

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,

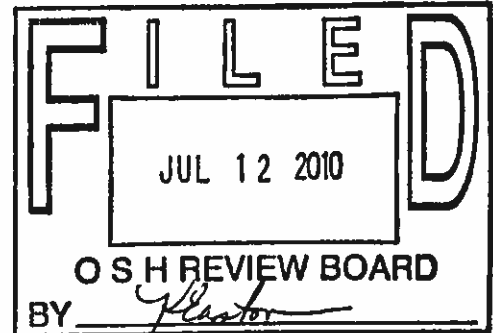
Docket No. LV 10-1414

Complainant,

vs.

10 AMAZON MASONRY, INC.

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 9th day of June, 2010,
16 in furtherance of notice duly provided according to law, MR. JOHN WILES,
17 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 MR.
20 CHRISTOPHER McCULLOUGH, ESQ., appearing on behalf of Respondent, **Amazon**
21 **Masonry, Inc.;** the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD**
22 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. The alleged violations in Citation 1, Item 1, referenced 29
28 CFR 1910.304(g)(5) and at Item 2, 29 CFR 1910.305(b)(1)(ii)

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1 In Citation 1, Item 1, the employer was charged with exposure to
2 employees of serious electrical hazard due to a missing ground pin
3 affixed to a diesel powered heater in violation of the proscriptions of
4 29 CFR 1910.304(g)(5). The alleged violation in Item 1 was classified
5 as "Serious" and a penalty proposed in the amount of ONE THOUSAND THREE
6 HUNDRED SEVENTY-FIVE DOLLARS (\$1,375.00).

7 Citation 1, Item 2 referenced 29 CFR 1910.305(b)(1)(ii). The
8 employer was charged with exposing employees to serious electrical
9 hazards by permitting access to a deficient electrical panel. The
10 alleged violation was classified as "Serious" and a penalty proposed in
11 the amount ONE THOUSAND THREE HUNDRED SEVENTY-FIVE DOLLARS (\$1,375.00).

12 Counsel for the complainant, through Safety and Health
13 Representative (SHR) Shane Buchanan presented evidence and testimony as
14 to the violations and appropriateness of the penalties. Mr. Buchanan
15 testified that he conducted an inspection at respondent's warehouse
16 facility in Las Vegas, Nevada. Complainant Exhibit "A" was identified
17 as the investigative report completed by Mr. Buchanan during the course
18 of his inspection. Exhibit "B" was identified as eleven pages of
19 photographic evidence.

20 Mr. Buchanan testified he observed and photographed at Exhibit B,
21 pictures numbered 1, 2, 3, 5 and 6, a defective electrical plug affixed
22 to a portable diesel heater. He testified the plug was missing the
23 ground pin required by 29 CFR 1910.304(g)(5). The plug was utilized at
24 the time of his inspection and the heater operational. He tested the
25 electrical connection and determined that the circuit was "live" and
26 referenced his test equipment for same at Exhibit B, picture number 8.
27 He noted during the course of his inspection two employees working near
28 the heater and confirmed it was being utilized for warmth in the

1 warehouse facility as the inspection occurred during the month of
2 January.

3 Based upon the employee exposure and potential for electrical shock
4 he classified the violation as Serious. He calculated the penalty based
5 upon the departmental enforcement manual giving credits for company
6 size, good faith, and other applicable criteria.

7 Counsel for complainant presented further testimony and evidence
8 through SHR Buchanan regarding Citation 1, Item 2. The SHR testified
9 that he inspected an electrical panel on the north wall of the facility
10 after observing "knockouts" to be missing in the panel structure. He
11 referenced Exhibit B, pictures numbered 9, 10 and 11, to demonstrate the
12 panel without a "close off" and missing "filler plates," the latter
13 designated by "arrows" on the photos. He described the hazard exposure
14 to live electrical parts coming in contact with employees. He
15 calculated the penalty in accordance with the operations manual and
16 rendered the credits as appropriate.

