

THE LAW OFFICES OF CHARLES R. ZEH, ESQ.
50 West Liberty Street, Suite 950
Reno, Nevada 89501
(775) 323-5700 FAX: (775) 786-8183

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD

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4 Chief Administrative Officer of the
5 Occupational Safety and Health
6 Administration, Division of Industrial
7 Relations of the Department of Business
8 and Industry, State of Nevada,

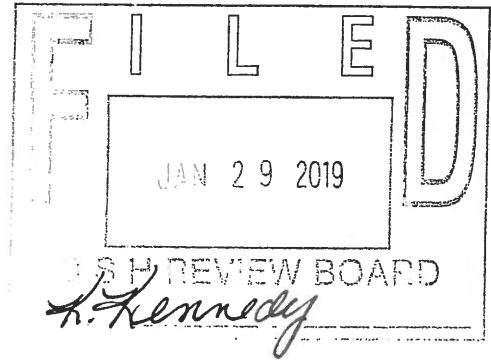
9 Complainant,

10 vs.

11 Reno Forklift, Inc.,

12 Respondent.

Docket No. RNO 17-1896



13 DECISION OF THE BOARD

14 This matter came on for hearing before the Nevada Occupational Safety and Health
15 Review Board (OSHA) on August 8, 2018, after notice was duly given according to law. Ms.
16 Salli Ortiz, Esq., appeared on behalf of the complainant, Chief Administrative Officer of the
17 Occupational Safety and Health Administration, Division of Industrial Relations (State). Mr.
18 Bruce R. Mundy, Esq., appeared on behalf of the respondent, Reno Forklift, Inc. (Reno Forklift).

19 Jurisdiction is not contested and is conferred by NRS 618.315. The State's complaint sets
20 forth the allegations which, the State claims, constitute violations of the Nevada Revised Statutes
21 as referenced in Exhibit "A," attached to the complaint. There, it is alleged:

22 Citation 1, Item 1: Serious

23 29 CFR 1910.147(c)(4)(i): Procedures shall be developed, documented and
24 utilized for the control of potentially hazardous energy when employees are
25 engaged in the activities covered by this section.

26 A. The employer did not utilize their procedures to control potentially hazardous
27 energy, which stated "Apply or Affix Lock and Tag (or other device) so that
28 equipment is held in 'safe' or 'off' positions." The two employees from Reno
Forklift de-energized the conveyor but did not affix a lock or tag before they
started working on the machine and removed the guards. As a result, employees
were exposed to unexpected energization of the conveyor system.

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1 B. The employer did not utilize their procedures to control potentially hazardous
2 energy, which stated, "Before performing service or maintenance on equipment or
3 machinery where energy or motion could release and cause injury, the energy
4 sources must be isolated and locked out." The employer allowed the practice of
5 running the conveyor systems while servicing and maintenance was being
6 performed. As a result, employees were exposed to an unguarded sprocket and
7 chain, and an employee's right middle finger was amputated after it was caught in
8 the sprocket and chain of the conveyor.

9 C. The employer did not utilize their procedures to control potentially hazardous
10 energy, which stated, "Before performing service or maintenance on equipment or
11 machinery where energy or motion could release and cause injury, the energy
12 sources must be isolated and locked out." The employer allowed the practice of
13 running the conveyor system while servicing and maintenance was being
14 performed. As a result, employees were exposed to unguarded rotating rollers.

15 D. The employer did not develop, document, and utilize a written procedure for
16 each piece or type of equipment (*e.g.*, conveyors) as described in their program.
17 A form entitled "LOTO Written Procedures (template)" was in their program but
18 was not completed for conveyors.

19 At the outset of the hearing, the parties, through legal counsel, stipulated to the admission
20 into evidence of complainant's Exhibits 1 through 3, consisting of a total of 72 pages and
21 respondent's Exhibit A, consisting of portions of 29 CFR § 1910.147. During the course of the
22 hearing, the complainant offered for admission into evidence Exhibit 4, consisting of a complete
23 copy of 29 CFR § 1910.147. This exhibit was also admitted into evidence without objection.

24 Counsel for the complainant waived opening statement. Counsel for respondent did not.
25 The bottom line of his opening statement was that no policy or procedure could have prevented
26 this accident from happening and, therefore, there is no plausible basis for charging Reno Forklift
27 with a violation and assessing a penalty. Tr., p. 10;9-10.

28 **I. Summary of the Case**

The State alleges that Reno Forklift's injured employee was not testing but was
investigating the defective conveyor belt when the incident occurred. While the conveyor belt
was running, the injured worker, Ed Wilson, reached out from beneath the conveyor belt and
caught his hand on an unguarded sprocket, resulting in a partial amputation of one finger. At no
time did the injured worker and his co-worker, Tim Coffman, ever lockout or tagout the

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1 conveyor belt¹, either before or after they had removed the guard rail to the conveyor belt, or
2 while Mr. Wilson was lying underneath the equipment, trying to hear the location of the
3 thumping noise which precipitated the call from TAGG Logistics (TAGG), in the first place, to
4 come and repair the conveyor belt. Mr. Wilson had his lockout and tagout equipment with him.
5 However, it never left his bag. He was completely exposed to the operating machinery in a zone
6 of hazard. Tr., 47;16-20, 102;18-2, 132;5.

7 Reno Forklift's policies stated that it would draft safety procedures addressed to each
8 piece of equipment but the drafting was incomplete. Reno Forklift had not drafted procedures
9 addressed to specific equipment or groups of equipment, though its own policies said they would
10 be drafted. This combination of factors and others elaborated upon below constituted the nucleus
11 of facts giving rise to the four citations, claims A through D of the complaint.

12 The respondent, Reno Forklift, contends that the injured worker, Mr. Wilson, was not
13 investigating, but testing the conveyor belt when he was lying under the conveyor belt, listening
14 for the thumping in order to locate where the thumping noise originated. Because he was testing
15 and not investigating, Reno Forklift claims that Mr. Wilson's activities were excepted by 29 CFR
16 § 1910.147(f), from the requirements of 29 CFR § 1910.147(c)(4)(i), because to test, the
17 equipment must be kept running and testing is an essential step in the repair process.

18 According to Reno Forklift, for testing purposes, employees may be in the zone of hazard
19 while the equipment is running.² Tr., 132;1-5. Reno Forklift also claimed that 29 CFR §
20 1910.147(c)(4)(i) was inapplicable by reason of the exception engrafted to the regulation, itself.
21 The safety procedures and precautions of 29 CFR § 1910.147(c)(4)(i) need not be developed if
22 all of the eight elements of the Exception are present.

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24 ¹As explained in greater detail, *infra*, tagout and lockout procedures and equipment are intended
25 to keep machinery or equipment from being energized (started) while employees are servicing or
26 maintaining equipment in order to guard against injury to employees by the operating
equipment/machinery. See, 29 CFR § 1910(a)(3)(i).

27 ²At the outset, Reno Forklift is on tenuous grounds. NRS 618.385(1) provides: " An employer
28 shall not ... [r]equire, permit, or suffer any employee to go or be in any employment or place of
employment which is not safe and healthful." Reno Forklift's theory of the case runs headlong into the
bar of NRS 618.385(1).

1 Further, Reno Forklift took the position that it should not be punished because the injury
2 was the product of a stupid move by the injured worker which Reno Forklift labeled a “brain
3 fart.” As a result, Reno Forklift claims that no safety precautions would have prevented the
4 incident. Tr., 10;9-10, 61;5-7, 127;10-13. Therefore, the citation should not be affirmed.

5 The Board, however, as elucidated below, finds each of Reno Forklift’s defenses wanting.
6 The injured worker was investigating the conveyor belt, not testing it and, therefore, while the
7 lockout and tagout requirements of 29 CFR § 1910.147(c)(4)(i) applied, they were never
8 deployed. This was a clear violation. Additionally, Reno Forklift was not capable of proving all
9 eight elements of the Exception that is attached to 29 CFR § 1910.147(c)(4)(i). This Exception
10 afforded Reno Forklift no safe harbor from the Regulation.

11 The Board also finds that it was undisputed, no lockout and tagout procedures were ever
12 deployed, that the lockout and tagout equipment never left Mr. Wilson’s equipment bag and that
13 Reno Forklift had not written any safety procedures for the conveyor belt, despite statements in
14 its policies that they would be drafted. Further, Reno Forklift failed to produce sufficient proof
15 of the rogue employee defense, while defending on the grounds that Mr. Wilson’s stupidity was
16 the direct and proximate cause of his injury.

17 Thus, the Board affirms all four counts of the State’s complaint, claims A through D, the
18 classification of the offense as “serious,” and the assessment of a \$4,000 penalty.

19 **II. Statement of The Pertinent Statutory and Regulatory Scheme.**

20 The Court in *ComTran Group, Inc. v. U.S. Dep’t. of Labor*, 722 F.3d 1304 (11th Cir.,
21 2013) detailed the general statutory and regulatory scheme for resolving OSHA complaints. The
22 Court explained:

23 Passed by Congress in 1970, OSHA sought to assure that “every working man
24 and women in the Nation [had] safe and healthful working conditions.” *See*,
25 *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1151 (11th Cir., 1994) (quoting 29
26 U.S.C. § 651(b)). The Act “granted employees a new set of important rights and
[intended] that they play a vital role in achieving safe and healthful conditions at
the workplace.” *Marshall v. Daniel Constr. Co., Inc.*, 563 F.2d 707, 711–12 (5th
Cir., 1977). [footnote one omitted]. *ComTran, supra* at 1306.

27 Nevertheless, “[i]t has been long-established that OSHA does not impose absolute (or
28 strict) liability on employers for harmful workplace conditions; instead, it focuses liability where

1 harm can, in fact, be prevented." *Ibid*, citing amongst other cases, *Brennan v. Occupational*
2 *Safety & Health Review Comm'n*, 502 F.2d 946, 951 (3rd Cir., 1974). The Ninth Circuit holds
3 further that there must be some connection between the employer and the alleged violation to
4 prevent the imposition of a regime of strict liability. *Brennan v. Occupational Safety & Health*
5 *Review Comm'n*, 511 F.2d 1139, 1145 (9th Cir., 1975). "Thus, while courts have emphasized the
6 importance of proper instruction and adequate supervision in safety-related matters, 'they have
7 consistently refused to require measures beyond those which are reasonable and feasible.'"
8 *ComTran, supra* at 1306.

