

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD

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Docket No. LV 09-1364

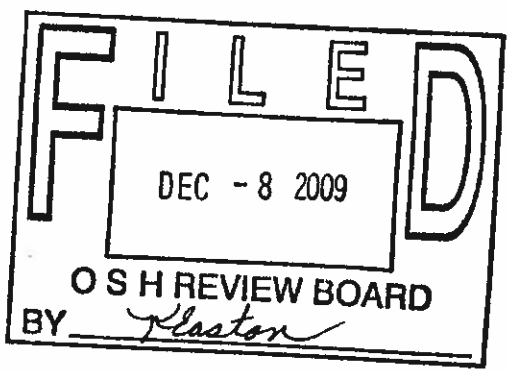
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4 CHIEF ADMINISTRATIVE OFFICER
5 OF THE OCCUPATIONAL SAFETY AND
6 HEALTH ADMINISTRATION, DIVISION
7 OF INDUSTRIAL RELATIONS OF THE
8 DEPARTMENT OF BUSINESS AND
9 INDUSTRY,

Complainant,

vs.

10 K. W. PIPELINE, INC.,

Respondent.



11
12
13 DECISION

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of November
16 2009, in furtherance of notice duly provided according to law, JOHN
17 WILES, ESQ., counsel appearing on behalf of the **Chief Administrative**
18 **Officer of the Occupational Safety and Health Enforcement Section,**
19 **Division of Industrial Relations** (OSHES), and RICK ROSKELLEY, ESQ.,
20 appearing on behalf of respondent, **K. W. PIPELINE, INC.;** the **NEVADA**
21 **OCCUPATIONAL SAFETY AND 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 OSHES sets forth allegations of violations
25 of Nevada Revised Statutes as referenced in Exhibit "A," attached
26 thereto.

27 Citation 1, Item 1 charges a violation of 29 CFR 1926.652(a)(1).
28 The complainant alleges that the employer respondent failed to ensure

1 cave-in protection for an employee working in an excavation with a depth
2 of 66 inches in violation of the standard. The violation was classified
3 as "Serious" and "Repeat". The proposed penalty for the alleged
4 violation was in the total sum of Fourteen Thousand Dollars
5 (\$14,000.00).

6 Citation 2, Item 1 charges a violation of 29 CFR 1926.21(b)(2).
7 The complainant alleges that the employer respondent failed to train an
8 employee in excavation safety. The violation was classified as
9 "Serious". A penalty was proposed in the amount of Two Thousand Eight
10 Hundred Dollars (\$2,800.00).

11 Citation 2, Item 2 charges a violation of 29 CFR 1926.651(j)(2).
12 The complainant alleges that the employer respondent did not ensure that
13 excavated materials were kept at least two feet from the edge of an
14 excavation. The violation was classified as serious. A penalty was
15 proposed in the amount of Two Thousand Eight Hundred Dollars
16 (\$2,800.00).

17 Citation 2, Item 3 charges a violation of 29 CFR 1926.651(k)(1).
18 The complainant alleges that the employer failed to ensure that a
19 competent person inspected an excavation daily prior to each work shift
20 as required by the standard.

21 Counsel for the complainant and respondent stipulated to the
22 admission of complainant's Exhibits A, B, C, D and E and respondent's
23 Exhibits A, B, C, D, E, F and G.

24 Counsel for the Chief Administrative Officer presented testimony
25 and evidence with regard to the alleged violations. Safety and Health
26 Representative (SHR) Ms. Tanisha Solano testified that on or about
27 January 27, 2009 she conducted a comprehensive inspection of the
28 Mountain Edge Apartments work site in Las Vegas, Nevada which involved

1 a general contractor and various subcontractors, including the
2 respondent, K.W. Pipeline, Inc. The SHR identified documentary and
3 photographic exhibits admitted in evidence. She specifically testified
4 from her narrative report, which included her findings in Exhibit A, and
5 photographic exhibits in Exhibit B. After observing an employee of
6 respondent working in an excavated trench, she conducted measurements
7 of the excavation with the assistance of a representative of the general
8 contractor. She field tested the soils in the spoil pile near the
9 excavation and determined same to be type "C" in nature. Photographic
10 Exhibit B, pages 4 and 5 were specifically identified by Ms. Solano to
11 establish the depth of the excavation to be more than five feet which
12 requires protection from cave-in unless it can be established that the
13 soils were other than type "C" or sufficiently cemented to qualify as
14 an exception to required cave-in protection.

