

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

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

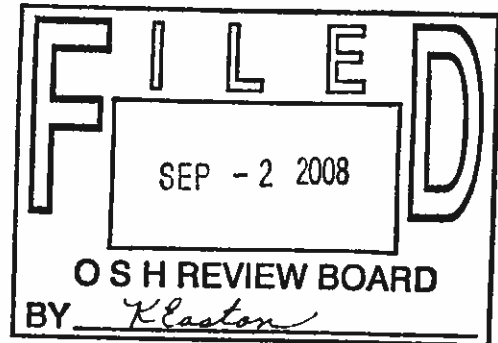
DOCKET NO. LV 08-1347

Complainant,

vs.

10 RELIABLE STEEL INCORPORATED,

11 Respondent.
12



13 DECISION

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of August,
16 2008, in furtherance of notice duly provided according to law, MR. JOHN
17 WILES, ESQ., counsel appearing on behalf of the Complainant, **Chief**
18 **Administrative Officer of the Occupational Safety and Health**
19 **Administration, Division of Industrial Relations (OSHA);** and MESSRS.
20 DALLIN WAYMENT, ESQ. and WADE DANN, ESQ., appearing on behalf of
21 Respondent, **Reliable Steel, Incorporated;** the **NEVADA OCCUPATIONAL SAFETY**
22 **AND HEALTH REVIEW BOARD** finds as follows:

23 Jurisdiction in this matter has been conferred in accordance with
24 Nevada Revised Statute 618.315.

25 The complaint filed by the OSHA sets forth allegations of violation
26 of Nevada Revised Statutes as referenced in Exhibit "A," attached
27 thereto. Counsel stipulated there were only two items to be in contest,
28 namely Citation 1, Item 1(a) and Citation 1, Item 1(b).

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1 Citation 1, Item 1(a) referenced 29 CFR 1926.502(b)(3). The
2 employer was charged with exposing employees to falls of approximately
3 55 feet, due to unsafe guardrailing systems not capable of withstanding
4 a force of at least 200 lbs. The alleged violation at Item 1(a) was
5 classified as Serious and a penalty proposed in the amount of TWO
6 THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00).

7 Citation 1, Item 1(b) referenced 29 CFR 1926.502(b)(5). The
8 employer was charged with exposing employees to falls of approximately
9 55 feet while walking/working proximally to an unsafe guardrailing
10 system where the midrails were not capable of withstanding a force of
11 at least 150 lbs. The alleged violation in Citation 1, Item 1(b) was
12 classified as "Serious" with no penalty proposed but appeared to be
13 grouped with the proposed penalty at Item 1(a).

14 Counsel for the complainant, through Safety and Health
15 Representative (SHR) Mr. Corey Church presented evidence and testimony
16 as to the violations and penalties. Mr. Church testified that he
17 conducted an accident investigation at the Cosmopolitan Resort Site in
18 Las Vegas, Nevada commencing on January 14, 2008. A fatality report had
19 been filed with OSHA and Mr. Church was instructed to investigate the
20 accident, obtain photographic evidence, witness statements, and reports
21 accordingly. The SHR concluded from his investigation that a welded
22 stanchion (post) collapsed because a supporting brace (kicker) had been
23 removed by the Respondent. He testified that the Respondent was engaged
24 in speciality steel work on a time and materials basis and required to,
25 among other things, move certain horizontal beams that had been welded
26 in place and reposition and reattach them as directed by the general
27 contractor. He further testified that for respondent to perform the
28 beam work, it needed to remove the braces which had been welded to the

1 posts in order to obtain access to the large horizontal beam which was
2 then removed, repositioned and reattached by respondent's employees.
3 Mr. Church testified that the posts were not installed by respondent,
4 but because it removed the braces, Mr. Church determined that the
5 strength of the post was compromised. He concluded that the decedent
6 fell against the guardrails attached to the posts and plunged to his
7 death due to the guardrail system failure caused by respondent's brace
8 removal. Mr. Church testified that the decedent, a safety inspector for
9 the general contractor Perini, was a man of approximately 6'5" in height
10 and 275 lbs. in weight. He further testified that respondent employee
11 Gus Galbraith, the welder who removed the bracing, told him that he did
12 not reattach the braces because they were not necessary to support the
13 posts which had been welded in place by another subcontractor. In his
14 opinion, the posts were designed to stand alone for use as a tie off for
15 guardrail cable lines.

