

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

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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,

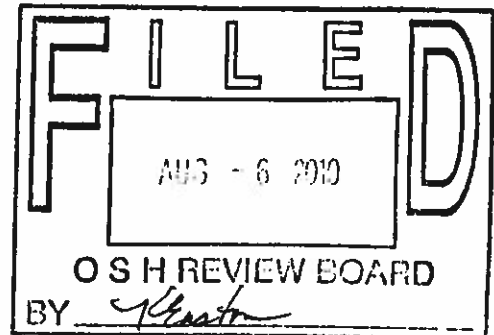
Docket No. LV 10-1415

Complainant,

vs.

10 AMAZON MASONRY, INC.

Respondent.



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 July,
16 2010, 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 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.

28 Prior to commencement of the hearing, counsel for complainant

1 withdrew from contest Citation 2, Item 1, referencing 29 CFR
2 1904.32(a)(1) classified as "Other" and Citation 3, Item 1, referencing
3 Nevada Revised Statute 618.376(1) classified as "Regulatory".

4 Citation 1, Item 1, charges a violation of 29 CFR 1926.701(b). The
5 complainant alleged that the employer respondent failed to ensure that
6 exposed rebar was equipped with protective caps in accordance with the
7 cited standard. The violation was classified as "Serious". The
8 proposed penalty for the alleged violation in the amount of SIX HUNDRED
9 AND SEVENTY-FIVE DOLLARS (\$675.00).

10 Counsel for the Chief Administrative Officer presented testimonial
11 and documentary evidence with regard to the alleged violation. Safety
12 and Health Representative (SHR) Steve Medellin testified that on January
13 5, 2009 he conducted an assigned comprehensive inspection of a Las
14 Vegas, Nevada construction site and identified the respondent as a
15 subcontractor on the project. During a "walk-around" inspection Mr.
16 Medellin observed uncapped steel rebar "sticking up" from concrete
17 footings and three respondent employees exposed to impalement hazards
18 while engaged in pouring concrete. SHR Medellin observed wood (2x4s)
19 attached to the rebar as an alternative to the caps. He was informed
20 the caps had not yet arrived on the construction site. Mr. Medellin
21 referenced his investigation report at Exhibit 1 that the employer was
22 aware of impalement hazard exposure based upon the identified use of the
23 wood 2x4 alternative means of compliance to protect the rebar.

24 SHR Medellin testified in furtherance of Exhibit 2, pages 1 through
25 3, which depicted employees of respondent engaged in concrete work and
26 exposed to areas of uncovered rebar. He testified based upon his
27 interviews with the respondent foreman that before the rebar caps
28 arrived at the job site there was an immediate requirement to pour

1 concrete which had arrived early. The concrete pour was commenced prior
2 to the caps showing up which required respondent employees to begin
3 removal of the 2x4 wood protective systems as depicted in Exhibit 2,
4 page 2.

5 SHR Medellin testified in response to questions from counsel
6 regarding calculation of the penalty proposed and the credits rendered
7 due to the circumstances and low severity and probability factors. He
8 also testified that employer knowledge was established through the
9 company foreman who told him that he knew rebar safety caps were
10 required.

11 On cross-examination, SHR Medellin testified affirmatively as to
12 the 2x4 wood protective systems constituting an acceptable cover or cap
13 under the standard as an alternate means of compliance. He admitted the
14 photograph at Exhibit 2, page 2 depicts four sections of rebar covered
15 by the wood 2x4 caps and one section exposed at the time of his
16 inspection. He testified in response to further questioning that he
17 understood concrete arrived early and blocks ordered to the site so the
18 employees had to remove the wood 2x4 rebar covers to commence setting
19 the blocks before hardening of the concrete.

20 Counsel rested the complainant's case and the witness was excused.

21 Counsel for the respondent presented testimonial evidence in
22 defense of the violations through Mr. Tim Brooks the owner of the
23 company. He described the need to remove caps or covers from rebar
24 during a "wet setting" process which requires prompt laying of block in
25 preset (wet) concrete. He testified as to company safety instructions
26 and employer knowledge of the need for capping rebar. He also described
27 the practical need for removal of caps or covers when certain type of
28 concrete work must commence to perform the job task. He further

1 testified as to the competency and capability of his union trained
2 employees engaged in the work at the job site. He testified there were
3 no serious hazardous conditions existent because work was being
4 conducted at a waist high level as opposed to working at a height above
5 the rebar.

6 On cross-examination, Mr. Brooks testified that the Exhibit 2
7 photographs depicted his employees pouring and finishing concrete but
8 not actually laying block during a wet setting process. Mr. Brooks
9 responded that some block was on the site but in a different area and
10 that block was being brought to the project from his nearby project to
11 set the material in the wet concrete before it hardened. He said his
12 employees were simply removing the wood 2x4 covers in order to proceed
13 with the block setting process which required removal of the covers to
14 perform their work. Respondent rested its case and both counsel
15 presented closing argument.

16 Counsel for the complainant argued the evidence established a
17 simple case of violation through SHR Medellin's testimony which was
18 corroborated by the photographs. Counsel admitted that use of wood
19 2x4's can satisfy the capping requirement of the standard but noted
20 Exhibit 2, page 2, depicted they were removed while employees were
21 pouring concrete and not during the "wet setting" process where block
22 must be immediately laid. He further argued there was no excuse for the
23 employees removing the wood 2x4 protective capping prior to setting the
24 block and therefore the violation established accordingly.