15 SHR testimony included her identification of respondent's foreman
16 on site to establish employer knowledge.

17 Previous violations were identified as reduced to final orders
18 against the same respondent to establish a "repeat" status for violation
19 of the applicable standard.

20 Ms. Solano testified as to her "Serious" classification of the
21 violation based upon the hazard of excavation cave-in or collapse and
22 the potential for serious injury or death.

23 SHR Solano identified photographic evidence in Exhibit B to
24 establish "sluffing" material near the vertical walls of the excavation,
25 instability of the soil as field tested from the spoil pile and heavy
26 equipment operated in the area which could create an additional level
27 of instability and contribute to a cave-in or collapse.

28 The SHR referenced the division guidelines for penalty calculations

1 and her application of various credits after commencing with the maximum
2 penalty permitted under the statutory limits.

3 At Citation 2, Item 1, referencing 29 CFR 1926.21(b)(2), SHR Solano
4 found the employer failed to train the employee she observed in the
5 excavation at the time of inspection. She obtained admission of a lack
6 of training based on her interview with the subject employee, and the
7 respondent's foreman, which was corroborated after responses to her
8 document request. The information did not include any evidence that the
9 subject employee had received cave-in protection training. Ms. Solano
10 testified that respondent's representative informed her that the subject
11 employee was a temporary employee and did not require training.

12 At Citation 2, Item 2, SHR Solano testified that she observed and
13 measured the distance of excavated materials from the edge of the trench
14 and found them to be in violation of the referenced standard. While the
15 excavation was difficult to access and photograph for safety purposes,
16 the admitted photographic evidence and testimony depicted and described
17 the proximity of excavated spoils at the edge of the trench which could
18 result in cave-in. Ms. Solano testified she also considered "sluffing"
19 of spoils and the admitted operation of heavy equipment nearby. An
20 exact measurement of the spoils from the edge could not be easily
21 accomplished therefore reliance on visual inspection and photographic
22 Exhibits B-1 and B-2 were submitted as evidence of the violative
23 conditions. Actual employer knowledge was based upon interviews with
24 the foreman and project manager. Mr. Wirthlin advised SHR Solano that
25 he inspected the excavation site the day before and that conditions had
26 not changed prior to her investigation.

27 At Citation 2, Item 3, the SHR testified no competent person
28 inspected the excavation on the day of her inspection or prior to the

1 commencement of work which is required by the standard. Ms. Solano
2 testified that the project manager, Mr. Adam Wirthlin, told her that he
3 had not performed an inspection of the site on the day of her
4 investigation but had done so prior to the shift work due to other
5 commitments. She testified that Mr. Wirthlin represented himself to be
6 a designated "competent person" and with knowledge of the excavation.
7 She further testified as to her penalty calculations and the
8 classification of the violation as serious.

9 Direct examination concluded with testimony regarding identity of
10 ownership of the cited respondent based upon the documents and records
11 obtained during the course of the investigation. Ms. Solano testified
12 that throughout her investigation responses were provided by employees
13 of the entity identified as K.W. Pipeline, Inc.; and her investigation
14 demonstrated that a business license in the name of the cited
15 respondent, as well as the same identity on the company trucks' logo and
16 contractor's board records.