9 Under OSHA, employers are obligated to comply with the "general duty" imposed upon
10 employers to make the workplace free of all recognized hazards. *ComTran* at 1307, 29 U.S.C. §
11 654(a)(1). Employers must also observe the "special duty" of compliance with all mandatory
12 health and safety standards. *ComTran* at 1307, 29 U.S.C. § 654(a)(2). In this case, the special
13 duty imposed upon Reno Forklift, is found at 29 CFR § 1910.147(c)(1), which states:

14 The employer shall establish a program consisting of energy control procedures,
15 employee training and periodic inspections to ensure that before any employee
16 performs any servicing or maintenance on a machine or equipment where the
17 unexpected energizing, startup or release of stored energy could occur and cause
injury, the machine or equipment shall be isolated from the energy source and
rendered inoperative.

18 Reno Forklift is also required to observe 29 CFR § 1910.147(c)(4)(i), which provides:
19 "Procedures shall be developed, documented and utilized for the control of potentially hazardous
20 energy when employees are engaged in the activities covered by this section."

21 The activities covered by this section are found in 29 CFR § 1910.147(a)(1)(i), where it
22 states that the standard:

23 Covers the servicing and maintenance of machines and equipment in which the
24 unexpected energization or start up of the machines or equipment, or release of
25 stored energy, could harm employees. This standard establishes minimum
performance requirements for the control of such hazardous energy.

26 Servicing and/or maintenance are defined terms. They include in their definition
27 "[w]orkplace activities such as constructing, installing, setting up, adjusting, inspecting,
28 modifying and maintaining and/or servicing machines or equipment." 29 CFR § 1910.147(b).

1 To prevail, the State has the initial burden of proving a *prima facie* case that a standard
2 has been transgressed. A *prima facie* case is shown under OSHA by proof, "(1) that the
3 regulation applied; (2) that it was violated; (3) an employee was exposed to the hazard that was
4 created; and importantly, (4) that the employer 'knowingly disregarded' the act's requirements."
5 *ComTran, supra* at 1307.

6 Employer knowledge can be shown upon proof that a supervisor had either actual or
7 constructive knowledge of the violation. In such case, knowledge is generally imputed to the
8 employer. *ComTran, supra* at 1307, 1308. Constructive knowledge is established by proof that
9 the employer failed to implement an adequate safety program, "with the rational being that - in
10 the absence of such a program - the misconduct was reasonably foreseeable." *ComTran, supra* at
11 1308.

12 Only if the State makes out a *prima facie* case must the employer come forward and
13 assert an affirmative defense or defenses. Absent proof of a *prima facie* case, a respondent
14 employer need mount no defense to avoid being sanctioned as charged.

15 In this case Reno Forklift defends primarily on the grounds that 29 CFR §
16 1910.147(c)(4)(i) is irrelevant because Mr. Wilson was testing, not inspecting, the conveyor belt
17 when the injury occurred. Therefore, Mr. Wilson's conduct came within the Exception engrafted
18 to 29 CFR § 1910.147(c)(4)(i), itself, and the exception of 29 CFR § 1910.147(f), relieving
19 Reno Forklift of the force and effect of 29 CFR §§ 1910.147(c)(1) and (c)(4)(i).

20 Reno Forklift also relies upon the unpreventable or unforeseeable employee misconduct
21 defense by reason of Mr. Wilson's brain fart, in the face of which an employer is defenseless. To
22 raise this defense, however, Reno Forklift must show that it: (1) created a work rule to prevent
23 the violation at issue; (2) adequately communicated that rule to its employees; (3) took all
24 reasonable steps to discover non compliance; and (4) enforced the rule against employees when
25 violations were discovered. See, *New York State Electric & Gas, Corp.*, 88 F.3d 98, 106 (2nd
26 Cir., 1996), *ComTran, supra* at 1308.

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1 **III. FINDINGS OF FACT**

2 The facts of the case are relatively simple and straight forward. The incident took place
3 on January 10, 2017, when an employee of Reno Forklift, had part of his finger partially
4 amputated by an unguarded sprocket when responding to a call to Reno Forklift, from TAGG to
5 repair a TAGG conveyor belt. Tr., 19;4-5. TAGG was, therefore, the host company or site, Tr.,
6 p. 19;4-5, as it was the location of the conveyor belt that was apparently in need of repair. Tr.,
7 19;6-7, 12;7.

8 Reno Forklift dispatched two employees in response to the call, Ed Wilson, and Tim
9 Coffman. Tr., pp. 32;24, 33;1-4. Mr. Wilson was a storage systems technician. Tr., 16;9-15.
10 He had worked on conveyor systems for the past year and a half. Tr., 95;9-11. Mr. Coffman was
11 new to Reno Forklift. He had never worked on a conveyor belt before, Tr., 18;12-14, had never
12 been trained on lockout/tagout procedures³ (LOTO), *Ibid.*, and was experiencing on the job
13 training, with this dispatch. Tr., 18;12-14, 58;1-3.

14 When Mr. Wilson and Mr. Coffman arrived at the site, they met “Mark,” who told them
15 there was a “thumping” noise in the conveyor. Mark is Mark McKenna, Operations manager for
16 TAGG Logistics. Tr., 19;16-17. According to Mr. Wilson, he told Mark that they would have to
17 shut the section down and evaluate it. “Evaluate” was Mr. Wilson’s words. Tr., 92;12-15.

18 By virtue of his experience in relation to his untrained co-worker, Mr. Wilson was the
19 supervisor on this call. Tr., 60;4-8, 108;5-9 (Mr. Wilson was the lead). Mr. Wilson was the
20 injured worker, also, whose partially amputated finger precipitated the State’s investigation on

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24 ³Lockout and tagout are defined terms. Lockout is the placement of a device on an energy
25 isolating device, to ensure that the energy to the equipment or machinery being worked on does not
26 become energized and cause injury to the unsuspecting worker. Tagout refers to the placement on the
27 machinery of that which is essentially a notice that the machinery is being worked on and must not be
28 energized, or started up, until the tagout device is removed, which is not to occur until the work is
finished. *See*, 29 CFR § 1910.147(b). In this case, there is no dispute that the conveyor belt had the
ability to be locked out and tagged out (*i.e.*, turned off and shut down). Tr., 104;5-7. The question in this
case is, as indicated, whether Wilson and Coffman were required to lockout and/or tagout the conveyor
belt under the circumstances, because the evidence is overwhelmingly that they failed to lockout or
tagout the conveyor belt when it was operational or could have been operational.

1 January 11, 2017, of the incident, Tr., 13;6, and ultimate issuance of citations in this case. Tr.,
2 33;1-4.

3 Turning to the incident, according to Mr. Wilson, he approached the conveyor with Tim
4 Coffman, moved people away from the conveyor belt and found the on-off switch to the
5 conveyor. The on-off switch proved to be located right next to where the incident happened. Mr.
6 Wilson shut down the conveyor belt, Tr., 92;19, and made sure, he claims, it was shut off before
7 "we" started looking at things. Tr., 92;19-20. Mr. Wilson recalls telling someone that this is
8 going to be "down" until we finish our work. Tr., 92;12-15.

9 Mr. Wilson testified, he then took off the chain guard and wiggled the chain to see if it
10 was too tight or if that was the problem. Mr. Wilson determined that it was not too tight. Tr.,
11 92;16-25. At this time, according to Mr. Wilson, Tim was standing next to the on-off switch.
12 Tr., 93;1-2. Mr. Wilson had his lockout/tagout in his bag. Tr., 93;2-3. His lockout/tagout
13 equipment, however, never left his bag. The chain guard was removed and the chain wiggled by
14 Mr. Wilson with no lockout or tagout deployed. Tr., 19;16-17, 28;6-7, 44;23-24, 53;1, 92;16-25.

15 While the chain guard was still removed from the belt, Mr. Wilson told Tim to start up
16 the equipment. Tr., 94;23-24, 98;4-9, 16-22. He said, they both backed away, at this moment
17 while the equipment was first running with the chain guard removed. Tr., 93;7-10. They could
18 not hear any thumping noise, however, from where they were standing, and so, Mr. Wilson
19 surmised that the thumping must be coming from the rollers, below. Tr., 93;12-13.

20 The equipment was then shut down while Mr. Wilson removed the belly pan in order to
21 see if anything was stuck on the rollers. Tr., 93;16-17. Nothing was discovered there and Mr.
22 Wilson, thus, decided to slide himself under the conveyor belt. When lying underneath the
23 conveyor, Mr. Wilson told Tim Coffman to start the conveyor belt so that he could listen for the
24 noise or thumping. Tr., 93;19-20. Watching and listening for noises are what Mr. Wilson was
25 doing from beneath the conveyor belt. *Ibid.*

26 The chain guard was still removed, while the conveyor belt was re-energized, or turned
27 on by Mr. Coffman while Mr. Wilson was laying underneath the conveyor belt. His
28 lockout/tagout equipment was still in his bag. Tr., 98;17-18. The person operating the switch to

1 .energize the equipment was not Mr. Wilson, the person listening for the thumping noise, but Mr.
2 Coffman, the inexperienced co-worker of Mr. Wilson. Tr., 93;10-22.

3 While the conveyor belt was still running, Mr. Wilson reached up with his hand, caught it
4 in the unguarded, rotating sprocket and lost part of his finger. Tr., 93;16-22, 94;1-3. He, then,
5 told Mr. Coffman to turn off the machinery. Tr., 93;21-23. Mr. Wilson actually claimed, he told
6 Mr. Coffman to turn off the machinery before he started to reach up with his hand, but "...as I
7 reached up, I got my finger caught before he [Mr. Coffman] actually got it off." Tr., 94;1-3.

8 From the beginning of this series of events, starting with when Mr. Wilson jiggled the
9 conveyor belt and took off the chain guard, to the last, when Mr. Wilson suffered the partial
10 amputation, at no point was the system ever locked out or tagged out. Tr., 100;1-14. *See also*,
11 Tr., 115;23 (didn't use lock out procedures to start out the job). The lockout and tagout
12 equipment remained in Mr. Wilson's bag, precisely where it didn't belong. Counsel for Reno
13 Forklift admits as much. Tr., 126;13-15. Moreover, Mr. Wilson, the person actively working on
14 the equipment, was not the person in control of the energization of the equipment. The person in
15 command of the on-off switch was Mr. Coffman, and this was the first time Mr. Coffman ever
16 worked on a conveyor belt. Tr., 58;1-3.