17 On cross-examination SHR Buchanan testified he did not test the
18 electrical panel subject of Citation 1, Item 2 to determine if it was
19 connected to any active power source. He further testified that Exhibit
20 B, picture 11 included identification of another electrical panel and
21 admitted it was possible that the subject panel could be the one
22 providing power to the facility. Mr. Buchanan testified the pin missing
23 from the electrical plug at Citation 1, Item 2, might have been in the
24 wall plug, but that because there was no "path of ground" there still
25 would be a violation under the standard.

26 Complainant counsel presented further testimony and evidence from
27 Mr. Vaughn Bachman who identified himself as an employee of respondent.
28 He testified that ". . . to my knowledge there was no energy to the

1 (electrical) panel . . ." subject of Citation 1, Item 2. He further
2 testified that when he attempted to turn on lights in the facility they
3 did not illuminate and he determined there to be ". . . no juice to the
4 box . . .". He testified on Exhibit B, picture 9, that the electrical
5 panel did not operate lights in the warehouse and was without power or
6 any function.

7 At Citation 1, Item 1 Mr. Bachman testified that he did not notice
8 the missing pin in the heater plug but that the heater was not in
9 regular operation because it required the use of diesel fuel.

10 Counsel for respondent conducted examination of Mr. Bachman the
11 employee of respondent but called in complainant's case in chief. Mr.
12 Bachman testified that all Amazon owned equipment is so labeled but the
13 photographic exhibits do not demonstrate any such labeling on the
14 heating device cited as missing a plug pin at Citation 1, Item 1. He
15 testified he never saw the heater in the building before the inspection.
16 Mr. Bachman never observed the heater on the premises for a period of
17 approximately one month while he was on the job nor saw it in operation.

18 After the conclusion of complainant's case, respondent presented
19 testimony in defense of the alleged violation. Mr. Travis West was
20 identified as the safety coordinator of respondent employed for
21 approximately two years. He testified all Amazon equipment is labeled
22 and the photographic exhibit of the heating device referenced at
23 Citation 1, Item 1 did not depict an Amazon label. He further testified
24 at Citation 1, Item 2, that when he found there was no ground pin in the
25 plug for the heater he was "shocked". He investigated the matter but
26 never found who actually owned the heater, but certain it was not the
27 property of Amazon. He testified that he conducted a review of the
28 company safety manual with the employees as to the use of unguarded

1 equipment. Mr. West testified he had no information that the panels
2 cited at Citation 1, Item 2 were energized.

3 Respondent presented testimony of Mr. Tim Brooks, the owner of
4 respondent Amazon Masonry, Inc. He testified the warehouse facility is
5 a leased property where he maintains mostly material for utilization on
6 various jobs being effectuated on the Las Vegas strip. He identified
7 picture 11 in Exhibit B, the electrical panel in question, and testified
8 it was a non-energized panel. He testified that he knows the panel to
9 be non-energized because he had to contact an electrician to trace power
10 to the live boxes and then activate the non cited panel to implement
11 power to the facility. He further testified that the panel shown at
12 picture 11 in Exhibit B has never been "live" during his rental of the
13 warehouse facility.

14 Mr. Brooks testified Exhibit B, picture 3, depicted non-flammable
15 ceramic tile, the principal product stored in the subject warehouse
16 facility. He testified that he is a safety conscious person. He
17 further testified the heater equipped with the defective plug was not
18 his property and that he never saw the heater actually being utilized.

19 At the conclusion of the hearing, counsel offered closing
20 arguments. However before the presentation of complainant's closing
21 argument, he moved, based upon the evidence, to dismiss Citation 1, Item
22 2, referencing 29 CFR 1910.305(b)(1)(ii). The violation at Citation 1,
23 Item 2 and penalty in the amount of ONE THOUSAND THREE HUNDRED SEVENTY
24 FIVE DOLLARS (\$1,375.00) were dismissed.

25 Complainant counsel argued with regard to Citation 1, Item 1,
26 referencing 29 CFR 1910.304(g)(5) involving the missing ground pin in
27 the heater plug. Counsel argued that it was not important as to **who**
28 owned the heater; the respondent **controlled** the area where it was

1 located subjecting its employees to electrical hazard exposure. He
2 argued the evidence demonstrated that respondent employees were
3 utilizing the heater and therefore actually exposed to the hazardous
4 condition. He further argued the evidence and testimony clearly
5 established the heater was connected to an energized circuit. The SHR's
6 testimony and photographs of the missing pin in the plug were
7 uncontroverted. Counsel argued the pictorial evidence corroborates the
8 testimony of the SHR demonstrating a lack of ground pin in the plug and
9 a clear violation of the cited standard. He also argued the citation
10 was appropriately classified as serious because lack of a grounding path
11 to an energized circuit demonstrates the potential for severe injury or
12 death. He concluded his argument by asserting that it would have been
13 easy to discover the missing ground pin with the exercise of reasonable
14 diligence.