17 Counsel for respondent conducted cross-examination of SHR Solano.
18 She testified that the subject Citation 1, Item 1, and previous final
19 orders for excavation violation were based upon a trench depth of over
20 five feet. Ms. Solano admitted that if there was no depth of at least
21 five feet there would be no violation. Counsel referenced Exhibit B,
22 page 4, a photograph depicting a ruler and questioned where the top of
23 the measurement was taken, asserting that the tape was bent and not
24 determinative of the depth. Ms. Solano testified she only took the
25 photograph but did not personally conduct the measurements which were
26 done by a superintendent of the general contractor. Counsel questioned
27 whether the superintendent bent the tape at the bottom or at the top,
28 which would render the measurement inaccurate. Ms. Solano testified she

1 could not see the bottom of the tape in the trench but believed the tape
2 was straight. Counsel then questioned the SHR with regard to
3 respondent's Exhibits C, D and E, which included additional photographs
4 taken by her on the day of the investigation but not submitted in
5 evidence by complainant. Counsel questioned whether the photos taken
6 in conjunction with those at complainant's Exhibit B, depicted a trench
7 of dissimilar depth. The witness testified that all of her photographic
8 evidence depicted a depth of over five feet, although it could have
9 varied a bit. Counsel continued cross-examination as to the depth of
10 the trench at various locations. He questioned whether the area toward
11 the "ramp" was part of the trench depth. Attention was directed to
12 Exhibit B, page 9, as to whether the entire trench was five feet in
13 depth. The witness responded that the area where the employee was
14 working in photographic Exhibit B, page 1 was the location of the
15 measurement and the tape in photographic Exhibit B, page 4. Counsel
16 continued cross-examination and referenced tab C, at respondent's
17 Exhibit A, a photograph depicting an employee working in the subject
18 trench with a shovel leaning against the side of the west vertical wall,
19 and represented to the witness that the shovel is approximately 57" in
20 height, appears to be at the top of the excavation, and questioned the
21 witness' measurement of the depth at 5'6" as inaccurate because it
22 reflected a bent tape toward the area of the spoils pile. The witness
23 reaffirmed her belief that the depth of the trench was more than 5 feet
24 and approximately 5'6".

25 Respondent counsel continued cross-examination with regard to
26 changes in company ownership and raised questions as to the
27 appropriateness of the citation and repeat classification to apply to
28 a new owner. The witness testified she previously made references to

1 the contractor's board information, letterhead, trucks' logos and
2 insurance information in citing respondent K.W. Pipeline, Inc. Counsel
3 further questioned the witness as to the height of the employee depicted
4 in the trench and noted that Exhibit B, picture 1, demonstrated the
5 employee in the trench with the top being just below his shoulders. The
6 witness answered she did not know the employee's height. Counsel
7 further questioned the SHR as to the identification of any gas line and
8 water line in the excavation. The witness identified the water line but
9 could not locate a gas line or identify a gas line depicted in any of
10 the photos.

11 Counsel continued cross-examination with regard to the
12 classification of soils and referred the witness to correspondence from
13 an engineer at complainant's Exhibit A, page 9, identifying the soils
14 as type "A" with some type "C" in the gravels. The witness testified
15 there was reference that some of the gravels were type "C" but believed
16 her field test demonstrated the material to have been predominantly type
17 "C" and/or disturbed which required additional protection in the
18 excavation.

19 Counsel referred the witness to respondent's photographic Exhibit
20 E, page 186, and a depicted measurement of the width of the trench and
21 to identify the spoils pile location and distance from the edge. The
22 witness responded that at the west side of the photo the spoils pile
23 appears to be less than 12 inches from the edge and the standard
24 requires two feet in distance.

25 Counsel conducted additional examination with regard to the cited
26 training violations at Exhibit A, page 8, and correspondence regarding
27 verbal instructions given to employee Sahl by the project manager of
28 respondent, Mr. Adam Wirthlin. The witness responded that the

1 individual in the trench was the person exposed to the hazard and
2 subject of the citation, not Mr. Sahl. She confirmed that the employee
3 in the excavation admitted he had not received appropriate training and
4 that same had been corroborated by project manager Wirthlin.