17 It is also clear from Mr. Wilson's testimony, he was doing no more than looking and
18 listening when the equipment was running and he suffered the partial amputation. That is, at the
19 moment he was laying beneath the conveyor belt, before trying to get out from under it, he was
20 not touching, probing, or otherwise maneuvering the machinery. Furthermore, while Mr. Wilson
21 was located underneath the conveyor system with a belly pan or guard off and the equipment
22 running when the partial amputation took place, Tr., 21;20-22, Mr. Wilson was exposed to
23 hazardous and extremely unsafe conditions. Reno Forklift, by and through counsel, concedes the
24 point that Mr. Wilson had placed himself in the "...realm of a hazardous area...." Tr., 47;19-20.
25 *See also*, Tr., 102;18-21 (inherently hazardous).

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1 The employees Reno Forklift sent to TAGG were not properly trained. As indicated,
2 this incident was Mr. Coffman's first exposure to work on a conveyor belt. Tr., 58;1-3. He was
3 learning on the job. There is no evidence that he had received any training on conveyor belts or
4 lockout/tagout procedures before arriving at TAGG. Tr., 18;12-14.

5 As for Mr. Wilson, he claims he worked on conveyors for the past year and a half, as of
6 the date of the incident. Tr., 95;9-11. The last training he had received from Reno Forklift,
7 however, dates back to April 15, 2016. When interviewed by OSHA staff, Mr. Wilson stated
8 that he received hands on lockout/tagout procedure training but never received written
9 procedures on lockout/tagout from his employer, Tr., 37;5-8. He never had seen a copy of the
10 lockout/tagout program in writing. Tr., 17;3-4. Mr. Wilson also admitted when testifying that
11 Reno Forklift should provide better training for different hazards and that he had never seen a
12 policy from Reno Forklift telling him how he should conduct a job when testing an energized
13 piece of equipment. Tr., 101;16-20, 102;1-3.

14 Reno Forklift, itself, acknowledged it had a duty to provide for the safety of its employees
15 when working on machinery, by attempting to draft a Lockout/Tagout Safety Program in an
16 effort to bring itself in compliance with 29 CFR § 1910.147. See, Exhibit 1, p. 40, Reno
17 Forklift's regulations for the control of hazardous energy. Reno Forklift's written program states:
18 "Before performing service or maintenance on equipment or machinery where energy or motion
19 could release and cause injury, the energy sources must be isolated and 'locked out.'" *Ibid.* Aside
20 from this pronouncement, however, the details for implementation of this dictate were not
21 drafted. A template for such a program was in evidence, but it was incomplete. See, Exhibit 1,
22 pp. 41-42. Furthermore, Reno Forklift stated in this "Program," that Management will:
23 "Establish written LO/TO procedures for each individual or group of similar machines in place."
24 This was never done. Tr., 58;21-23, 59;1-4. There was no such procedure established for the
25 conveyor belt the subject of the State's complaint.⁴

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28 ⁴To the extent that any of the following conclusions of law and legal analysis amount to findings
of fact, they are incorporated herein by reference.

1 **IV. The Undisputed Facts Sustain All Four Elements of the State's Complaint**

2 The State's complaint, itself, is quoted above, and does not bear repeating. During the
3 hearing on the complaint, however, witnesses for the State were interrogated concerning the
4 meaning and import of the complaint.⁵

5 Jake La France, the State District Manager, Tr., 55;8, testified that the gravamen of
6 Subparagraph A of the complaint arose when Mr. Coffman and Mr. Wilson de-energized the
7 machine (the conveyor belt), removed the guards, and Mr. Wilson put his hands on the chain to
8 see if it was too tight, without either tagging out or locking out the "machine," contrary to Reno
9 Forklift's own procedures, Exhibit 1, p. 40, ¶ 4.1.1, and the Federal Regulations. Tr., 57;25,
10 58;1-6. The gravamen of Subparagraph B of the complaint is the same, except it is directed at
11 the failure to lockout and tagout, while there was undisputedly an unguarded chain to which the
12 employees were exposed. Tr., 58;7-10. The gravamen of Subparagraph C of the complaint is the
13 same, also, except it is directed to the exposure of the employees to unguarded rollers, without a
14 tagout or lockout. Tr., 58;11-12.

15 Mr. La France also addressed Subparagraph D of the complaint. Its gravamen is directed
16 towards Paragraph 3.1.3 of Reno Forklift's policies. As indicated, it requires the development of
17 LOTO safety procedures for similar pieces of equipment, or individual pieces of equipment.
18 This was never completed. Tr., 58;21-23, 59;1-4, 66;3-8. *See also*, Exhibit 1, pp. 40, 41.

19 Turning to the Regulations, themselves, they apply "...to the control of energy during
20 servicing and/or maintenance of machines and equipment." 29 CFR § 1910.147(a)(2)(i). 29
21 CFR § 1910.147(a)(3)(i) requires employers to "...establish a program and utilize procedures for
22 affixing appropriate lockout devices or about tagout devices to energy isolating devices and to
23 otherwise disable machines or equipment to prevent unexpected energization, start up or release
24 of stored energy in order to prevent injury to employees." Then, 29 CFR § 1910.147(c)(1)
25 mandates that, "...employer[s] shall establish a program consisting of energy control procedures,
26 employee training and periodic inspections to ensure that before any employee performs any
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28 ⁵To the extent any of the preceding Findings of Fact amount to conclusions of law, they are
incorporated herein by reference.

1 servicing or maintenance on a machine or equipment where the unexpected energizing, startup or
2 release of stored energy could occur and cause injury, the machine or equipment shall be isolated
3 from the energy source and rendered inoperative.”

4 As indicated, *supra*, servicing and maintenance are defined terms. They expressly include
5 the “inspecting” of a machine. 29 CFR § 1910.147(b).

6 Finally, there is 29 CFR § 1910.147(c)(4)(i), which provides that, “[p]rocedures shall be
7 developed, documented and utilized for the control of potentially hazardous energy when
8 employees are engaged in the activities covered by this section.” Those activities include the
9 servicing and maintenance, as defined in the Regulations, of machinery and equipment that have
10 energy sources which could, but need not actually have to, suddenly energize and cause injury to
11 the employee servicing or maintaining the equipment. It is the potential to energize and cause
12 injury that turns the screw.

13 In short, these regulations and Reno Forklift’s own procedures require that LOTO safety
14 procedures be created and demand that they then be followed in order to avoid a citation.
15 Applying the undisputed facts outlined above, it is patent that the incident giving rise to partially
16 amputated finger violated both Reno Forklift’s own procedures as well as the regulations
17 providing for and requiring lockout/tagout safety precautions to be made. From the very moment
18 that Mr. Wilson and Mr. Coffman first looked at the conveyor belt until they left, they never
19 locked out or tagged out the conveyor belt, even though they worked on the conveyor belt while
20 it was idle to remove the guardrail, the bottom pan, and to touch the chain to see if it was too
21 tight. The conveyor belt was also not locked out or tagged out when Mr. Wilson was lying
22 beneath the running conveyor belt, without the safety guard re-installed, when engaged to listen
23 and look at the operating machinery while he had admittedly placed himself in a zone of hazard.

24 Further, it is beyond dispute, that Reno Forklift failed to follow its own pronouncement
25 and draft or caused to be drafted LOTO procedures for each individual or group of similar
26 machines as Reno Forklift required of itself. *See*, Exhibit 1, p. 40, ¶ 3.1.3. And, as is required of
27 Reno Forklift by the Regulations, Reno Forklift failed in this regard, also.

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1 It cannot be gainsaid, then, that the State has established the elements of its complaint,
2 based upon the undisputed facts before the Board. The Board finds that the State has proven a
3 *prima facie* case for the violation of 29 CFR § 1910.147(c)(4)(i), Subparagraphs A through D.
4 The incident relates to the regulations pertinent to employee safety in connection with operating
5 equipment and machinery. The facts are undisputed that the failure to follow Reno Forklift's
6 own policies and the failure of Reno Forklift to have drafted pertinent policies amounted to
7 violations of the pertinent Regulations cited and analyzed above. These failures of omission and
8 commission are the direct and proximate cause of the partial amputation sustained by the injured
9 employee.

10 Furthermore, by reason of the undisputed facts, the requisite scienter of the employer,
11 Reno Forklift, is established. An employer's knowledge may reasonably be inferred, and the
12 likelihood of injury is reasonably foreseeable, when, as here, the training of employees in
13 pertinent safety measures is indifferent, at best, and when there are gaps in the employer's safety
14 protocol and procedure, as here. The scienter element of a *prima facie* case is clearly also
15 established by the undisputed facts of this case. *Ibid.*

16 Because the Board finds and concludes that the State proved the *prima facie* case for the
17 elements set out in its complaint, the Board also finds the burden shifts to Reno Forklift to prove
18 it has an affirmative defense or defenses to the State's complaint. Absent an affirmative defense,
19 liability may be assigned to Reno Forklift due to the charges brought by the State. *See,*
20 *ComTran, supra* at 1307.

21 In defense of itself, Reno Forklift claims that the regulations cited above are irrelevant to
22 this case for reasons which include, *inter-alia*, that no amount of regulations could have
23 prevented this incident from occurring. Tr., 10;8-10. The incident was the product of a brain fart
24 on the part of Mr. Wilson and there is nothing an employer can do to prevent harm under those
25 circumstances. Reno Forklift also claimed that Mr. Wilson was testing, not inspecting the
26 conveyor belt, and for that reason, the regulations relied upon by the State were also irrelevant
27 because the regulations allow for the testing of equipment while running. Tr., 9;12-16, 10;1-4.
28 Finally, Reno Forklift claims that the circumstances fall within the exception to 29 CFR §

1 1910.147(c)(4)(i), thereby excusing Reno Forklift for not having completed and failed to have in
2 place the lockout/tagout procedures otherwise required of employers. Tr., 9;12-16. For these
3 reasons, Reno Forklift claims that the State's charges against it should be dismissed.

4 Considering these affirmative defenses, Mr. Wilson's "brain fart" defense is simply a
5 more colorful restatement of the rogue employee or here, the rogue supervisor defense to an
6 OSHA complaint. The rogue employee or supervisor defense is based upon the premise the
7 misconduct was unpreventable or unforeseeable. *See, New York State Elec. & Gas Corp., supra*
8 at 106-108.