25 Counsel for respondent presented closing argument in defense of the
26 violations. Counsel asserted it was impossible to accomplish the work
27 task without removing the protective wood capping at some point in time.
28 He argued rebar will not stand in wet concrete which is why wood 2x4's

1 are used to both secure and cap the rebar. He argued the photographs
2 established the wood 2x4's were in the process of being removed but had
3 been in place serving as recognized alternative protection under the
4 standard. He said the covers were being removed to proceed with the
5 necessary work effort. Counsel argued it was reasonable to remove the
6 wood rebar covers; and that it would be absurd to read the standard
7 literally to mean that one can never remove caps or covers from rebar.
8 He asserted that "plain meaning" dictates at some moment either the
9 caps, whether they be normal capping or the wood alternative, would have
10 to be removed. Counsel further argued that without some interpretation
11 or commonsense application as to when the rebar covers could be removed
12 creates an inability to enforce or meaningfully comply with the
13 standard.

14 In reviewing the testimony, exhibits, and arguments of counsel, the
15 board is required to measure same against the elements to establish
16 violations under Occupational Safety & Health Law based upon the
17 statutory burden of proof and competence of evidence.

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

20 All facts forming the basis of a complaint must be
21 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD
22 ¶16,958 (1973).

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

1 2003).

2 A respondent may rebut allegations by showing:

- 3 1. The standard was inapplicable to the situation
4 at issue;
- 5 2. The situation was in compliance; or lack of
6 access to a hazard. See, Anning-Johnson Co.,
7 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

8 The photographs at Exhibit 2, pages 1 through 3, depict a violative
9 condition where a section of rebar is uncovered near working employees.
10 However the photographs also demonstrate that the employer had taken
11 measures to protect the employees from an impalement hazard by covering
12 the rebar as intended by the standard. The testimony and photographs
13 further establish that the employees were exposed only at a waist high
14 level to impalement hazard and not that of a more serious nature wherein
15 work for example is conducted from a scaffold or elevated platform. In
16 the latter instance an employee fall onto rebar creates a far more sever
17 potential hazard and one for which there is a greater probability of
18 severe injury or death. SHR Medellin in is his penalty calculation
19 recognized the low severity and probability factors in his analysis and
20 recommendations to reach the proposed penalty for the citation.

21 The recognized defense of **impossibility of compliance** has merit.
22 However the lack of any corroborating evidence of any block on site is
23 duly noted. The testimony from both complainant and respondent
24 witnesses established the triggering event for removal of protective
25 rebar covering to be the setting of blocks in order to accomplish the
26 work effort. Had there been block on site depicted by photographs or
27 witness testimony that block was outside of view but within reasonable
28 access of the employees, the defense of impossibility may have been
sufficient to rebut the evidence of violation.

1 W.C. Sivvers Company, 1 OSHC 1074, 1973-1974 OSHD ¶
2 17, 792 (1972); J.H. Baxter & Co., 1 OSHC 3147,
3 1971-1973 OSHD ¶ 16,315 (1973): The impossibility
4 of compliance is relevant and may be advanced as a
5 defense.

6 W.B. Meredith, II, Inc., 1 OSHC 1782, 1973-1974
7 OSHD ¶ 18,003 (1974); Robert W. Setterlin & Sons
8 Co., 4 OSHC 1214, 1975-1976 OSHD ¶ 20,682 (1976):
9 Impossibility is a proper defense where the
10 necessary work could not be performed with safety
11 devices installed.

12 Diebold Inc., 3 OSHC 1897, 1975-1976 OSHD ¶ 20,333
13 (1976), appeal filed, No. 76-1278 (6th Cir. March 8,
14 1976): The Secretary of Labor would find a de
15 minimis violation even if compliance were
16 impossible, provided the cited employer failed to
17 seek to protect its employees by other means.

18 The board finds evidence of a violation of the standard but subject
19 to mitigation. The employer took measures to protect the rebar through
20 alternative means of compliance by use of wood 2x4 coverings. The work
21 effort involved concrete construction and therefore practical
22 determinations in the field to accomplish the work task in an expedient
23 but safe manner. The employees depicted in the photographic exhibits
24 were working at only waist high levels which reduces severity and
25 probability factors for potential injury that might occur from exposure
26 to uncovered rebar. Accordingly, notwithstanding a finding of
27 violation, the mitigating factors in evidence require a reclassification
28 of the violation from "serious" to "other". The penalty proposed is
reasonable and already reflects reductions given by the SHR based upon
low severity and probability factors.

The photographic evidence depicts facts of violation, the
applicability of the standard to the facts, non complying conditions,
exposure to employees of respondent, and employer knowledge as imputed
through the company foreman and the efforts to accomplish alternate
means of compliance to capping through use of wood covering. American

1 Wrecking Corp. v. Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.
2 2003), et. seq., *ibid.* at page 5.

3 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
4 **REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as
5 to Citation 1, Item 1, 29 CFR 1926.701(b). The violation is
6 reclassified as "Other". The proposed penalty in the amount of SIX
7 HUNDRED SEVENTY-FIVE DOLLARS (\$675.00) is approved.

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

19 DATED: This 6th day of August, 2010.

20 NEVADA OCCUPATIONAL SAFETY AND HEALTH
21 REVIEW BOARD

22 /s/
23 TIM JONES, CHAIRMAN