16 Counsel for respondent conducted cross-examination of SHR Church.
17 He inquired as to the determination to cite the respondent under the
18 subject standard. Mr. Church responded that he was aware respondent had
19 not originally erected or welded the posts which were to serve as a
20 horizontal lifeline system, but that same had been performed by another
21 subcontractor. Mr. Church further responded to additional questions
22 stating that he "assumed" the posts would hold the 200 lbs. required by
23 the standard with the bracing in place but conducted no testing to
24 establish any capability to withstand at least 200 lbs. of force. Mr.
25 Church testified that he assumed that the posts were sufficient
26 initially, but failed after removal of the bracing and that the accident
27 occurred because the structure in place was modified by respondent.

28 Counsel for complainant presented witness testimony through Mr.

1 Michael Silvey. The witness identified himself as a project
2 superintendent of Schuff Steel, the company responsible for initially
3 erecting and welding the steel posts. Mr. Silvey testified the purpose
4 of the posts was for attachment of a steel cable fall arrest system.
5 He also testified as to the requirement that same withstand code
6 established stress standards and should have withstood up to 2500 lbs.
7 of stress. He further testified as to the purpose of the posts to serve
8 as a tie-off point for Schuff employees to install decking in the area.

9 Counsel for the respondent presented evidence and testimony through
10 four witnesses. Mr. Dan Allbaugh identified himself as a union iron
11 worker, welder and foreman employed by respondent. He testified that
12 he had spent many years as a welder and conducted instructional classes
13 with regard to same. Mr. Allbaugh testified that the failure of the
14 post was due to poor welding which did not conform, in his opinion, to
15 welding standards for the codes in Clark County. He further testified
16 that the braces or kickers were not designed to create an additional
17 support to prevent people from falling "against" the barricade structure
18 but to prevent tension on the guardline from "pulling it in" when used
19 as a horizontal safety line cable. He testified that he examined the
20 post involved in the accident and that it showed no weld on the break.
21 He supported his testimony by identifying the defective weld in the
22 stipulated photographic evidence.

23 On cross-examination, Mr. Allbaugh testified that the braces were
24 not required from a contractual or welding protocol standpoint; that the
25 posts were supposed to ". . . stand on their own after being welded
26 . . ." He further testified that as foreman on the subject job, he
27 believed the welded posts were safe without the braces and in fact his
28 co-workers actually "tied-off" onto the posts while performing their

1 work tasks. Mr. Allbaugh testified that there is no company policy with
2 regard to the use of braces in the subject work so the judgement of the
3 foreman or a certified welder is controlling. He believed the braces
4 were not needed and there was no problem with removing and not
5 reinstalling them after his employees completed their work task.

6 Counsel for the respondent presented testimony of Mr. Gus
7 Galbraith. The witness identified himself as a 22-year union iron
8 worker and certified welder for 20 years. He further testified that he
9 removed the safety cable at the top mid-rails to reach the posts so that
10 he could remove the bracing and reposition the beam which was the direct
11 job assignment for his crew. After he completed the repositioning and
12 welding of the beam, he reinstalled the safety cables and tightened them
13 with a "come-a-long" and noticed no problems. He further testified that
14 the respondent employees finished their work in the area of the fatality
15 approximately 60 days before the accident. He noted while he was
16 working in other areas of the site that Perini safety personnel and
17 others were walking around the area on a regular basis.