9 The elements of the defense require the employer, Reno Forklift, to show: "... it (1)
10 created a work rule to prevent the violation at issue; (2) adequately communicated that rule to its
11 employees; (3) took all reasonable steps to discover noncompliance; and (4) enforced the rule
12 against employees when violations were discovered." *Id.*, at 106. This defense fails for Reno
13 Forklift as the undisputed facts chronicled, above, show that Reno Forklift did not communicate
14 well its LOTO policy to its employees. Mr. Wilson said, he never saw it. Tr., 17;3-4, 29;17-18,
15 37;5-8, 90;3-4, 101;16-22, 102;1-3. Mr. Wilson also admitted that he never saw the LOTO
16 written procedure. Tr. 37;6-8. And, the last training he recalled, took place April 15, 2016. Tr.,
17 96;11-13. There was also no follow up to determine if the training had been absorbed and of any
18 value. Tr., 105;4-8. Reno Forklift's approach to training Mr. Wilson was perfunctory at best.
19 Mr. Coffman had received no training. This was his first conveyor job. Tr., 18;12-14, 89;22-25.

20 There is no evidence, either, that Reno Forklift enforced the LOTO policy, if violated.
21 George Pimpl, the Vice-president of Reno Forklift, said that Mr. Wilson did everything right. It
22 was Mr. Wilson's call as to how to handle it and so, Mr. Pimpl felt, he could not stop the
23 situation from occurring. There was no discipline, in other words, administered. Tr., 108;5-9.

24 The Board concludes that Reno Forklift cannot rely upon the rogue employee affirmative
25 defense. Based upon the undisputed facts set out in the record before the Board, it is evident
26 from the analysis, above, that Reno Forklift failed in several respects to prove the elements of
27 this affirmative defense.

28 ///

1 Addressing the claim Mr. Wilson was testing, not inspecting when he was lying under the
2 conveyor belt while it was running, it is true that 29 CFR § 1910.147(f)(1) allows for the
3 operation of the machine or equipment with the lockout or tagout devices removed in order "...to
4 test or position the machine, equipment or component thereof,..." if the rest of the conditions
5 following 29 CFR § 1910.147(f), entitled "Additional Requirements" are met. Reno Forklift
6 argues that when Mr. Wilson was laying under the conveyor belt listening and looking, he was
7 "testing" the equipment and, therefore, not servicing or maintaining the equipment, such that it
8 was permissible for Mr. Wilson to operate the conveyor belt, without a lockout or tagout device
9 employed, and it was permissible for him to be in the zone of hazard while the belt was running.
10 Reno Forklift claims the equipment cannot be tested unless it is running, and 29 CFR §
11 1910.147(f), permits employers to allow the testing of equipment or machinery while it is
12 running and while the employee remains in the zone of hazard. Tr., 8;23-25, 9;1, 9;12-16, 35;13.

13 The State contends that Mr. Wilson was "inspecting," not "testing" the conveyor belt at
14 the time he was lying under the conveyor belt, in the zone of hazard, listening and looking at the
15 equipment while it was running. Tr., 77;6-9. Neither the term "testing" nor "inspecting" is
16 defined in the regulations, pertinent, here. It is well settled, however, that when interpreting
17 statutes or regulations, the words employed are to be given their plain and ordinary meaning.
18 *See, Barrick Goldstrike Mine v. Peterson*, 116 Nev. 541, 545 (2000); *Nelson v. Heer*, 123 Nev.
19 217, 224, 163 P.3d 420 (2007). Both the word test and the word inspect are common and
20 ordinary terms whose use in the Regulations, here, are not nuanced. Test includes in its meaning,
21 "A means employed to examine, try or prove,..." Tested includes amongst its meanings, "To
22 administer a test in order to diagnose..." Webster's II New Riverside University Dictionary,
23 Copyright 1984, p. 1198. The word inspect means: "To examine in detail for flaws..."
24 Webster's II New Riverside University Dictionary, Copyright 1984, p. 632.⁶

25 Having the meanings of the two words laid out side by side, what, then, was Mr. Wilson
26 doing when he was lying, listening and looking at the conveyor belt? Was he testing or

27
28 ⁶Webster's is an approved source for determining a word's plain and ordinary meaning. *See, Nelson, supra* at 224, fn. 17.

1 inspecting? Both terms use the word "examine" to define them. The word "test," however,
2 connotes a more active, than passive role of the testor, especially when the word "try" is included
3 in the meaning. This also stems from the association of the word "diagnose" with "test." On the
4 other hand, the term inspection has a more passive connotation. One can inspect, without
5 probing, pushing, pulling, or otherwise administering.

6 Applying these meanings for inspecting and testing to Mr. Wilson, the Board concludes
7 he was inspecting, not testing, while passively laying under the conveyor belt listening and
8 watching. He was looking for flaws, an activity squarely within the meaning of an inspection.
9 Reno Forklift is incorrect when it claims it is excused from the requirements of 29 CFR §
10 1910.147(c)(4)(i), by reason of 29 CFR § 1910.147(f). Mr. Wilson was inspecting, not testing.
11 The Board finds and concludes that the State's complaint withstands the "testing" affirmative
12 defense, based upon the Board's finding and conclusion that Mr. Wilson was inspecting, not
13 testing.

14 Assuming, *arguendo*, Mr. Wilson was testing instead of inspecting, the Board concludes
15 that Reno Forklift's reliance upon 29 CFR § 1910.147(f) is nevertheless unavailing. 29 CFR §
16 1910.147(f) applies only if the sequence of actions following 29 CFR § 1910.147(f) are met.
17 They include the requirement that employees be removed from the machine or equipment area
18 according to paragraph (e)(2). 29 CFR § 1910.147(f)(1)(ii). Paragraph (e)(2) in turn states that
19 "...the work area shall be checked to ensure that all employees have been safely positioned or
20 removed." 29 CFR § 1910.147(e)(2)(i). 29 CFR § 1910.147(e)(3) states that, "[e]ach lockout
21 device shall be removed from each energy isolating device by the employee who applied the
22 device."

23 Applying these regulations, Reno Forklift's claim of defense based upon 29 CFR §
24 1910.147(f) fails as well. The simple fact of the matter is, Reno Forklift failed to comply with
25 these basic requirements that must be sequentially followed. The lockout and tagout devices
26 were never applied in the first place, though, when Mr. Wilson and Mr. Coffman removed the
27 guard they clearly should have been deployed. Thus, since the lockout and tagout devices were
28 never applied, Reno Forklift could not comply with the requirement that the person who installed

1 each lockout device, must also be the person to remove it and then, at the end re-install it. 29
2 CFR § 1910.147(f)(1)(v). Tr., 36;3-4, 7. That never happened. Tr., 68;14-21.

3 Similarly, Mr. Wilson was laying under the conveyor belt in a zone of hazard while the
4 machine was operational. Tr., 47;16-20, 102;18-21, 132;1-5. Mr. Coffman was standing next to
5 the machine. This amounts to a blatant violation of 29 U.S.C. § 1910.147(e)(2), which requires
6 all employees, not just some of the employees, to be removed from the area or safely positioned
7 while the machine is running. Tr., 30;22-25, 78;17-25, 79;6-10. Neither Mr. Wilson nor Mr.
8 Coffman were removed from the area and Reno Forklift concedes that Mr. Wilson, at least, was
9 in the zone of hazard. Hence, even if Mr. Wilson were testing, instead of inspecting, Reno
10 Forklift is not protected by 29 CFR § 1910.147(f), because it failed to satisfy the sequential
11 additional requirements that must be met.

12 This leaves, finally, Reno Forklift's argument that 29 CFR § 1910.147(c)(4)(i) is
13 inapplicable because Reno Forklift falls within the exception to 29 CFR § 1910.147(c)(4)(i),
14 itself. The exception to 29 CFR § 1910.147(c)(4)(i) merely frees the employer from
15 documenting the required procedure for a particular machine or equipment. It does not excuse,
16 however, abiding by or failing to have a lockout/tagout procedure that must be followed. Not
17 much is gained by this exception, in other words.

18 Nonetheless, Reno Forklift sought this safe harbor. To fall within this exception, the
19 employer must satisfy all eight elements to the Exception. They include the requirement that
20 Reno Forklift show that the machine is isolated from its energy source and locked out during
21 servicing or maintenance. Reno Forklift must also show that the lockout device was under the
22 exclusive control of the authorized employee performing the servicing or maintenance. *See*, 29
23 CFR § 1910.147(c)(4)(i), Exception, ¶¶ 4 and 6.

24 The Board finds that from the moment Mr. Wilson and Mr. Coffman started dismantling
25 the equipment, by removing the guard rail, while the machine was turned off, it was never locked
26 out or tagged out. Mr. Wilson's lockout and tagout equipment never left his bag, as he admits.
27 Tr., 16;22-24, 93;2-3, 98;17-19, 100;1-14. The record before the Board could not be more clear
28 on this point. Moreover, the conveyor belt was capable of being tagged or locked out. Tr.,

1 104;5-7. Impossibility is no defense to the failure to start dismantling the conveyor belt without
2 having first tagged out or locked out the equipment. There is no reason why Mr. Wilson and Mr.
3 Coffman could not and did not lockout or tagout the conveyor belt, when they first started
4 tinkering with this “thumping” machine. The Board, thus, concludes that Reno Forklift’s
5 “exception defense” to 29 CFR § 1910.147(4)(c)(i) is to no avail.

6 The State’s complaint alleges that the offenses committed were “Serious.” *See*,
7 Complaint, p. 2. It is well settled that “...when a regulation makes the occurrence of an accident
8 with a substantial probability of death or serious physical harm *possible*, the employer has
9 committed a serious violation of the regulation.” *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d
10 1069, 1073 (3rd Cir., 1979) (emphasis added). Substantial probability “refers not to the
11 probability that an accident will occur but to the probability that, an accident having occurred,
12 death or serious injury could result,” *Ill. Power Co v. OSHRC*, 632 F. 2d 25, 28 (7th Cir.,
13 1980)....” *Secretary of Labor v. Trinity Industries, Inc.*, 504 F.3d 397, 401 (3rd Cir., 2007).

14 Reno Forklift never mounted a serious challenge to the classification of the offense as
15 “serious.” Reno Forklift would be hard pressed to mount such a challenge in that it admitted
16 during the hearing that working on a piece of equipment that is running is inherently hazardous.
17 Tr., 102;18-21. *See also*, Tr., 47;16-20. A condition that is inherently hazardous clearly smacks
18 of the potential for serious harm or death. The characterization of the situation as inherently
19 hazardous easily surmounts for the State, the burden of showing a condition that might well lead
20 to death or serious injury.