5 Counsel for complainant presented testimony from respondent
6 witness, Mr. Adam Wirthlin. He testified that he is the project manager
7 for respondent, and that his father was the owner of respondent but sold
8 same in October of 2008 to Oscar Renda Contracting. He further
9 testified that he was retained by the new owner after the sale to act
10 as project manager on K.W. Pipeline, Inc. projects taken over by Oscar
11 Renda. Counsel submitted evidence from complainant's Exhibit C and D
12 and questioned the witness with regard to same to show his continued
13 involvement in the cited company. Exhibit C established the name change
14 date from K.W. Pipeline to Renda in September of 2009, and at page 9 the
15 date of October 8, 2009 reflected another name change to Renda LLC. At
16 complainant's Exhibit D, the witness admitted that he, Adam Wirthlin,
17 is a qualified member of the new entity.

18 Mr. Wirthlin further testified that he did not inspect the
19 excavation on the day of the investigation as charged at Citation 2,
20 Item 3, but that he did measure the excavation the day before the
21 inspection and told employees that the trench was not to be deeper than
22 five foot.

23 The respondent presented testimonial evidence from Mr. Adam
24 Wirthlin. He testified the cited company, K.W. Pipeline, Inc. was
25 founded by his father in 1979 but the company sold in October of 2008
26 to Oscar Renda, the current owner under various entity designations.
27 He testified that when the company was sold to Renda only three people
28 were retained including himself, an office bookkeeper and one mechanic.

1 He testified that the new owner is based in Texas and handles large
2 scale projects as opposed to the previous work performed by K.W.
3 Pipeline involving small scale projects. He stated that the scope of
4 work is substantially different than previous.

5 Mr. Wirthlin testified that soils testing is generally done to
6 demonstrate "A," "B" or "C" type soils and that "A" is cemented and the
7 safest soil for work in an excavation. He testified the subject trench
8 site soil was type "A". He told the foreman and equipment operator not
9 to get into the ditch if it was five foot or deeper. He testified that
10 employee Sahl had been employed by the company for 15 years, that all
11 employees including Sahl were trained not to enter any excavation if it
12 was five foot or deeper without appropriate protection as required by
13 the OSHA standards.

14 Mr. Wirthlin testified that he personally measured the subject
15 trench, which was less than five feet. He stated there was no gas line
16 in the excavation to create a hazard as testified by the SHR. He
17 further testified that the employee in complainant's Exhibit A, pages
18 1 and 2, Mr. Laub is approximately 5'8" tall and the photo depicts his
19 entire head and the top of his shoulders to be at least 18" above the
20 top of the trench excavation. He believes the trench, in his opinion,
21 to be "four foot plus" in depth. He testified that the Clark County
22 Code provides that water lines must be 42" deep and no one digs any
23 deeper because you only get paid for whatever you dig and it would make
24 no sense. The photos of a water line depicted in the bottom of the
25 trench further demonstrates his measurement as to depth given the county
26 code. He further testified that accurate estimates of the trench depth
27 can also be established from the shovel depicted in the photograph at
28 complainant's Exhibit A, page 2, because it is approximately 4'8" in

1 height and leaning against the side vertical wall of trench. He
2 identified the photograph at complainant's Exhibit B, page 3, to show
3 the depth near the ramp of the trench at less than four feet to the
4 floor.

