (1984)). Substantial evidence is that "which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4).

Application of OSHA Regulations Under Nevada Law

"Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and the only way a State may regulate OSHA-regulated occupational safety and health issues is pursuant to an approved state plan that displaces

the federal standards." Gade v. Nat'l. Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 99 (1992). Nevada has such an approved state OSHA plan, which adopts federal OSHA standards contained within 29 CFR § 1926. See NRS 618.005-990. This includes installation safety requirements for electrical wiring during construction. See 29 CFR § 1926.402-408.

Following an inspection or investigation, NV OSHA may issue a citation to an employer for a violation of OSHA standards. NRS 618.465. A serious violation is warranted if there is "a substantial probability that death or serious harm could result . . . unless the employer did not and could not, with exercise of reasonable diligence, know of the presence of the violation." NRS 618.625(2).

NV OSHA carries the burden of proof in demonstrating a violation of OSHA law. NAC 618.788. To prove a citable violation occurred, NV OSHA must establish by a preponderance of the evidence: (1) the applicability of the OSHA regulation; (2) noncompliance with the OSHA regulation; (3) employee exposure to a hazardous condition; and (4) the employer's actual or constructive knowledge of the violative conduct. Original Roofing Co., LLC v. Chief Admin. Officer of OSHA, 135 Nev., Adv. Op. 18, 2019 WL 2397628, at *2 (Nev. June 6, 2019); see also Astra Pharmaceutical Prods., 9 BNA OSHC 2126, 1981 CCH OSHD P25578 (No. 78-6247, 1981).

Multi-Employer Worksite Doctrine

Pelican argues it does not qualify as a "controlling employer" under the multi-employer worksite doctrine. Because employer classification on a multi-employer worksite determines whether OSHA citation is permissible and sets the applicable standard of care, this is a threshold issue.

Federal statute and case law recognize the multi-employer worksite doctrine to determine if citation for an OSHA violation is appropriate where more than one employer may be citable for a hazardous condition. See Solis v. Summit Contractors, Inc., 558 F.3d 815 (8th Cir, 2009); Universal Const. Co., Inc. v. Occupational Safety and Health Review Com'n, 182 F.3d 726 (10th Cir. 1999); see also 29 U.S.C. § 654(a)(2). Under the multi-employer worksite doctrine, the role of the employer determines its obligations. OSHA

Instruction CPL 02-00-124, ¶ X.A (Dec. 10, 1999). If the employer is not a creating, exposing, correcting, or controlling employer, it is not citable for a condition hazardous to another employer's employees. Id.

A controlling employer is an employer who has general supervisory authority over the worksite, including "the power to correct safety and health violations itself or require others to correct them." Id. at X.E.1. Control can be established by contract or by exercise of control in practice. Id. Control established by contract "can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers." Id. at X.E.5.a.

Pelican argues it drafted its contracts with subcontractors, including ADL, to explicitly limit its responsibility to identify safety concerns. Specifically, it noted a general contractor such as Mr. Farahi cannot reasonably be expected to know the regulations applicable to the many specialties practiced by its subcontractors. Courts have addressed this concern but nonetheless continued to apply the multi-employer worksite doctrine:

> Although a general contractor plays a role in setting safety standards at worksites, OSHA is an intricate and function-specific regulatory regime such that each employer on a worksite may be uniquely situated to know of the very specific regulatory requirements affecting its particular trade. Therefore, the controlling employer citation policy places an enormous responsibility on a general contractor to monitor all employees and all aspects of a worksite. However, these policy concerns should be addressed to Congress or to the Secretary and not to the courts.

Solis, 558 F.3d 815, 829.

The subcontractor agreement between Pelican and ADL required ADL to "acknowledge that it will fully adhere to all Safety Requirements" and "adhere to relevant safety direction." In addition, the agreement stated ADL was responsible for all jobsite requirements, including "minimum safety standards," as defined by OSHA. Thus, this contract provided Pelican with the right to require ADL to adhere to safety and health requirements. Further, if Pelican identified a violation, the agreement provided it "may

1 immediately issue a stop work order and require that [ADL] immediately cause its
2 employee who violated the requirement to be removed from the jobsite." If the offending
3 employee was not removed, Pelican was given the authority to immediately terminate the
4 subcontract. Thus, Pelican also had the power to require ADL to correct any safety
5 violations. This contractual relationship was confirmed by Mr. Farahi's testimony that "if
6 we see something wrong, we point it out to [ADL] and expect them to fix it." As such, the
7 Review Board's conclusion that Pelican met the definition of a controlling employer was
8 supported by substantial evidence. Pelican is within the class of employers that may be
9 cited for a violation of OSHA standards hazardous to ADL employees.