21 The State, however, also addressed at the hearing, the elements by which a serious
22 violation could be assessed. Mr. La France testified that the violation was labeled serious
23 because of the substantial probability that death or serious physical harm could occur. Tr., 61;19-
24 22. Given that Reno Forklift believes the situation is hazardous, Reno Forklift has little to
25 quibble with or argue about the classification the offense(s) as serious. In reality, there is no
26 room to argue, once that assessment is reached, as the Nevada Revised Statutes dictate a serious
27 classification where serious harm or death is the likely result of the injury. *See*, NRS 618.625(2).

28 ///

1 The State also considered the elements of "gravity," "severity" and "probability." Reno
2 Forklift mounted no challenge to the State's application of these elements for assessing a financial
3 assessment and classification of the offense as serious.

4 The Board, accordingly, finds substantial support for the classification of the offense as
5 serious. It concludes, as well, that the assessment in the amount of \$4,000 is appropriate as the
6 gravity based penalty. Tr., 62, 63.

7 **V. DECISION OF THE BOARD AND ORDER**

8 Based upon the Findings of Fact, Conclusions of Law and the Analysis set out herein and
9 good cause appearing, it is the Decision of the Nevada Occupational Safety and Health Review
10 Board (the Board) that Reno Forklift, Inc., violated Nevada Revised Statutes Citation 1, Item 1, 29
11 CFR § 1910.147(c)(4)(i), Subparagraphs A, B, C, and D; and therefore,

12 It is Ordered and Decreed that the classification for the offense, aforementioned, as
13 "Serious" is supported by substantial evidence and constitutes an appropriate classification of the
14 offense; and

15 It is also Ordered and Decreed that the proposed penalty in the amount of \$4,000 is
16 supported by substantial evidence and constitutes an appropriate level of penalty to be assessed in
17 this case, which the respondent, Reno Forklift, Inc., is hereby Ordered to pay; and

18 It is finally Ordered that counsel for the complainant submit proposed Findings of Fact and
19 Conclusions of Law to the Nevada Occupational Safety and Health Review Board consistent with
20 this Decision and serve copies on opposing counsel within 20 days from date of decision. After
21 five days time for filing any objections, the final Findings of Fact and Conclusions of Law shall be
22 submitted to the Nevada Occupational Safety and Health Review Board by prevailing counsel.

23 Service of the Findings of Fact and Conclusions of Law, signed Chairman of the Nevada
24 Occupational Safety and Health Review Board, shall constitute the Final Order of the Board.

25 Dated this 29th day of January, 2019.

Nevada Occupational Safety and Health
Review Board

27 By: /s/James Halsey
28 James Halsey, Acting Chairman

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4 **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
5 **REVIEW BOARD**

6 * * * * *

7 **Chief Administrative Officer of the**
8 **Occupational Safety and Health**
9 **Administration, Division of Industrial**
10 **Relations of the Department of Business**
11 **and Industry, State of Nevada,**

12 **Complainant,**

13 **vs.**

14 **Reno Forklift, Inc.,**

15 **Respondent.**

Docket No. RNO 17-1896

Inspection No. 1206644

FILED

MAR 29 2024

QSH REVIEW BOARD
BY [Signature]

16 **ORDER FILING FINDINGS OF FACT,**
17 **CONCLUSIONS OF LAW AND FINAL ORDER**

18 The above captioned matter came on for hearing before the Nevada Occupational Safety
19 and Health Review Board on March 13, 2024, for the Board to consider whether the proposed
20 Findings of Fact, Conclusions of Law and Final Order prepared by the State of Nevada were
21 consistent with the Board's decision in this matter dated January 29, 2019. No challenge to the
22 proposed Findings of Fact, Conclusions of Law and Final Order, (FOF) was levied by
23 Respondent against the FOF proposed by the State. The parties were duly noticed for this
24 hearing.

25 GOOD CAUSE APPEARING, the Board HEREBY FINDS that the proposed Findings of
26 Fact, Conclusions of Law and Final Order, attached hereto as Exhibit A, are consistent with the
27 Board's Decision in this case dated January 29, 2019, and HEREBY ORDERS that said Findings
28 of Fact, Conclusions of Law and Final Order are the Findings of Fact, Conclusions of Law and
Final Order of the Board, effective this date for this matter.

RECEIVED

APR 26 2024

**DIR LEGAL
CARSON CITY OFFICE**

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IT IS SO ORDERED

Dated this 30th day of March, 2024.

NEVADA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD



By: /s/Rodd Weber
Rodd Weber, Chairman

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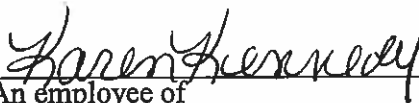
CERTIFICATE OF SERVICE

Pursuant to NRCPC 5(b), I hereby certify that I am an employee of the Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached document, *Order Filing Findings of Fact, Conclusions of Law and Final Order*, on those parties identified below by placing an original or true copy thereof in a sealed envelope, certified mail, return receipt requested, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada to the following addresses:

Salli Ortiz, Esq.
State of Nevada
Division of Industrial Relations
Division of Counsel's Office
1886 East College Pkwy., Suite 110
Carson City, NV 89706.

Bruce R. Mundy, Esq.
200 South Virginia St., 8th Floor
Post Office Box 18811
Reno, NV 89511-0811

Dated this 29th day of March, 2024.


An employee of
the Law Offices of Charles R. Zeh, Esq.

STATE OF NEVADA
Division of Industrial Relations - Division Counsel's Office
400 West King Street, Suite 201, Carson City, Nevada 89703
Telephone: (775) 684-7286 Fax: (775) 687-1621

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
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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
10 AND INDUSTRY, STATE OF NEVADA,
11 Complainant,

DOCKET NO: RNO 17-1896

Inspection No: 1206644

12 vs.

13 RENO FORKLIFT, INC.,

14 Respondent.
15 _____/

16 **FINDINGS OF FACT, CONCLUSIONS OF LAW**
17 **AND FINAL ORDER**

18 This matter came before the NEVADA OCCUPATIONAL SAFETY AND HEALTH
19 REVIEW BOARD ("Review Board") for a hearing on October 11, 2018. The Review Board
20 has jurisdiction to hear such matters pursuant to Nevada Revised Statutes §618.315. The
21 hearing was conducted pursuant to Chapter 618 and 233B of the Nevada Revised Statutes.

22 Complainant, the Chief Administrative Officer of the Nevada Occupational Safety and
23 Health Administration, Division of Industrial Relations ("NV OSHA"), was represented by
24 Salli Ortiz, Esq., Division Counsel, Division of Industrial Relations of the Nevada
25 Department of Business and Industry. Respondent, RENO FORKLIFT, INC. ("RENO
26 FORKLIFT") was represented by Bruce R. Mundy, Esq.

27 At the hearing, the parties stipulated to the admission of NV OSHA's Exhibits 1
28 through 3, and RENO FORKLIFT's Exhibit A. Tr. 7:21 through 8:7.

NV OSHA presented the testimony of the Compliance Safety and Health Officer
("CSHO") that conducted the inspection, Robert Gillings ("CSHO Gillings"), as well as
CSHO Gillings' Supervisor, Jake La France ("Supervisor La France"). RENO FORKLIFT

1 presented the testimony of injured worker Edward Wilson ("IW Wilson") and Owner
2 George Pimpl ("Owner Pimpl").

3 The Review Board, having heard testimony, admitted documentary evidence in this
4 matter, considered the parties' respective arguments, and being fully advised regarding
5 the underlying subject matter, renders the following Findings of Fact, Conclusions of Law,
6 and Final Order:

7 **PRELIMINARY FINDINGS**

8 1. At all times mentioned, the Complainant served as the Chief Administrative
9 Officer of the Occupational Safety and Health Administration, Division of Industrial
10 Relations, Department of Business and Industry, which is the agency of the State of Nevada
11 responsible for the administration of Occupational Safety and Health.

12 2. Respondent RENO FORKLIFT is a Nevada domestic corporation, with a business
13 and mailing address at 171 Coney Island Drive, Sparks, Nevada 89431.

14 3. Pursuant to NRS 618.315, jurisdiction has been conferred upon NV OSHA over
15 the working conditions at RENO FORKLIFT's job site at 10855 Lear Boulevard, Suite 105,
16 Reno, Nevada 89506.

17 4. On January 11, 2017, NV OSHA received an accident referral. Ex. 1, pg. 3.

18 5. Robert Gillings was the CSHO who conducted the inspection. Ex. 1, pgs. 5, 18-21.

19 6. Supervisor La France was identified as the NV OSHA supervisor who reviewed
20 the evidence, citation process and the responsible complainant witness to support the
21 violations.

22 7. On January 11, 2017, CSHO Gillings conducted an Opening Conference with
23 RENO FORKLIFT Safety Director Bob Manning ("Safety Dir. Manning"). Ex. 1, pg. 4; see
24 Ex. 1, pg. 18.

25 8. On March 16, 2017, NV OSHA issued a Citation and Notification of Penalty
26 ("Citation"), Inspection Number 1206644, to RENO FORKLIFT for one "Serious" violation
27 of 29 CFR 1910.147(c)(4)(i), for the control of potentially hazardous energy. Ex. 1, pg. 44.
28

1 9. By contest letter dated March 30, 2017, RENO FORKLIFT contested the citation
2 and penalty set forth in the Citation resulting from Inspection Number 1206644. Ex. 1,
3 pg. 56.

4 10. On April 19, 2017, NV OSHA filed a Complaint with the Review Board alleging
5 the code violations. Ex. 1, pg. 44. The alleged violation is as follows:

6 **Citation 1, Item 1: SERIOUS**

7 29 CFR 1910.147(c)(4)(i): Procedures shall be developed, documented and
8 utilized for the control of potentially hazardous energy when employees are
9 engaged in the activities covered by this section.

10 A. The employer did not utilize their procedures to control potentially
11 hazardous energy, which stated "Apply or Affix Lock and Tag (or other
12 device) so that equipment is held in 'safe' or 'off' position." The two
13 employees from Reno Forklift de-energized the conveyor but did not affix a
14 lock or tag before they started working on the machine and removed the
15 guards. As a result, employees were exposed to unexpected energization of
16 the conveyor system.