5 Mr. Wirthlin testified that he estimated the spoils pile depicted
6 in Exhibit B, page 3, at three foot from the edge of the trench.
7 Complainant's Exhibit B, page 5, does not show sluffing, but rather
8 droppings from the bucket, and that sluffing does not occur at the top
9 of a trench but lower, and not in cemented type "A" soil. He testified
10 that he has worked in the field for more than four years and never saw
11 a trench cave in from the top and that no sloping or shoring is
12 necessary in the type "A" soil he experienced, which was very hard. He
13 further testified that the area was subject of a previous excavation and
14 that the spoils pile examined by the SHR was not appropriate for testing
15 as it was taken from spoils of previously disturbed soil and not from
16 the sides of the excavation which remain cemented and very hard. He
17 testified that the trench was initially dug when the water line was
18 installed and the material backfilled and then removed by his company
19 to perform the work which was underway at the time of the inspection.
20 He testified that the wall materials were undisturbed and remained
21 cemented type "A" soil. He responded to direct examination that no one
22 ever removes a soil sample from a spoil pile, and stated it needs to be
23 core tested to find the real conditions. The SHR's determination was
24 incorrect based upon a lack of appropriate testing.

25 At the conclusion of the presentation of testimony and evidence,
26 counsel presented closing arguments.

27 Counsel for complainant argued that the SHR measured the trench,
28 appears credible, and could not conduct the measurements herself so

1 asked for the assistance of the general contractor's superintendent. He
2 argued that the photo in Exhibit A, page 4, shows the depth of the
3 trench and should be accepted for what it represents. Counsel further
4 argued that the records demonstrated uncontroverted evidence of final
5 orders for repeat violations and that Citation 1, Item 1 should be
6 confirmed. He further argued that the weight of evidence is what the
7 SHR measured and photographed on the day of inspection and not what the
8 respondent witness measured the day before.

9 Counsel argued that at Citation 2, Item 1, the respondent admitted
10 the temporary employee in the excavation was not trained but was only
11 **told** to stay out of the trench and hired as an equipment operator. He
12 further argued that the respondent cannot assert employee misconduct if
13 he did not train the individual and that the operator was an employee
14 for the purposes of OSHA definitions.

15 Counsel argued at Citation 2, Item 2, the spoil pile in the
16 photographs matched the sworn testimony of the credible SHR and that
17 same were on the edge of the trench not two feet from the side. He
18 argued that the test is a "bright line" so it is relatively simple and
19 you can see from the photographs that the materials are closer than two
20 feet.

21 Counsel argued at Citation 2, Item 3, there was no daily inspection
22 as required by the standard and that the respondent witness admitted he
23 was not there on the day of the investigation but merely examined and
24 inspected the trench the day before.

25 Counsel concluded closing argument by stating that K.W. Pipeline
26 is the cited party and the respondent in this case and that mere
27 assertions or opinions regarding a change in ownership should not affect
28 the citation or the repeat status of the violation.

1 Respondent presented closing argument. Counsel argued that the
2 threshold of the case is a lack of the complainant having met its
3 statutory burden of proof, which is solely that of complainant and not
4 the responsibility of respondent. He argued there was simply no
5 credible proof or preponderance of evidence that the depth of the
6 excavation was more than five feet. He asserted that Mr. Wirthlin was
7 experienced in the field and well aware of the measurement limitations
8 as a "bright line" and the critical requirement that extra precautionary
9 measures are needed when any trench or excavation is over five foot in
10 depth. The SHR admitted she did not measure the depth of the excavation
11 but merely took photos. No photograph shows the depth of the trench at
12 over five feet. Exhibit B, picture 4, is not definitive and the sworn
13 testimony of Mr. Wirthlin was that the tape appeared bent and that he
14 personally measured the excavation, before any work was performed, at
15 less than five feet. He further argued there was no evidence of a
16 serious violation and/or knowledge of hazardous conditions. He further
17 stated that a previous settlement agreement in this matter, which is in
18 evidence, demonstrates there were no hidden facts with regard to the
19 sale of K.W. Pipeline, Inc. to the current owner such that the new owner
20 should be charged with a repeat status.

