

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD

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

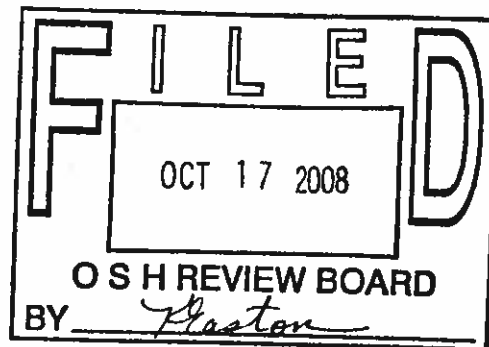
Docket No. LV 08-1351

Complainant,

vs.

9 BOMBARD ELECTRIC COMPANY,

Respondent.



11
12 DECISION

13 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
14 **HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of September,
15 2008, in furtherance of notice duly provided according to law, MS.
16 JENNIFER LEONESCU, ESQ. and MS. NANCY WONG, co-counsel appearing on
17 behalf of the Complainant, **Chief Administrative Officer of the**
18 **Occupational Safety and Health Administration, Division of Industrial**
19 **Relations (OSHA)**; and MR. RICK ROSEKELLEY, ESQ., appearing on behalf of
20 Respondent, **Bombard Electric Company**; the **NEVADA OCCUPATIONAL SAFETY AND**
21 **HEALTH REVIEW BOARD** finds as follows:

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

24 The complaint filed by the OSHA sets forth allegations of violation
25 of Nevada Revised Statutes as referenced in Exhibit "A", attached
26 thereto. The alleged violations in Citation 1, Items 1(a), 1(b), 1(c)
27 and 1(d), referenced 29 CFR 1926.1053. All of the sub-items related to
28 the same incident involving an extension ladder.

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1 In Citation 1, Item 1(a), referencing 29 CFR 1926.1053(b)(4) the
2 employer was charged with failing to ensure that a 16 foot extension
3 ladder was used for purposes in which it was designed. The alleged
4 violation in Item 1(a) was classified as "Serious" and a penalty
5 proposed, grouped with the other sub-items, in the amount of FOUR
6 THOUSAND FIVE HUNDRED DOLLARS (\$4,500.00).

7 In Citation 1, Item 1(b), referencing 29 CFR 1926.1053(b)(7) the
8 employer was charged with failing to ensure that employees abstained
9 from using the "fly section" of a 16 foot extension ladder on slippery
10 surfaces. The alleged violation in Item 1(b) was classified as
11 "Serious" and the proposed penalty was grouped with sub-item 1(a).

12 In Citation 1, Item 1(c), referencing 29 CFR 1926.1053(b)(15) the
13 employer was charged with failing to ensure that a 16 foot extension
14 ladder was inspected by a competent person for visible defects. The
15 alleged violation in Item 1(c) was classified as "Serious" and the
16 proposed penalty was grouped with sub-item 1(a).

17 In Citation 1, Item 1(d), referencing 29 CFR 1926.1053(b)(16) the
18 employer was charged with failing to ensure that 16 foot extension
19 ladder with structural defects was not immediately marked/identified as
20 defective and withdrawn from service. The alleged violation in Item
21 1(d) was classified as "Serious" and the proposed penalty was grouped
22 with sub-item 1(a).

23 Counsel for the complainant, through Safety and Health
24 Representative (SHR) Corey Church presented evidence and testimony as
25 to the violations and appropriateness of the penalties. Mr. Church
26 testified that he conducted an accident investigation at the Boulder
27 Station Hotel and Casino, Boulder Café location, at 4111 Boulder
28 Highway, Las Vegas, Nevada. Mr. Church testified that he was directed

1 to the location after a report of a serious injury. He conducted his
2 investigation and reported that an apprentice employee, Brandon
3 Anderson, was utilizing the "fly section" only of an extension ladder
4 which had been disassembled. The ladder failed and Anderson fell from
5 the height of the ladder to the floor incurring severe lacerations to
6 his arm. Mr. Church was informed by personnel that approximately 1
7 quart of blood was lost through a deep cut in the arm area, and included
8 a concern whether an amputation might be required. The SHR determined
9 that injuries were very serious and indeed life threatening.