17 B. The employer did not utilize their procedures to control potentially
18 hazardous energy, which stated, "Before performing service or maintenance
19 on equipment or machinery where energy or motion could release and cause
20 injury, the energy sources must be isolated and locked out." The employer
21 allowed the practice of running the conveyor systems while servicing and
22 maintenance was being performed. As a result, employees were exposed to
23 an unguarded sprocket and chain, and an employee's right middle finger was
24 amputated after it was caught in the sprocket and chain of the conveyor.

25 C. The employer did not utilize their procedures to control potentially
26 hazardous energy, which stated, "Before performing service or maintenance
27 on equipment or machinery where energy or motion could release and cause
28 injury, the energy sources must be isolated and locked out." The employer
allowed the practice of running the conveyor systems while servicing and
maintenance was being performed. As a result, employees were exposed to
unguarded rotating rollers.

D. The employer did not develop, document, and utilize a written procedure
for each piece or type of equipment (e.g. conveyors) as described in their
program. A form entitled "LOTO Written Procedures (template)" was in their
program but was not completed for conveyors.

The Serious citation item had a proposed penalty of \$4,000.

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FINDINGS OF FACT

1
2 1. NV OSHA conducted an inspection on January 11, 2017, based on a referral that
3 was submitted to it, reporting an accident that occurred at Respondent's jobsite at Tagg
4 Logistics ("TAGG"). Ex. 1, pgs. 18-19.

5 2. The inspection was designated as Inspection No. 1206644.

6 3. The incident took place on January 10, 2017, when an employee of RENO
7 FORKLIFT had part of his finger partially amputated by an unguarded sprocket when
8 responding to a call from TAGG to repair a TAGG conveyor belt. Tr. 19:1-7; Ex. 1, pgs. 18-
9 19. TAGG was the host company or site, as it was the location of the conveyor belt that was
10 apparently in need of repair. *Id.*

11 4. In response to the call from TAGG, RENO FORKLIFT dispatched two employees,
12 IW Wilson and his assistant, Installer Tim Coffman ("Installer Coffman"). Tr. 32:24; 33:1-
13 4; see Ex. 1, pgs. 18-19. IW Wilson was a storage systems technician. Tr. 16:9-15; see Ex. 1,
14 pgs. 23-26; see also Ex. 1, pgs. 27-28.

15 5. IW Wilson had worked on conveyor systems for the past year and a half. Tr. 95:9-
16 11; see Ex. 1, pgs. 23-26.

17 6. Installer Coffman was new to RENO FORKLIFT. He had never worked on a
18 conveyor belt before, Tr. 18:12-14, had never been trained on lockout/tagout procedures
19 ("LOTO"), and was experiencing on the job training, with this dispatch. Tr. 18:12-14; 58:1-
20 3; see Ex. 1, pgs. 27-28.

21 7. When IW Wilson and Installer Coffman arrived at the site, they met with Mark
22 McKenna, Operations Manager for TAGG ("Ops. Mgr. McKenna"), who told them there
23 was a "thumping" noise in the conveyor. Tr. 19:16-17; Tr. 92:9-15. According to IW Wilson,
24 he told Ops. Mgr. McKenna that they would have to shut the section down and evaluate it.
25 Tr. 92:9-15. "Evaluate" was IW Wilson's word. *Id.*

26 8. By virtue of his experience in relation to his untrained co-worker, IW Wilson was
27 the lead/supervisor on this call. Tr. 60:4-8; 108:5-9. IW Wilson was the injured worker
28 whose partially amputated finger precipitated NV OSHA's investigation.

1 9. Lockout and tagout are defined terms. Lockout is the placement of a device on an
2 energy isolating device, to ensure that the energy to the equipment or machinery being
3 worked on does not become energized and cause injury to the unsuspecting worker. *See*
4 29 CFR §1910.147(b). Tagout refers to the placement on the machinery of that which is
5 essentially a notice that the machinery is being worked on and must not be energized, or
6 started up, until the tagout device is removed, which is not to occur until the work is
7 finished. *Id.* In this case, there is no dispute that the conveyor belt had the ability to be
8 locked out and tagged out (i.e., turned off and shut down). Tr. 104:5-7.

9 10. It is undisputed that IW Wilson and Installer Coffman did not lockout or tagout the
10 conveyor belt when it was operational or could have been operational.

11 11. According to IW Wilson, he approached the conveyor with Installer Coffman,
12 moved people away from the conveyor belt and found the on-off switch to the conveyor.
13 Tr. 92:9-25. The on-off switch proved to be located right next to where the incident
14 happened. IW Wilson shut down the conveyor belt, claiming he made sure it was shut off
15 before they started looking at things. *Id.* IW Wilson recalls telling someone that this is
16 going to be "down" until they finished their work. *Id.* IW Wilson testified that he then took
17 off the chain guard and wiggled the chain to see if it was too tight or if that was the
18 problem. He determined that it was not too tight. *Id.* Installer Coffman was standing next
19 to the on-off switch. Tr. 93:1-2.

20 12. IW Wilson had his lockout/tagout equipment with him, but it never left his bag.
21 Tr. 93:2-3; 98:17-22.

22 13. The chain guard was removed, and the chain wiggled, by IW Wilson with no
23 lockout or tagout deployed. Tr. 19:16-17; 28:6-7; 44:23-24; 53:1; 92:16-25.

24 14. While the chain guard was still removed from the belt, IW Wilson told Installer
25 Coffman to start up the equipment. Tr. 93:1-9. Both were backed away while the
26 equipment was first running with the chain guard removed. *Id.* They could not hear any
27 thumping noise, however, from where they were standing. *Id.*

28

1 15. IW Wilson surmised that the thumping must be coming from the rollers, below.
2 Tr. 93:11-12. The equipment was then shut down while IW Wilson removed the belly pan
3 in order to see if anything was stuck on the rollers. Tr. 93:11-12.

4 16. IW Wilson then decided to slide himself under the conveyor belt. When lying
5 underneath the conveyor, IW Wilson told Installer Coffman to start the conveyor belt so
6 that he could listen for the noise or thumping. Tr. 93:18-20.

7 17. Watching and listening for noises are what IW Wilson was doing from beneath the
8 conveyor belt. Ibid. pg. 93. The chain guard was still removed, while the conveyor belt was
9 re-energized, or turned on by Installer Coffman, with IW Wilson laying underneath the
10 conveyor belt.

11 18. IW Wilson's LOTO equipment was still in his bag. Tr. 98:17-18. The person
12 operating the switch to energize the equipment was not IW Wilson, the person listening
13 for the thumping noise, but Installer Coffman, the inexperienced co-worker of IW Wilson.
14 Tr. 93:10-22.

15 19. While the conveyor belt was still running, IW Wilson reached up with his hand,
16 caught it in the unguarded, rotating sprocket, and lost part of his finger. Tr. 93:16-22;
17 94:1-3. IW Wilson told Installer Coffman to turn off the machinery. Tr. 93:20-25.

18 20. At no point was the system ever locked out or tagged out. Tr. 100: 2-14; *see also*,
19 Tr. 115:23 (didn't use lock out procedures to start out the job).

20 21. IW Wilson, the person actively working on the equipment, was not the person in
21 control of the energization of the equipment. The person in command of the on-off switch
22 was Installer Coffman, and this was the first time Installer Coffman ever worked on a
23 conveyor belt. *See* Tr. 58:1-3.

24 22. RENO FORKLIFT concedes the point that IW Wilson had placed himself in the
25 "...realm of a hazardous area...." Tr. 47:19-20; *see also*, Tr. 102:19-21 (working on a piece
26 of equipment that is running is inherently hazardous).

27 23. The employees RENO FORKLIFT sent to TAGG were not properly trained.
28

1 24. This incident was Installer Coffman's first exposure to work on a conveyor belt.
2 Tr. 58:1-3. He was learning on the job. There is no evidence that he had received any
3 training on conveyor belts or LOTO procedures before arriving at TAGG. Tr. 18:12-14.

4 25. IW Wilson claimed he worked on conveyors for the past year and a half, as of the
5 date of the incident. Tr. 95:9-11. The last training he had received from RENO FORKLIFT
6 dates back to April 15, 2016. IW Wilson stated to NV OSHA that he received hands on
7 LOTO procedure training, but never received written procedures on LOTO from RENO
8 FORKLIFT. Tr. 37:3-8. He had never seen a copy of the LOTO program in writing.
9 Tr. 17:3-4.

10 26. IW Wilson had never seen a policy from RENO FORKLIFT telling him how he
11 should conduct a job when testing an energized piece of equipment. Tr. 101:16 through
12 102:3.

13 27. RENO FORKLIFT has a duty to provide for the safety of its employees when
14 working on machinery. It attempted to draft a LOTO Safety Program in an effort to bring
15 itself in compliance with 29 CFR §1910.147. *See* Ex. 1, pgs. 40.

16 28. RENO FORKLIFT's written program states: "Before performing service or
17 maintenance on equipment or machinery where energy or motion could release and cause
18 injury, the energy sources must be isolated and 'locked out.'" *Ibid*. The details for
19 implementation of this dictate were not drafted. The template for such a program that was
20 in evidence was incomplete. *See* Exhibit 1, pgs. 41-42.

21 29. RENO FORKLIFT's management failed to "Establish written lock out/tagout
22 procedures for individual or group of similar machines in place", despite that requirement
23 being outlined in its written program. Tr. 58;21 through 59:4; Ex. 1, pg. 40. There was no
24 such procedure established for the conveyor belt the subject of NV OSHA's Complaint.

25 26 CONCLUSIONS OF LAW

27 1. Nevada Administrative Code 618.788 places the burden of proof on NV OSHA. NV
28 OSHA must prove by a preponderance of the evidence that: (i) the cited standard applied
to the condition; (ii) the existence of noncomplying conditions; (iii); employee exposure or

1 access, and (iv) the employer knew, or with the exercise of reasonable diligence could have
2 known, of the violative condition." See Belger Cartage Service, Inc., 7 9 OSAHRC 16/B4, 7
3 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28, 373 (No.76-1948, 1979); Harvey
4 Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,
5 830, pp. 28, 908-10 (No. 76-1408, 1979); Am. Wrecking Corp. v. Sec'y of Labor, 351 F.3d.
6 1254, 1261 (D.C. Cir. 2003).

7 2. All facts forming the basis of a Complaint must be proved by a preponderance of
8 the evidence. See Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16, 958 (1973).

9 3. The undisputed facts sustain all four elements of NV OSHA's Complaint.