21 Counsel further argued as to Citation 2, Item 1, there was no
22 requirement to train an equipment operator on how to work in a trench
23 so the burden of proof failed regarding training. The other employee,
24 Mr. Sahl, was not in the trench so there was no exposure. The operator
25 entered the trench on his own and therefore there is not an issue of
26 employee misconduct but rather simply a failure of the complainant to
27 meet its burden of proof that training is required for an equipment
28 operator to be doing something that was not his job.

1 At Citation 2, Item 2, counsel argued there was no burden of proof
2 to establish that the spoils pile was less than two feet from the edge
3 of the excavation. The photographic exhibits were confusing, but one
4 photograph at page 186 appears to show some distance around the edges
5 of the excavation to be greater than two feet. He argues that the
6 photograph depicting the measurement across the top of the trench is
7 evidence of compliance.

8 Counsel argued at Citation 2, Item 3 that there was no requirement
9 in the standard for actual "daily" or 24-hour day inspections. There
10 was no satisfaction of the burden of proof that same had not been
11 performed as required by the standard, which was prior to the
12 commencement of the shift. He argued that an inspection occurred prior
13 to the work effort, therefore the standard was satisfied, particularly
14 considering a 24-hour construction town when "daily" is meaningless as
15 utilized by the complainant to charge a violation.

16 Counsel concluded his argument by reasserting the sole
17 responsibility of the complainant to meet its burden of proof by a
18 preponderance of evidence to support the violations. He argued there
19 was no credible evidence to establish the subject excavation constituted
20 a hazard which could result in death or serious injury. If there was
21 any violation, it was not serious in nature.

22 In reviewing the testimonial evidence, exhibits, and arguments of
23 counsel, the board is required to measure same against the elements to
24 establish violations under Occupational Safety & Health Law based upon
25 the statutory burden of proof and competence of evidence.

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

28 All facts forming the basis of a complaint must be

1 proved by a preponderance of the evidence. See
2 Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD
3 ¶16,958 (1973).

4 To establish a prima facie case, the Secretary
5 (Chief Administrative Officer) must prove the
6 existence of a violation, the exposure of
7 employees, the reasonableness of the abatement
8 period, and the appropriateness of the penalty.
9 Bechtel Corporation, 2 OSHC 1336, 1974-1975 OSHD
10 ¶18,906 (1974); Crescent Wharf & Warehouse Co., 1
11 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).

12 A "serious" violation is established in accordance with NRS
13 618.625(2) which provides in pertinent part:

14 . . . a serious violation exists in a place of
15 employment if there is a substantial probability
16 that death or serious physical harm could result
17 from a condition which exists or from one or more
18 practices, means, methods, operations or processes
19 which have been adopted or are in use at that place
20 of employment unless the employer did not and could
21 not, with the exercise of reasonable diligence,
22 know the presence of the violation.

23 The testimony and evidence demonstrate that an employee of
24 respondent was engaged in work in an unprotected excavation. The core
25 issue for the board is to determine whether the excavation required
26 protection based upon the parameters of the standard and the "bright
27 line" test that the excavation must be more than five feet in depth
28 before implementation of various methods of protection. While the
testimony of SHR Solano and that of respondent's Mr. Wirthlin were both
credible, the photographic evidence was difficult to interpret. The SHR
did not actually measure the depth of the trench but relied on another
individual, not present at the time of hearing, to measure while she
obtained photographs. However the photographs at complainant's Exhibit
B, page 4 and 5, were neither clear nor convincing to establish depth.
Complainant's photographic exhibits obtained from the investigation
records were no more enlightening to establish depth. The burden of