10 Mr. Church testified as to each of the items charged at Citation
11 1, all of which were interrelated involving the extension ladder. He
12 testified that at Item 1(a) he cited the a violation based upon misuse
13 of an extension ladder which had been taken apart and utilized
14 separately, which is a violation of the standard and of the
15 manufacturer's restricted warnings. Mr. Church further testified that
16 at Item 1(b) he found the basis of a violation due to the use of the
17 "fly section" on surfaces which were slippery and containing a build-up
18 of drywall, dust and other debris. Additionally, the SHR found a basis
19 for violation at Item 1(c) due to a failure of inspection by a competent
20 person in that the extension ladder being utilized by the injured
21 employee and the other employees had visible defects that could have
22 been easily identified by a competent person had he/she performed an
23 inspection on the ladder at the site. Finally Mr. Church testified as
24 to Item 1(d) and his basis for violation due to a failure to remove the
25 fly section from service or marking same. He testified that the
26 employees has disassembled the extension ladder to permit use of the
27 bottom section on the property but the fly section remained in the
28 immediate work area such that it was accessible to the injured employee.

1 On cross-examination, Mr. Church testified that he did not cite for
2 any failure of training because he was satisfied there was adequate
3 training of the employees. He also responded that he found the injured
4 employee had utilized the bottom section of the ladder all day and it
5 contained slip-resistant pleated pads. When Mr. Anderson was finishing
6 his work he utilized the fly portion of the ladder on only one occasion,
7 which resulted in his fall and injury. On further cross-examination,
8 Mr. Church testified that the ladder was marked with pink paint but he
9 saw no red construction tape on the ladder or other markings except for
10 a yellow decal from the manufacturer which indicated a "do not use
11 separately" notification. Mr. Church responded to questions with regard
12 to his difficulty in locating the actual fly section of the ladder on
13 the scene after testifying on direct examination that he felt the ladder
14 had been concealed from him on his initial inquiries. He responded that
15 Items 1(a) and 1(b) citations apply only to use of the fly section.
16 Items 1(c) and 1(d) relate to violative general use of an extension
17 ladder including failure to inspect by a competent person and withdrawal
18 from service by removal from the work site. Mr. Church testified that
19 indeed an average person should know that a ladder painted pink with a
20 yellow "do not use" decal should not be used. He went on to testify as
21 to the seriousness of the violations and the penalty calculations
22 involving reductions and credits resulting in a beneficial "grouped"
23 penalty based upon established enforcement guidelines.

24
25 On board questioning, Mr. Church testified that there was no basis
26 for violation in utilizing the base portion of an extension ladder alone
27 so long as it contained slip-resistant pads and was otherwise safe;
28 however the fly section could never be used alone regardless of its

1 condition.

2 Counsel for respondent presented evidence and testimony in defense
3 of Citation 1 and the sub-items referenced. Mr. Chris Mikasa, the
4 foreman of respondent on the site testified that the employees involved
5 in the project included he as foreman of the electrical crew, Mr. Scott
6 Cavanaugh, a journeyman electrician and injured employee Mr. Brandon
7 Anderson, an apprentice electrician. He described the site as a
8 confined work area in the café portion of the Boulder Station Hotel and
9 Casino which included other trades. Mr. Mikasa testified that on the
10 morning of the accident when they arrived and began unloading their
11 truck containing tools and materials, the subject extension ladder was
12 noted in a visibly defective condition. The three employees decided to
13 disassemble the extension ladder as it was too big and too heavy for
14 utilization of their work effort, and because the fly section was
15 damaged. This would allow them to complete their work in a timely and
16 safe fashion by using only the bottom section of the ladder. After the
17 three employees together completed the disassembly, the damaged fly
18 section was moved to the far end section of the room. They decided to
19 use the bottom section of the ladder and start work on one end of the
20 room and proceed their way down the wall using the ladder to access the
21 upper ceiling area to conduct their electrical work. Employee Anderson
22 was assigned the task of working off the ladder height and Mr. Mikasa
23 and Mr. Cavanaugh would, upon call of Mr. Anderson, brace or "foot" the
24 ladder while he was ascending or descending. The work continued all day
25 long, moving the ladder down the wall as they progressed.