10 4. SV La France, now Northern Nevada OSHA District Manager La France, testified
11 that the gravamen of subparagraph A of the Complaint arose when IW Wilson and
12 Installer Coffman de-energized the machine (the conveyor belt), removed the guards, and
13 IW Wilson put his hands on the chain to see if it was too tight, without either tagging out
14 or locking out the "machine," contrary to RENO FORKLIFT's own procedures. and the
15 Federal Regulations. Tr. 55:2-8; Tr. 57:24 through 58:6; Ex. 1, pg. 40 (¶ 4.1.1).

16 5. The gravamen of subparagraph B of the Complaint is directed at the failure to
17 LOTO, while there was undisputedly an unguarded chain to which the employees were
18 exposed. Tr. 58:7-10.

19 6. The gravamen of subparagraph C of the Complaint is the same, except it is directed
20 to the exposure of the employees to unguarded rollers, without a LOTO. Tr. 58:11-12.

21 7. The gravamen of subparagraph D of the Complaint is directed towards paragraph
22 3.1.3 of RENO FORKLIFT's policies, which requires the development of LOTO safety
23 procedures for similar pieces of equipment, or individual pieces of equipment. Tr. 58:21
24 through 59:4; 66:3-8; see Ex. 1, pgs. 40, 41. This was never completed.

25 8. The Regulations apply "...to the control of energy during servicing and/or
26 maintenance of machines and equipment." 29 CFR §1910.147(a)(2)(i).

27 9. 29 CFR §1910.147(a)(3)(i) requires employers to "...establish a program and utilize
28 procedures for affixing appropriate lockout devices or about tagout devices to energy

1 isolating devices and to otherwise disable machines or equipment to prevent unexpected
2 energization, start up or release of stored energy in order to prevent injury to employees.”

3 10. 29 CFR §1910.147(c)(1) mandates that, “...employer[s] shall establish a program
4 consisting of energy control procedures, employee training and periodic inspections to
5 ensure that before any employee performs any servicing or maintenance on a machine or
6 equipment where the unexpected energizing, startup or release of stored energy could
7 occur and cause injury, the machine or equipment shall be isolated from the energy source
8 and rendered inoperative.”

9 11. Servicing and maintenance are defined terms, which expressly include the
10 “inspecting” of a machine. 29 CFR §1910.147(b).

11 12. 29 CFR §1910.147(c)(4)(i) provides that, “[p]rocedures shall be developed,
12 documented and utilized for the control of potentially hazardous energy when employees
13 are engaged in the activities covered by this section.” Those activities include the servicing
14 and maintenance, as defined in the Regulations, of machinery and equipment that have
15 energy sources which could, but need not actually have to, suddenly energize and cause
16 injury to the employee servicing or maintaining the equipment.

17 13. The incident giving rise to a partially amputated finger violated both RENO
18 FORKLIFT’s own procedures as well as the regulations providing for and requiring LOTO
19 safety precautions to be made.

20 14. From the moment that IW Wilson and Installer Coffman first looked at the
21 conveyor belt until they left, they never locked out or tagged out the conveyor belt, even
22 though they worked on the conveyor belt while it was idle to remove the guardrail, the
23 bottom pan, and to touch the chain to see if it was too tight.

24 15. The conveyor belt was also not locked out or tagged out when IW Wilson was lying
25 beneath the running conveyor belt, without the safety guard re-installed, when engaged to
26 listen and look at the operating machinery while he had admittedly placed himself in a
27 zone of hazard.

28

1 16. It is beyond dispute that RENO FORKLIFT failed to follow its own pronouncement
2 to draft, or cause to be drafted, LOTO procedures for each individual or group of similar
3 machines as it required of itself. *See* Ex. 1, pg. 40 (¶ 3.1.3).

4 17. As it is required of RENO FORKLIFT by the Regulations, RENO FORKLIFT failed
5 in this regard also.

6 18. The Review Board finds that NV OSHA has proven a prima facie case for the
7 violation of 29 CFR §1910.147(c)(4)(i), Subparagraphs A through D, based upon the
8 undisputed facts before it.

9 19. The facts are undisputed that the failure to follow RENO FORKLIFT's own policies,
10 and the failure of RENO FORKLIFT to have drafted pertinent policies, amounted to
11 violations of the pertinent Regulations cited and analyzed above.

12 20. These failures of omission and commission are the direct and proximate cause of
13 the partial amputation sustained by the injured employee.

14 21. By reason of the undisputed facts, the requisite scienter of the employer, RENO
15 FORKLIFT, is clearly established.

16 22. An employer's knowledge may reasonably be inferred, and the likelihood of injury
17 is reasonably foreseeable, when, as here, the training of employees in pertinent safety
18 measures is indifferent, at best, and when there are gaps in the employer's safety protocol
19 and procedure, as here.

20 23. The Review Board finds and concludes that NV OSHA proved the prima facie case
21 for the elements set out in this Complaint.

22 24. The Review Board finds the burden shifts to RENO FORKLIFT to prove it has an
23 affirmative defense or defenses to the State's Complaint.

24 25. Absent an affirmative defense, liability may be assigned to RENO FORKLIFT due to
25 the charges brought by the State. *See ComTran Group, Inc. v. US. Dep't. of Labor,*
26 722 F.3d 1304, 1307 (11th Cir., 2013).

27 26. In its defense, RENO FORKLIFT argues that the regulations cited above are
28 irrelevant to this case for reasons which include that no amount of regulations could have
prevented this incident from occurring. Tr. 10:8-10. The incident was the product of a

1 "brain fart" on the part of IW Wilson, and there is nothing an employer can do to prevent
2 harm under those circumstances. RENO FORKLIFT also claims that IW Wilson was
3 testing, not inspecting, the conveyor belt, so the regulations relied upon by the State were
4 also irrelevant because the regulations allow for the testing of equipment while running.
5 Tr. 9:12-16; 10:1-4. RENO FORKLIFT argues that the circumstances fall within the
6 exception to 29 CFR §1910.147(c)(4)(i), thereby excusing RENO FORKLIFT for not having
7 completed, and failing to have in place, the LOTO procedures otherwise required of
8 employers. Tr. 9:12-16. These are the reasons upon which RENO FORKLIFT bases its
9 claim that the State's charges against it should be dismissed.

10 27. Considering the affirmative defenses available, relying on IW Wilson's "brain fart"
11 is simply a restatement of the rogue employee or here, the rogue supervisor, defense to an
12 OSHA complaint.

13 28. The rogue employee or supervisor defense is based upon the premise the
14 misconduct was unpreventable or unforeseeable. See New York State Elec. & Gas Corp.,
15 88 F.3d 98, 106-108 (2nd Cir., 1996).

16 29. The elements of the affirmative defense require the employer, RENO FORKLIFT, to
17 show it "... (1) created a work rule to prevent the violation at issue; (2) adequately
18 communicated that rule to its employees; (3) took all reasonable steps to discover
19 noncompliance, and; (4) enforced the rule against employees when violations were
20 discovered." New York State Elec. & Gas Corp., 88 F.3d at 106.

21 30. This defense fails for RENO FORKLIFT.

22 31. The undisputed facts chronicled above show that RENO FORKLIFT did not
23 communicate well its LOTO policy to its employees (rule adequately communicated). IW
24 Wilson said he never saw it. Tr. 17:3-4; 29:17-18; 37:5-8; 90:3-4; 101:16 through 102:3. IW
25 Wilson also admitted that he never saw the LOTO written procedure. Tr. 37:6-8. The last
26 training he recalled took place April 15, 2016. Tr. 96:11-13.

27 32. There was no follow up to determine if the training had been absorbed and of any
28 value (reasonable steps to discover noncompliance). Tr. 105:4-8. RENO FORKLIFT's

1 approach to training IW Wilson was perfunctory at best. Installer Coffman had received
2 no training, and this was his first conveyor job. Tr. 18:12-14; 89:22-25.

3 33. There is no evidence that RENO FORKLIFT enforced the LOTO policy, if violated
4 (enforcement of the rule). Owner Pimpl said that IW Wilson did everything right. It was
5 IW Wilson's call as to how to handle it and so, Owner Pimpl stated, he could not stop the
6 situation from occurring. There was no discipline administered. Tr. 108:3-9.

7 34. The Board concludes that RENO FORKLIFT cannot rely upon the rogue employee
8 affirmative defense.

9 35. It is evident from the analysis of the undisputed facts that RENO FORKLIFT failed
10 in several respects to prove the elements of this affirmative defense.

11 36. Addressing the claim that IW Wilson was testing, not inspecting, when he was lying
12 under the conveyor belt while it was running, it is true that 29 CFR §1910.147(f)(1) allows
13 for the operation of the machine or equipment with the lockout or tagout devices removed
14 in order "...to test or position the machine, equipment or component thereof..." *if* the rest
15 of the conditions following 29 CFR §1910.147(f), entitled "Additional Requirements", are
16 met.

17 37. The Review Board considered RENO FORKLIFT's argument that, when IW Wilson
18 was laying under the conveyor belt listening and looking, he was "testing" the equipment
19 and not servicing or maintaining the equipment. That it was permissible for IW Wilson to
20 operate the conveyor belt, without a LOTO device employed, as it was permissible for him
21 to be in the zone of hazard while the belt was running. Also, RENO FORKLIFT's claims
22 that the equipment cannot be tested unless it is running, and 29 CFR §1910.147(f) permits
23 employers to allow the testing of equipment or machinery while it is running and while the
24 employee remains in the zone of hazard. Tr. 8:23 through 9:1; 9:12-16; 35:13.

25 38. The Review Board also considered NV OSHA's contention that IW Wilson was
26 "inspecting," not "testing" the conveyor belt at the time he was lying under it in the zone of
27 hazard, listening and looking at the equipment while it was running. Tr. 77:6-9.

28 39. Neither the term "testing" nor "inspecting" is defined in the regulations pertinent
here.

1 40. It is well settled, however, that when interpreting statutes or regulations, the words
2 employed are to be given their plain and ordinary meaning. See Barrick Goldstrike Mine v.
3 Peterson, 116 Nev. 541, 545 (2000); Nelson v. Heer, 123 Nev. 217, 224, 163 P.3d 420
4 (2007).