1 proof to establish the proscribed depth to trigger protection and/or
2 violation is the responsibility of the complainant. Evidence and
3 testimony showed various portions of the body of the subject employee
4 extending above the trench at Exhibit B, page 1, the shovel length at
5 Exhibit B, page 2, varying depths showing the shallow nature of the
6 excavation floor at the "ramp" in Exhibit B, page 3, Exhibit B, page 4,
7 which bears no overall relationship to the depth of the trench but
8 merely a close up depiction of a ruler, and Exhibit B, page 5, which
9 does not demonstrate a relevant measurement. All of the foregoing facts
10 prohibit a finding of the essential requirement of applicability of the
11 standard to the facts and thus satisfaction of complainant's burden of
12 proof. The board must have substantial evidence by a preponderance to
13 find a violation. In a citation alleging an egregious offense involving
14 a repeat violation, the proof must be clear to support a fair finding.
15 While both Ms. Solano and Mr. Wirthlin appeared credible and forthright
16 in their testimony, there was no corroboration of the measurement by,
17 for example, the individual who assisted Ms. Solano, nor any other
18 competent evidence to establish the core element for finding a
19 violation, i.e. the depth of the trench at greater than five feet.

20 At Citation 2, Item 1, Mr. Wirthlin admitted the employee on the
21 payroll of the respondent in the trench was not trained in excavation
22 safety. Regardless of the depth of the excavation or other parameters,
23 any excavation, particularly one which shows indications of loose
24 material, sluffing, or heavy equipment nearby, could be subject of
25 disruption and resultant cave-in. The policy, spirit and intent of
26 occupational safety and health legislation is designed to protect
27 employees at a work site where such activity is underway. The statute
28 requires training. The uncontroverted evidence establishes the facts

1 of violation.

2 As to Citation 2, Item 2, photographic depiction of site
3 conditions, while somewhat difficult to interpret, did reach a
4 sufficient weight of evidence to satisfy the burden of proof and
5 establish a violation. The corroborating credible testimony of the SHR
6 on site the day of the investigation as opposed to the respondent
7 witness, Wirthlin on site the day before, supports finding of violation.
8 The standard requires excavated spoils be stored at least two feet from
9 the edge of the excavation. The pictorial evidence, while confusing,
10 did sufficiently demonstrate that at least some, if not all, exterior
11 areas of the excavation, the spoils and/or loose material were near the
12 edge of the excavation. An employee was in the excavation and exposed
13 to injury from falling rock or debris due to lack of compliance with the
14 cited standard. Heavy equipment was operating in the area, the soils
15 had been disturbed previously, and the preponderance of evidence
16 sufficient to meet the burden of proof and support finding a violation.

17 At Citation 2, Item 3, the respondent admitted that he did not
18 inspect the depth of the excavation on the day of or before the work
19 shift commended in accordance with the requirement of the standard. 29
20 CFR 1926.651(k)(1) provides in pertinent part:

21 **Daily** inspections of excavations, the adjacent
22 areas, and protective systems shall be made by a
23 competent person or evidence of a situation that
24 could result in possible cave-ins, indications of
25 failure of protective systems, hazardous
26 atmospheres, or other hazardous conditions. An
27 inspection shall be conducted by the competent
28 person **prior** to the start of work and **as needed**
throughout the shift. Inspections shall also be
made after every rainstorm or other hazard
increasing occurrence. These inspections are only
required when employee exposure can be reasonably
anticipated. (emphasis added)

The admission of Mr. Wirthlin, together with the uncontroverted

1 testimony of SHR Solano established the facts of violation.

2 The board finds that the complainant met its burden of proof by a
3 preponderance of substantial evidence to support violations at Citation
4 2, Item 1, Citation 2, Item 2 and Citation 2, Item 3. The board finds
5 there was no legally competent evidence to rebut or mitigate lack of
6 compliance. The board finds the serious classification to be
7 appropriate for violations of standards at an excavation site.
8 Excavation cave-in protection at a work site is necessitated due to the
9 **substantial probability that death or physical** harm could result from
10 violations thereof. (emphasis added) NRS 618.625; Black Construction
11 Corp., 1999 OSHD ¶ 31,922 at p. 47,340-47,341 (1999). The citations are
12 properly classified as "serious". NRS 618.625(2). Responsible
13 supervisory employees were charged with control of the site and had
14 actual or constructive knowledge to support the findings of violation.
15 Administrator of the Division of Occupational Safety and Health vs.
16 Pabco Gypsum, 105 Nev. 371, 372, 755 P.2d 701 (1989).