10 Knowledge of Violative Conduct

11 The parties generally agree NV OSHA established the first three elements of a
12 violation of OSHA law. First, 29 CFR 1926.404(b)(1)(i) and 29 CFR 1926.405(a)(2)(ii)(I)
13 applied to Pelican and ADL's construction activities. Second, they failed to comply with
14 these regulations by running extension cords across an active driveway and plugging
15 them into the laundry room outlet without a GFCI or assured grounding conductor
16 program. Finally, ADL employees using the extension cords to power their tools were
17 exposed to a hazardous condition as a result of these activities. Therefore, the primary
18 issue before this Court is whether the Review Board erred in finding Pelican had
19 knowledge of these violations. While Pelican acknowledges Mr. Farahi was aware of
20 ADL's use of the extension cords, it maintains it did not have the requisite knowledge that
21 these conditions constituted violations of OSHA standards. Further, Pelican argues NV
22 OSHA failed to show Mr. Farahi or Pelican had the technical skill or experience with
23 electrical matters to foresee such use of extension cords would create a safety hazard.

24 Employer knowledge is established by demonstrating "the employer either knew,
25 or with the exercise of reasonable diligence, could have known of the presence of the
26 violative condition." Original Roofing, 2019 WL 2397628, at *2 (quoting Pride Oil Well
27 Serv., 15 BNA OSHC 1809, 1992 CCH OSHD P29807 (No. 87-692, 1992)). An employer's
28 exercise of reasonable diligence includes the obligation to anticipate potential hazardous

conditions, take measures to prevent those conditions, and to inspect worksites. Id. As with a single employer, a controlling employer must exercise reasonable care to prevent and detect violations on a worksite. OSHA Instruction, at X.E.2. However, the extent of the measures the controlling employer must implement is less than what is required of an employer to protect its own employees. Id. at X.E.3. In determining whether a controlling employer has exercised reasonable care in discovering violations, a fact finder may consider whether the controlling employer: (1) conducted periodic inspections of appropriate frequency; (2) implemented an effective system for promptly correcting hazards; and (3) enforced the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections. Id. at X.E.4.

Pelican argues the text of NRS 618.625, which sets forth the requirements for a serious citation, necessarily requires knowledge that a condition is a safety issue or a violation of OSHA standards, rather than just knowledge of the facts underlying the violation. However, a plain reading of the statutory language belies this analysis. NRS 618.625 states an employer may not be issued a serious violation unless the employer could, with the exercise of reasonable diligence, "know of the presence of the violation." The word presence designates physical existence or location in a place or thing. See e.g. Phillips v. State, 99 Nev. 693, 695, 669 P.2d 706, 707 (1983). Thus, the requirement that an employer know the presence of a violation necessitates knowledge of a tangible condition. Presence does not imply the more abstract legal status of that condition.

The comparison of a serious violation to a willful violation of OSHA standards is also instructive. While a willful violation is not defined by Nevada statute, the Nevada Supreme Court has drawn upon federal case law defining what constitutes a willful violation. See Century Steel, Inc. v. State, Div. of Idus. Relations, 122 Nev. 584, 589-90, 137 P.3d 1155, 1159 (2006). Whether a violation is willful is a fact-sensitive inquiry which considers, in relevant part, "if the action is taken with either intentional disregard of or plain indifference to the relevant safety requirements." Id. at 593, 137 P.3d at 1161. The

1 more severely punished willful violation explicitly requires knowledge of the applicable
2 regulation, while a serious violation does not. This suggests the knowledge element alone
3 does not include knowledge that a condition is an OSHA safety violation.