5 41. Both the word "test" and the word "inspect" are common and ordinary terms whose
6 use in the Regulations, here, are not nuanced. Test includes in its meaning, "A means
7 employed to examine, try or prove...". Tested includes amongst its meanings, "To
8 administer a test in order to diagnose...". Webster's II New Riverside University
9 Dictionary, Copyright 1984, p. 1198. The word inspect means "To examine in detail for
10 flaws...". Webster's II New Riverside University Dictionary, Copyright 1984, p. 632. Both
11 terms use the word "examine" to define them. The word "test," however, connotes a more
12 active, than passive role of the testor, especially when the word "try" is included in the
13 meaning. This also stems from the association of the word "diagnose" with "test." On the
14 other hand, the term inspection has a more passive connotation. One can inspect, without
15 probing, pushing, pulling, or otherwise administering.

16 42. Applying these meanings for "inspecting" and "testing" to IW Wilson's actions, the
17 Review Board concludes he was inspecting, not testing, while passively laying under the
18 conveyor belt listening and watching. IW Wilson was looking for flaws, an activity
19 squarely within the meaning of an inspection.

20 43. Reno Forklift is incorrect when it claims it is excused from the requirements of 29
21 CFR §1910.147(c)(4)(i), by reason of 29 CFR §1910.147(f).

22 44. The Review Board finds and concludes that NV OSHA's Complaint withstands the
23 "testing" affirmative defense, based upon the Review Board's finding and conclusion that
24 IW Wilson was inspecting, not testing.

25 45. Even assuming, arguendo, that IW Wilson was testing instead of inspecting, the
26 Review Board concludes that RENO FORKLIFT's reliance upon 29 CFR §1910.147(f) is
27 nevertheless unavailing.

28 46. 29 CFR §1910.147(f) applies only if the sequence of actions following 29 CFR
§1910.147(f) are met. They include the requirement that employees be removed from the

1 machine or equipment area according to paragraph (e)(2). 29 CFR §1910.147(f)(1)(ii).
2 Paragraph (e)(2) in turn states that "...the work area shall be checked to ensure that all
3 employees have been safely positioned or removed." 29 CFR §1910.147(e)(2)(i). 29 CFR
4 §1910.147(e)(3) states that, "[e]ach lockout device shall be removed from each energy
5 isolating device by the employee who applied the device."

6 47. Applying these regulations, RENO FORKLIFT's claim of defense based upon
7 29 CFR §1910.147(f) fails as well.

8 48. RENO FORKLIFT failed to comply with these basic requirements that must be
9 sequentially followed. The LOTO devices were never applied in the first place, even though
10 when IW Wilson and Installer Coffman removed the guard they clearly should have been
11 deployed. Since the LOTO devices were never applied, RENO FORKLIFT could not
12 comply with the requirement that the person who installed each lockout device must also
13 be the person to remove it and then, at the end, re-install it. 29 CFR §1910.147(f)(1)(v); Tr.
14 36:3-4, 7. That never happened. Tr. 68:14-21.

15 49. IW Wilson was laying under the conveyor belt in a zone of hazard while the
16 machine was operational. Tr. 47:16-20; 102:18-21; 132:1-5. Installer Coffman was standing
17 next to the machine. This amounts to a blatant violation of 29 U.S.C. §1910.147(e)(2),
18 which requires all employees, not just some of the employees, to be removed from the area
19 or safely positioned while the machine is running. Tr. 30:22-25; 78:17-25; 79:6-10.

20 50. Neither IW Wilson nor Installer Coffman were removed from the area and RENO
21 FORKLIFT concedes that IW Wilson was in the zone of hazard.

22 51. Hence, even if IW Wilson were testing, instead of inspecting, RENO FORKLIFT is
23 not protected by 29 CFR §1910.147(f), because it failed to satisfy the sequential additional
24 requirements that must be met.

25 52. The Review Board also considered RENO FORKLIFT's argument that 29 CFR
26 §1910.147(c)(4)(i) is inapplicable because RENO FORKLIFT falls within the exception to
27 29 CFR §1910.147(c)(4)(i), itself.
28

1 53. The exception to 29 CFR §1910.147(c)(4)(i) merely frees the employer from
2 documenting the required procedure for a particular machine or equipment. It does not
3 excuse, abiding by or failing to have a LOTO procedure that must be followed.

4 54. To fall within this exception, the employer must satisfy *all* eight (8) elements to the
5 exception. They include the requirement that RENO FORKLIFT show that the machine is
6 isolated from its energy source and locked out during servicing or maintenance. RENO
7 FORKLIFT must also show that the lockout device was under the exclusive control of the
8 authorized employee performing the servicing or maintenance. *See* 29 CFR
9 §1910.147(c)(4)(i), Exception, ¶ ¶ 4 and 6.

10 55. The Review Board finds that from the moment IW Wilson and Installer Coffman
11 started dismantling the equipment, by removing the guardrail while the machine was
12 turned off, it was never locked out or tagged out. IW Wilson's LOTO equipment never left
13 his bag, as he admits. Tr. 16:22-24; 93:2-3; 98:17-19; 100:1-14. The record before the
14 Review Board could not be clearer on this point.

15 56. The conveyor belt was capable of being tagged or locked out. Tr. 104:5-7.
16 Impossibility is no defense to the failure to start dismantling the conveyor belt without
17 having first tagged out or locked out the equipment. There is no reason why IW Wilson
18 and Installer Coffman could not and did not LOTO the conveyor belt, when they first
19 started tinkering with this "thumping" machine.

20 57. The Review Board concludes that Reno Forklift's "exception defense" to 29 CFR
21 §1910.147(4)(c)(i) is to no avail.

22 58. NV OSHA's Complaint alleges that the offenses committed were "Serious." Ex. 1,
23 pgs. 53-54.

24 59. It is well settled that "...when a regulation makes the occurrence of an accident with
25 a substantial probability of death or serious physical harm *possible*, the employer has
26 committed a serious violation of the regulation." Bethlehem Steel Corp. v. OSHRC, 607
27 F.2d 1069, 1073 (3rd Cir., 1979) (emphasis added). Substantial probability "refers not to
28 the probability that an accident will occur but to the probability that, an accident having
occurred, death or serious injury could result,' Ill. Power Co v. OSHRC, 632 F. 2d 25, 28

1 (7th Cir., 1980)". Secretary of Labor v. Trinity Industries, Inc., 504 F.3d 397, 401 (3rd Cir.,
2 2007).

3 60. RENO FORKLIFT never mounted a compelling challenge to the classification of the
4 offense as "serious." It would be hard pressed to mount such a challenge in that it
5 admitted during the hearing that working on a piece of equipment that is running is
6 inherently hazardous. Tr. 102:18-21; see also Tr. 47:16-20. A condition that is inherently
7 hazardous clearly has the potential for serious harm or death. The characterization of the
8 situation as inherently hazardous easily surmounts for the State, the burden of showing a
9 condition that might well lead to death or serious injury.

10 61. The State, however, also addressed at the hearing, the elements by which a serious
11 violation could be assessed. SV La France testified that the violation was labeled serious
12 because of the substantial probability that death or serious physical harm could occur.
13 Tr. 61:19-22.

14 62. Given that RENO FORKLIFT concedes the situation is hazardous, it cannot argue
15 with or argue about the classification of the offense(s) as serious.

16 63. There is no room to argue the classification, once that assessment is reached, as the
17 Nevada Revised Statutes dictate a serious classification where serious harm or death is the
18 likely result of the injury. *See* NRS 618.625(3).

19 64. NV OSHA also considered the elements of "gravity," "severity" and "probability."

20 65. RENO FORKLIFT mounted no challenge to the State's application of these
21 elements for assessing a financial penalty and classification of the offense as serious.

22 66. The Review Board finds substantial support for the classification of the offense as
23 serious.

24 67. The Review Board also concludes that the assessment in the amount of \$4,000 is
25 appropriate as the gravity-based penalty. Tr. 62, 63.

26 68. The Review Board finds that a violation of 29 CFR 1910.147(c)(4)(i) did occur as to
27 Citation 1, Item 1, the violation was properly classified as Serious, and the proposed
28 penalty in the amount of Four Thousand Dollars (\$4,000) is confirmed.

///

STATE OF NEVADA
Division of Industrial Relations - Division Counsel's Office
400 West King Street, Suite 201, Carson City, Nevada 89703
Telephone: (775) 684-7286 Fax: (775) 687-1621

FINAL ORDER

1
2 1. Citation 1, Item 1, is AFFIRMED as a SERIOUS violation of the cited standard,
3 29 CFR 1910.147(c)(4)(i);

4 2. The penalty amount for Citation 1, Item 1, of Four Thousand Dollars (\$4,000), is
5 APPROVED;

6 3. Any of the Findings of Fact that are more appropriately deemed Conclusions of Law
7 shall be so deemed. Any of the Conclusions of Law that are more appropriately deemed
8 Findings of Fact shall be so deemed.

9 4. Any party who is aggrieved by this order may file a petition for judicial review in
10 accordance with NRS Chapter 233B.

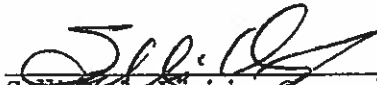
11 DATED this 29th day of March, 2024
2023.

12
13 NEVADA OCCUPATIONAL SAFETY AND
14 HEALTH REVIEW BOARD

15 

16 _____
17 RODD WEBER, Chairman

18 Submitted by:

19 
20 _____
21 Salli Ortiz, Division Counsel
22 Division of Industrial Relations
23 400 West King Street, Suite 201
24 Carson City, Nevada 89703
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26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of Nevada, Department of Business and Industry, Division of Industrial Relations (DIR), and that on this date, I caused to be served a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER, OSHA Docket RNO 17-1896**, by the method indicated below, and addressed to the following:

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Rodd Weber, Chairman Nevada Occupational Safety & Health Review Board c/o CHARLES R. ZEH, ESQ. 50 W. Liberty Street, Suite 950 Reno, NV 89501	<input type="checkbox"/> Via State Mail room <input checked="" type="checkbox"/> Certified Mail:7022 2410 0001 5083 9091 <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Interdepartmental Mail <input type="checkbox"/> Messenger Service

DATED this 30th day of June, 2023.



 Christy Bateman
 State of Nevada Employee

STATE OF NEVADA
 Division of Industrial Relations - Division Counsel's Office
 400 West King Street, Suite 201, Carson City, Nevada 89703
 Telephone: (775) 684-7286 Fax: (775) 687-1621

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Charles R. Zeh, Esq.
The Law Offices of Charles R. Zeh, Esq.
50 West Liberty Street, Suite 950
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