18 Respondent counsel presented additional testimony from Mr. Frank
19 Martinovic. The witness identified himself as a graduate structural
20 engineer on the Cosmopolitan project. Mr. Martinovic testified he
21 conducted tests to determine the cause of failure of the steel posts at
22 the job site which resulted in the fatality and initiated the inspection
23 and citations to respondent. He explained the various testing criteria
24 and standards utilized to reach a determination for the cause of the
25 failure. He testified that in his expert opinion the braces should not
26 have been used initially but made no difference with regard to strength
27 of the post to which they were welded. He further testified that the
28 posts as designed and if properly welded should have held without

1 braces. He also testified, based on his destructive testing, that the
2 failure which occurred was not affected by the modification performed
3 by respondent but due to the welding work performed by another
4 subcontractor. He testified that the bracing removal had no affect on
5 the failure of the steel post.

6 On cross-examination, Mr. Martinovic testified that removing the
7 brace (kicker) does not make the welded post stronger or weaker. He
8 also testified that the failed post weld had not been completed even
9 half way around the post, and that had it been so welded it would have
10 held based upon his testing and in his professional opinion. He
11 testified that the post failed because it was welded only to
12 approximately one-quarter of the area which was not enough to withstand
13 200 lbs. of force.

14 Counsel for complainant and respondent provided closing arguments.
15 Complainant argued that the case renders itself to a simple analysis to
16 find violation. Counsel further argued that if a contractor changes a
17 system it should return it to its original condition. Respondent
18 employees removed the brace (kicker) on the failed post and did not
19 notify anyone of their actions. They removed the braces on all floors
20 in order to perform their work tasks and should have replaced those that
21 they removed. Respondent modified the existing guardrail system and
22 caused the failure. By such action, respondent left the issue open for
23 controversy and for no good reason.

24 The respondent argued that while the loss of a life is of great
25 concern to all parties, the cited respondent was not in violation of the
26 cited standards and did not bear the responsibility placed upon it by
27 the SHR and complainant. He argued that the respondent employer did
28 ensure that the posts were sufficient for tie-off purposes by its

1 employees as they utilized same several times while performing their own
2 work tasks. Respondent did not erect or weld the posts. There was no
3 proof or evidence that the posts were originally, with or without the
4 braces, in compliance with the standard to withstand the forces directed
5 by the standard or those resultant from contact by a man the size of the
6 decedent. He argued that simply because an alteration occurred, does
7 not provide the basis for a violation nor should the respondent be
8 charged with creating a hazard in a guardrail system for which it had
9 no responsibility.

10 In reviewing the facts and evidence the board is required to apply
11 the law established under occupational safety and health legislation and
12 particularly the "multi-employer construction worksite doctrine."

13 To establish a prima facie case, the Secretary
14 (Chief Administrative Officer) must prove the
15 existence of a violation, the exposure of
16 employees, the reasonableness of the abatement
17 period, and the appropriateness of the penalty.
18 Bechtel Corporation, 2 OSHC 1336, 1974-1975 OSHD
19 ¶18,906 (1974); Crescent Wharf & Warehouse Co., 1
20 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).

21 Where an employer at a multi-employer construction worksite **created**
22 or **controlled** the area of a hazard, it is subject of citation and
23 finding of a violation **even where its own employees were not exposed** but
24 only those of other employers (see Brennen v. OSHRC (Underhill
25 Construction Corp.), 513 F.2d 1032 (2d Cir. 1975). (Emphasis added.)
26 Beatty Equipment Leasing v. Secretary of Labor, 577 F.2d 534 (9th Cir.
27 1978).

28 Where an employer neither created the hazard nor controlled the
area of the hazard, it may be subject of a citation and finding of a
violation if the complainant satisfies its burden of proof by showing:

1. A specific standard applies;

- 1 2. Failure to comply with the standard; and
2 3. Employees of the cited employer had access to the hazard.
3 Anning-Johnson Co., 1975-1976 OSHD ¶ 20,690, at p. 24,779,
4 24,783. (emphasis added)

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

8 All facts forming the basis of a complaint must be
9 proved by a preponderance of the evidence. Armor
10 Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958
11 (1973).