4 Federal case law is also consistent with the position that knowledge requires only
5 knowledge of the facts of the dangerous condition. In Phoenix Roofing, Inc., the
6 Occupational Safety Health Review Commission addressed the issue of knowledge where
7 an employer was aware there were unguarded skylight openings in its roof during
8 construction, but maintained it did not know there was a danger a person might fall
9 through the openings. 17 BNA OSHC 1076 (No. 90-2148, 1995), aff'd, 79 F.3d 1146 (5th Cir.
10 1996) (unpublished). The Commission held "[e]mployer knowledge is established by a
11 showing of employer awareness of the physical conditions constituting the violation. It
12 need not . . . be shown that the employer understood or acknowledged that the physical
13 conditions were actually hazardous." Id; see also Sw. Acoustics & Specialty, Inc., 5 BNA
14 OSHC 1091, 1977-1978 CCH OSHD P21582 (Np. 12174, 1977) (when determining
15 seriousness of a citation, "the knowledge element . . . is directed not to the requirements of
16 the law, but to the physical conditions which constitute a violation"); Midwest Steel, Inc.,
17 26 BNA OSHC 2177, 2017 CCH OSHD P33619 (No. 15-1471, 2017) (knowledge of violative
18 condition does not require knowledge of OSHA requirements).

19 Even assuming arguendo the stringent knowledge requirement advocated by
20 Pelican is correct, this Court finds Pelican's argument that there is insufficient evidence of
21 Mr. Farahi's technical expertise to find he had constructive knowledge unpersuasive. NV
22 OSHA presented documentary evidence that Pelican is a licensed contractor in the field of
23 general building and Mr. Farahi is its qualified manager. In order to receive a contractor's
24 license, an applicant must show "such a degree of experience . . . and such general
25 knowledge of the building, safety, health and lien laws of the State of Nevada and
26 administrating principles of the contracting business as the Board deems necessary for the
27 safety and protection of the public." NRS 624.260(1). In addition, each applicant must
28 have had at least four years of experience as a journeyman, foreman, supervising

employee, or contractor in the classification for which he or she is applying. NRS 624.260(6). It is common sense that the use of power tools is a regular occurrence in even the most general construction projects. In addition, Mr. Farahi testified he was familiar with the distinction between GFCI and non-GFCI outlets and their use in bathrooms. At least two ADL representatives asked Mr. Farahi to provide them with a generator. Even if they did not specify why they were requesting a generator, their request raised the existence of a possible issue. If Mr. Farahi did not have actual knowledge that use of damaged or non-grounded electrical cords could constitute a safety hazard, he had the background and experience such that, with the exercise of reasonable diligence, he could have known of the presence of a violative condition.

NV OSHA carries the burden of proving an employer's actual or constructive knowledge of violative conduct to demonstrate a violation of OSHA law. Consistent with federal case law, this Court concludes knowledge may be established by a showing of the employer's awareness of the physical conditions constituting the violation. Photographs taken by Mr. Gillings show the cords at issue were in use in the open. Mr. Farahi testified he instructed ADL employees to "get extension cords" and plug their tools into the "power available on each building." He regularly spent time at the worksite and was familiar with the existing apartment buildings and electrical sources. He also testified he was aware cords extended across the driveway and were "being run over daily." Therefore, this Court concludes the Review Board's finding of substantial and preponderant evidence of all four elements, including employer knowledge, is clearly supported by the record.

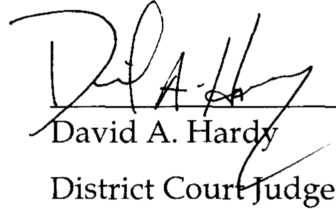
III. Conclusion

The evidence contained within the administrative record supports the finding that Pelican was a general contractor with the contractual power to require ADL to correct safety and health violations on the Bella Largo construction worksite. As such, it was a controlling employer against whom an OSHA violation may be cited. Further, NV OSHA met its burden of proving the applicability of 29 CFR 1926.404(b)(1)(i) and 29 CFR

1926.405(a)(2)(ii)(I) to Pelican, noncompliance with these regulations, employee exposure to a hazardous condition, and Pelican's knowledge of the violative conduct. Based upon the foregoing, this Court concludes Pelican has not met its burden of showing its substantial rights were prejudiced by the Review Board's approval of its citation. Accordingly, the final order of the Review Board is affirmed.

IT IS SO ORDERED.

Dated: June 23, 2019.



David A. Hardy
District Court Judge