17 Based upon the above and foregoing, the board concludes that, as
18 a matter of fact and law, the violations occurred and the proposed
19 penalties appropriate and reasonable.

20 The board further finds the complainant failed to meet its burden
21 of proof by a preponderance of substantial evidence to support a
22 violation of Citation 1, Item 1. There was no clear or convincing
23 evidence to establish the depth of the trench to be in violation of the
24 standard.

25 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
26 **REVIEW BOARD** that no violation of Nevada Revised Statutes did occur as
27 to Citation 1, Item 1, 29 CFR 1926.652(a)(1) based upon a lack of
28 sufficient evidence to meet the burden of proof upon the complainant to

1 support a violation and the citation and proposed penalties are
2 dismissed.

3 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**
4 **HEALTH REVIEW BOARD** that violations of Nevada Revised Statutes did occur
5 as to Citation 2, Item 1, 29 CFR 1926.21(b)(2), Citation 2, Item 2, 29
6 CFR 1926.651(j)(2) Citation 2, Item 3, 29 CFR 1926.651(k)(1). The
7 violations charged are confirmed and the proposed penalties in the
8 amount of TWO THOUSAND EIGHT HUNDRED DOLLARS (\$2,800.00) for each
9 violation are approved, for a total penalty in the amount of EIGHT
10 THOUSAND FOUR HUNDRED DOLLARS (\$8,400.00).

11 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
12 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION,**
13 **DIVISION OF INDUSTRIAL RELATIONS,** to submit proposed Findings of Fact
14 and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
15 **REVIEW BOARD** and serve copies on opposing counsel within twenty (20)
16 days from date of decision. After five (5) days time for filing any
17 objection, the final Findings of Fact and Conclusions of Law shall be
18 submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by
19 prevailing counsel. Service of the Findings of Fact and Conclusions of
20 Law signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
21 **REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

22 DATED: This 8th day of December, 2009.

23 NEVADA OCCUPATIONAL SAFETY AND HEALTH
24 REVIEW BOARD

25 /s/

26 _____
27 TIM JONES, CHAIRMAN
28

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,

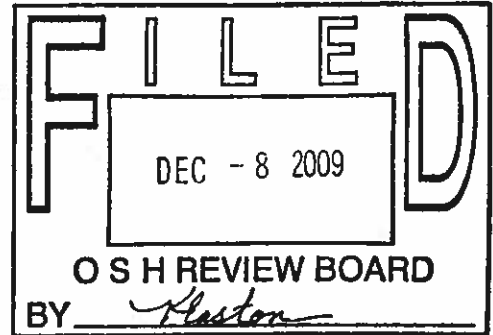
Docket No. LV 09-1364

Complainant,

vs.

10 K. W. PIPELINE, INC.,

Respondent.



11
12
13 CERTIFICATE OF MAILING

14 Pursuant to NRCP 5(b)(2)(B), I certify that I am an employee of
15 SCARPELLO & HUSS, LTD., and that on December 8, 2009 I deposited for
16 mailing, certified mail/return receipt requested, at Carson City,
17 Nevada, a true copy of the **DECISION** addressed to:

18 John Wiles, Esq., DIR Legal
19 1301 North Green Valley Parkway
20 Suite 200
21 Henderson NV 89014

22 Rick Roskelley, Esq.
23 Littler Mendelson
24 3960 Howard Hughes Parkway, Suite 300
25 Las Vegas NV 89169-5937

DATED: December 8, 2009

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DEC 10 2009
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26 *Karen A. Easton*
27 KAREN A. EASTON

28 SUBSCRIBED and SWORN to before me
this 8th day of December, 2009.

Linda M. Krueger
NOTARY PUBLIC