26 In response to the specific charged violations, Mr. Mikasa
27 testified that he personally inspected the ladder immediately when it
28 arrived, as the designated competent person, and determined it to be

1 defective. He further testified that in order to complete the work task
2 he determined it needed to be disassembled using only the safe portion.
3 He noted that the bottom portion did contain slip-resistant cleated
4 pads. He also testified that while there was material on the floor
5 because other trades were working, there were laborers who were
6 continuously cleaning up or removing materials as the work of the
7 various trades, including that of the respondent, progressed. He
8 testified that the fly section was never intended to be utilized. The
9 ladder was removed from the immediate area of work to the only other
10 area available as the owner of the property did not permit any materials
11 to be carried in and out of the designated room work site, to avoid
12 annoyance of their other business and customers.

13 Mr. Mikasa testified that while he was reviewing plans he heard a
14 noise and turned to see Mr. Anderson falling from what was later
15 determined to be the fly section of the ladder. He rushed to provide
16 emergency aid. He further testified that at no time during the day had
17 Mr. Anderson ever used the bottom section of the ladder without calling
18 for assistance from either Mr. Cavanaugh or Mr. Mikasa to foot the
19 ladder. On the single occasion he used the fly section, he did not call
20 for assistance nor did anyone realize he was accessing the defective fly
21 section of the extension ladder.

22 Counsel for respondent presented evidence and testimony from Mr.
23 Brandon Anderson, the apprentice electrician and injured employee. Mr.
24 Anderson testified that he was in the third year of his fourth year
25 apprenticeship at the time of the accident. He completed the OSHA 1030
26 and ladder safety training during his apprenticeship. He testified that
27 he was given training by three other of respondent's employees and
28 participated in weekly toolbox safety meetings conducted by the foreman.

1 He also testified that proper use of ladders was covered and identified
2 on respondent's Tab D in Exhibit A reflecting his signature on a
3 document confirming he attended the subject meeting. Mr. Anderson
4 testified that he and the other two employees of respondent all
5 identified the extension ladder when it arrived at the site as being
6 defective and all three decided to use only the bottom portion and not
7 the top or fly section. They decided together to remove the fly portion
8 and utilize the bottom and he and journeyman employee Cavanaugh
9 disassembled the ladder with foreman Mikasa's knowledge and oversight.
10 The defective portion of the ladder, i.e. the fly section was leaned up
11 against the wall away from the work area. Mr. Anderson testified it was
12 placed in that area to avoid danger to other workers and remain outside
13 of their immediate location. He testified that he had never during the
14 day utilized even the bottom section without calling for bracing. He
15 also testified that he used the fly section only once on the day of the
16 accident and that was the time of the failure and incident. He
17 testified that he did not understand why he ascended the fly section nor
18 call for bracing, but simply during the "crunch" time to finish the job
19 and conclude the day, grabbed the materials needed and ran up the
20 ladder.

21 On cross-examination Mr. Anderson testified that he knew the
22 extension ladder was defective when it arrived because he had to remove
23 red caution tape from the ladder in order to separate the sections to
24 retain only the bottom section for use. He testified that either he or
25 journeyman Cavanaugh saw the red tape, removed it, and understood the
26 ladder fly section portion was defective and not to be utilized. He
27 concluded his testimony by confirming that he erroneously used the fly
28 section only once but understood it was defective and not to be used.

1 He simply erred in haste.

2 Both counsel stipulated into the record their evidence packets as
3 Exhibit "1" on behalf of complainant and Exhibit "A" on behalf of
4 respondent.

5 Respondent presented testimony from Mr. Scott Cavanaugh, the
6 journeyman electrician and third employee on the job site. He testified
7 as to his ladder training, co-work on disassembly of the defective
8 ladder after noting same in the morning of the day in question,
9 participated in removing the fly portion of the ladder, and taking same
10 to an area that he felt was "out of the way." He testified there was
11 no other place in the room to safely store the ladder without having to
12 keep moving it around all day long. He testified that he noted employee
13 Anderson using only the bottom portion of the ladder all day long and
14 had "footed it" for him on request. He further testified he never saw
15 employee Anderson utilize even the bottom portion of the ladder without
16 footing. He testified that all employees knew that the fly section was
17 defective and not to be used.