12 The employer establishes an affirmative defense by showing:

- 13 1. The employer neither created nor controlled the hazardous
14 condition; **and**
15 2. Either (a) its employees were protected by realistic measures
16 taken as an alternative to literal compliance; or (b) it did
17 not have notice of the hazardous conditions with reasonable
18 diligence. Id. The Fifth Circuit Court approved allocating
19 to the employer the burden of showing that it neither created
20 nor controlled the hazard, rather than making it part of the
21 complainant's case in chief. Central of Georgia Railroad Co.
22 v. OSHRC, 576 F.2d 620 (5th Cir. 1978).

23 A "serious" violation is established in accordance with NRS
24 618.625(2) which provides in pertinent part:

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

1 The board finds that the facts, testimony and evidence in the
2 subject case are undisputed that respondent did not erect or install the
3 posts (stanchions) nor weld them in place. It is further undisputed
4 that a post failed when an employee of the general contractor, not
5 employed by respondent, fell to his death after striking the guardrails
6 attached to the post. The respondent did not "create or control" the
7 post hazard which failed and resulted in the employee death.

8 The testimony of Messrs. Allbaugh and Galbraith was that as
9 experienced employees of respondent they observed no defective
10 conditions in the posts and tied-off on them while performing their work
11 task to remove the braces and reposition the beams. They had no
12 "notice" of any hazardous conditions from defective welds or other
13 causes with the exercise of reasonable diligence.

14 The unrefuted testimony of respondent's expert witnesses in the
15 welding field, namely structural engineer Martinovic and company foreman
16 Allbaugh, was that the braces (kickers) served no purpose to strengthen
17 or weaken the welded posts (stanchions). The expert testimony
18 established that removing the braces did not contribute to the weakness
19 of the posts but rather a failure to weld more than one-quarter of the
20 post structure created an inherent defect in the posts such that when
21 struck by the force of a man the size of the decedent, the guardrail was
22 incapable of preventing his fall due to a collapse of the post. There
23 was no general or expert testimony or testing proffered by the
24 complainant to either establish the initial capability of the posts
25 (stanchions) to withstand the 150 and 200 lb. forces required by the
26 standard, or to rebut the general and expert testimony and testing
27 evidence presented by respondent.

28 The cited standard did not apply to the respondent under the facts

1 and evidence presented based upon the general elements required to prove
2 a violation or the multi-employer construction worksite doctrine as
3 developed in the recognized case law.

4 The board concludes there to have been no violation by respondent
5 as charged in Citation 1, Item 1(a), 29 CFR 1926.502(b)(3) nor in
6 Citation 1, Item 1(b), 29 CFR 1926.502(b)(5). The tragic fatality must
7 be well recognized with an ever increasing focus on safety and accident
8 prevention, however the board cannot find a violation without the
9 legally recognized elements to meet the statutory burden of proof by a
10 preponderance of evidence. Here the respondent cannot be found in
11 violation for that which it had no specific legal responsibility under
12 the cited standard. Respondent employees were not exposed to a
13 discoverable hazard even with/after the exercise of reasonable
14 diligence. Respondent did not **create** or **control** the hazardous condition
15 which resulted in the failure of the steel post and death of an employee
16 of the general contractor.

17 Based upon the above and foregoing, it is the decision of the
18 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation of
19 Nevada Revised Statute did occur as to Citation 1, Item 1(a), 29 CFR
20 1926.502(b)(3) or Citation 1, Item 1(b), 29 CFR 1926.502(b)(5). The
21 proposed penalty in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS
22 (\$2,500.00) is denied.

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

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

5 DATED: This 2nd day of September, 2008.

6 NEVADA OCCUPATIONAL SAFETY AND HEALTH
7 REVIEW BOARD

8 By /s/
9 JOHN SEYMOUR, Chairman