15 Respondent counsel presented closing argument. He argued the
16 complainant's case must be dismissed due to failure of the statutory
17 burden of proof. He argued the heater was not actually in use at the
18 time of the inspection and there was no evidence as to **when** the plug pin
19 actually broke away from the plug itself. He further argued there was
20 no evidence that the missing pin could be within the **knowledge** of the
21 employer nor was it probable with the exercise of reasonable diligence
22 the employer knew or could have known of such a defect.

23 The board in reviewing the facts, documentation, testimony and
24 other evidence must measure same against the established applicable law
25 developed under the Occupational Safety & Health Act.

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

28 All facts forming the basis of a complaint must be
proved by a preponderance of the evidence. Armor

1 Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958
2 (1973).

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

17 A "serious" violation is established upon a preponderance of
18 evidence in accordance with NRS 618.625(2) which provides in pertinent
19 part:

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

29 The board finds the evidence provided by SHR Buchanan credible and
30 un rebutted with regard to the facts of violation at Citation 1, Item 1,
31 referencing 29 CFR 1910.304(g)(5). The testimony was corroborated by the
32 photographic exhibits at Exhibit B, pictures numbered 5 and 6. Further,
33 at Exhibit B, picture number 8, the testimonial evidence of the
34 energized circuit was corroborated.

35 Mr. West and Mr. Brooks testified the respondent to be the lessee
36 of the warehouse. As the lessee, respondent was in control of the
37 premises operations, including the equipment being utilized by
38 employees. Reasonable diligence by the respondent supervisory or safety

1 representatives could have reasonably and easily detected the defective
2 plug connection; something typical for routine inspection or
3 maintenance. The testimony and evidence demonstrated the heater
4 equipment to have been on the premises for an extended period of time.

5 The board concludes that at Citation 1, Item 1, the employer failed
6 to satisfy the requirements of 29 CFR 1910.304(g)(5). Employees were
7 exposed to the potential of electrical shock due to the hazard created
8 by lack of the ground pin in the plug on the heating device being
9 utilized. It is reasonably inferred the employer knew or should have
10 known with the exercise of reasonable diligence of the defective
11 condition. Employee exposure is satisfied if there is "access to a
12 hazard".

13 Actual knowledge is not required for a finding of
14 a serious violation. Foreseeability and
15 preventability render a violation serious provided
16 that a reasonably prudent employer, i.e., one who
17 is safety conscious and possesses the technical
18 expertise normally expected in the industry
19 concerned, would know of the danger. Candler-
20 Rusche, Inc., 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723
(1976), appeal filed, No. 76-1645 (D.C. Cir. July
16, 1976); Rockwell International, 2 OSHC 1710,
1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d
1283 (6th Cir. 1976); Mountain States Telephone &
Telegraph Co., 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365
(1973).

21 Under Occupational Safety and Health Law, there
22 need be no showing of **actual** exposure in favor of
23 a rule of **access** based upon reasonable
24 predictability - (1) the zone of danger to be
25 determined by the hazard; (2) access to mean that
26 employees either while in the course of assigned
27 duties, personal comfort activities on the job, or
28 while in the normal course of ingress-egress will
be, are, or have been in the zone of danger; and
(3) the employer knew or could have known of its
employees' presence so it could have warned the
employees or prevented them from entering the zone
of danger. Gilles & Cotting, Inc., 3 OSHC 2002,
1975-1976 OSHD ¶ 20,448 (1976); Cornell & Company,
Inc., 5 OSHC 1736, 1977-1978 OSHD ¶ 22,095 (1977);
Brennan v. OSAHRC and Alesea Lumber Co., 511 F.2d
1139 (9th Cir. 1975); General Electric Company v.