18 Respondent presented evidence and testimony from John Hastings.
19 He identified himself as director of safety for eleven years with
20 respondent. Mr. Hastings testified with regard to the safety program
21 of respondent, and the enforcement policy and practice with regard to
22 ladder safety. He confirmed the safety training of injured employee
23 Anderson. Mr. Hastings testified that there was red tape on the ladder
24 and that it should have never been sent to the work site but due to some
25 mix up in the corporate yard it was placed on the truck but with
26 appropriate identification of defective status.

27 The board in reviewing the facts and evidence presented is unable
28 to find any actionable violative conduct or condition by respondent.

1 At Item 1(a), the board finds that the ladder utilized on the job site,
2 which was only the lower portion, did not constitute ". . . use of an
3 extension ladder for purposes in which it was not designed . . ." The
4 evidence and testimony of particularly the three employees who were
5 involved in the incident who testified separately under the rule of
6 exclusion, all described the same circumstances after noting a defect
7 in the extension ladder sent to the job site. Messrs. Mikasa,
8 Cavanaugh, and Anderson all testified that they disassembled the
9 extension ladder after noting it was defective and, together, took all
10 reasonable steps to assure that the defective portion was removed from
11 service to the farthest extent of the room permissible so as not to
12 interfere with other work and their own efforts. Once the ladder was
13 disassembled, it no longer constituted an "extension ladder" based on
14 permitted safe use of a bottom section only which was admittedly
15 appropriate as testified by SHR Church.

16 At Item 1(a), there was no improper use of an "extension ladder"
17 because after disassembly only the bottom section was utilized for the
18 work effort except on the one occasion when the fly portion was
19 improperly and mistakenly utilized by injured employee Anderson.

20 At Item 1(b) the board finds no violative conditions for use of the
21 bottom section ladder based upon conditions of the floor being other
22 than a normal work site involving various employees including those
23 assigned to the housekeeping tasks of maintaining a clean working
24 surface. There was no evidence that the surface was slippery.
25 Particularly the ladder bottom portion bore non-skid cleated pads. No
26 evidence, photos or other depictions indicated extraordinary flooring
27 conditions.

28 At Item 1(c), the evidence demonstrated that Mr. Mikasa was the

1 designated competent person who provided his credentials and
2 identification to SHR Church and as confirmed by safety director
3 Hastings. He did immediately inspect the ladder when it arrived on the
4 job site along with the other two employees. The ladder was identified
5 at the time as both unuseable and defective. A joint agreement of all
6 three employees was made to disassemble the ladder and utilize only the
7 bottom portion. It would have been better to disassemble the ladder
8 outside the specific work area, however it appeared that the conditions
9 at the site, the requirements of the owner and those other job tasks
10 resulted in the disassembly occurring in the work room by necessity.
11 While the location of disassembly was unfortunate, that did not in and
12 of itself demonstrate either a lack of immediate inspection nor that the
13 ladder was not "withdrawn from service" as required under Item 1(d).
14 Further, while the ladder could have been better safeguarded, it
15 appeared to have been reasonably safeguarded in accordance with the
16 standard, particularly when the very employee who fell to his injury,
17 was personally involved in the determination of defectiveness, the
18 disassembly from the bottom section, and removal from the immediate area
19 of work effort. The case and accident facts were described
20 consistently, under oath and independently by each of respondent's
21 witness employees on the scene the day of the incident. An act of
22 employee error or misconduct occurred on the part of Mr. Anderson which
23 resulted in his injury. Indeed it would have been better if the ladder
24 were not even in the room to avoid an improvident act, but the facts do
25 not support finding a violation just on what might have been better
26 other than that which appeared reasonable and compliant with this
27 standard. The injured employee utilizing the defective fly section, was
28 personally involved in and had knowledge of the restrictions of use for

1 the fly section.

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

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

9 To prove a violation of a standard, the Secretary
10 must establish (1) the applicability of the
11 standard, (2) the existence of noncomplying
12 conditions, (3) employee exposure or access, and
13 (4) that the employer knew or with the exercise of
14 reasonable diligence could have known of the
15 violative condition. See Belger Cartage Service,
16 Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
17 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
18 Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
19 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
20 (No. 76-1408, 1979); American Wrecking Corp. v.
21 Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.
22 2003).

23 A respondent may rebut allegations by showing:

- 24 1. That the standard was inapplicable to the
25 situation at issue;
- 26 2. That the situation was in compliance; or lack
27 of access to a hazard. See, Anning-Johnson
28 Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690
(1976).

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

. . . a serious violation exists in a place of
employment if there is a substantial probability
that death or serious physical harm could result
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.

The injured employee Anderson utilized the fly section despite his
admitted knowledge that same was defective; but as importantly, he
failed to call for bracing or "footing" the ladder which had been his

1 practice and the policy of all three employees of respondent throughout
2 the entire day. In his haste to finish work, although there was no
3 evidence or testimony that unreasonable working conditions were imposed
4 upon him based on the witness testimony, he not only erroneously used
5 the fly section of the ladder, but failed to follow the policy and
6 practice of the company and his daily routine by calling for assistance
7 in bracing.

8 While the board does not reach the necessity to analyze the defense
9 of unpreventable employee misconduct, the record contains sufficient
10 evidence to excuse the employer from violations even had the initial
11 burden of proof been established by the Complainant to shift the burden
12 to Respondent as to the defense. See *Jensen Construction Co.*, 7 OSHC
13 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10 OSHC 2128,
14 1980 OSHC 1045 ¶24,174 (1980). The elements required for the defense
15 of employee misconduct are:

- 16 (1) The employer must establish work rules designated to
17 prevent the violation
- 18 (2) The employer has adequately communicated these rules to
19 its employees
- 20 (3) The employer has taken steps to discover violations
- 21 (4) The employer has effectively enforced the rules when
22 violations have been discovered.

23 Evidence that the employer effectively communicated
24 and enforced safety policies to protect against the
25 hazard permits an inference that the employer
26 justifiably relied on its employees to comply with
27 the applicable safety rules and that violations of
28 these safety policies were not foreseeable or
preventable. *Austin Bldg. Co. v. Occupational
Safety & Health Review Comm.*, 647 F.2d 1063, 1068
(10th Cir. 1981).

When an employer proves that it has effectively
communicated and enforced its safety policies,
serious citations are dismissed. See *Secretary of
Labor v. Consolidated Edison Co.*, 13 O.S.H. Cas.

NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER
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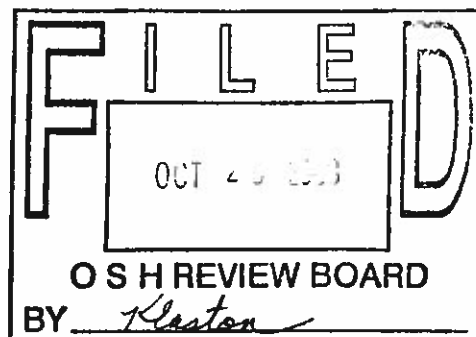
Docket No. LV 08-1351

Complainant,

vs.

BOMBARD ELECTRIC COMPANY,

Respondent.



NOTICE OF ERRATA

ON THE 17th day of September, 2008, NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD (BOARD), entered the Decision in the subject captioned matter. The Decision contained a typographical error on page 13, as follows:

"Based upon the above and foregoing, it is the decision of the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD that a violation of Nevada Revised Statute did occur as to Citation 1, Item 1(a) 29 CFR 1926.1053(b)(4), Item 1(b) 29 CFR 1926.1053(b)(7), Item 1(c) 29 CFR 1926.1053(b)(15) and Item 1(d) 29 CFR 1926.1053(b)(16). The proposed penalty in the amount of FOUR THOUSAND FIVE HUNDRED DOLLARS (\$4,500.00) denied."

The portion of the Decision which contained the error is amended through this Errata and corrected to provide at page 13, line 11, the following:

". . . Nevada Revised Statute did not occur as to Citation 1, Item 1(a) . . ."

In all other respects the Decision entered by the BOARD is confirmed.

DATED this 20th day of OCTOBER, 2008.

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NEVADA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD

By: /s/
JOHN SEYMOUR, CHAIRMAN