

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,

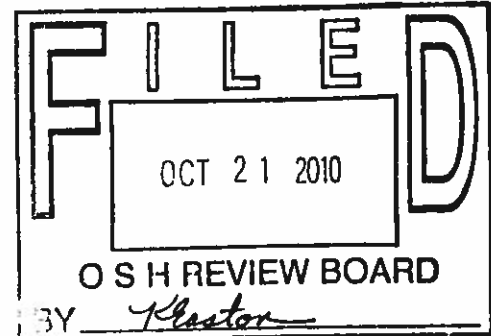
Docket No. LV 10-1428

Complainant,

vs.

10 BOMBARD MECHANICAL, LLC,

Respondent.



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12
13 DECISION

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 12th day of August,
16 2010, 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 Administration, Division of**
19 **Industrial Relations** (OSHA), and RICK D. ROSKELLEY, ESQ., appearing on
20 behalf of respondent, **BOMBARD MECHANICAL, LLC**; the **NEVADA OCCUPATIONAL**
21 **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 OSHA sets forth allegations of violations
25 of Nevada Revised Statutes as referenced in Exhibit "A," attached
26 thereto.

27 Citation 1, Item 1(a) charges a violation of 29 CFR
28 1926.1053(b)(13). The complainant alleges that the employer respondent

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1 failed to ensure that the top or top step of a stepladder was not used
2 as a step by an employee. The violation was classified as "Serious".
3 The proposed penalty for the alleged violation was in the sum of One
4 Thousand One Hundred Dollars (\$1,100.00).

5 Counsel for the Chief Administrative Officer presented testimony
6 and evidence with regard to the alleged violation. Safety and Health
7 Representative (SHR) Mr. Scott Matthews testified that on or about March
8 16, 2010 while inspecting a hotel property in Las Vegas, Nevada, he
9 observed an employee standing on the top level of a stepladder. He
10 identified the employee as a sheet metal worker employed by Bombard
11 Mechanical, LLC. He testified the employee was standing on the top of
12 an approximate six foot A-frame stepladder in full view of both the
13 employee's foreman and the SHR. Mr. Matthews identified his OSHA
14 Inspection Report containing the facts and details of the investigation
15 admitted in evidence as Exhibit 1. He further identified Exhibit 2
16 consisting of six photos, numbered 1 through 6. Mr. Matthews identified
17 the violating employee Mr. Noveal Antee depicted in Exhibit 2, photo
18 number 3, and the respondent foreman depicted in Exhibit 2, photo number
19 1. The foreman is shown standing at a distance of approximately 10 to
20 15 feet from the employee on the ladder.

21 On cross-examination respondent counsel questioned SHR Matthews on
22 his classification of the penalty as serious, the value rating of "5"
23 at Exhibit 1 and the penalty calculation details of the Inspection
24 Report. Mr. Matthews testified that employee Antee told him he stepped
25 on the top of the ladder once. The SHR rated the violation at a "5"
26 testifying that he would have rated it as a "10" if the action were
27 longer or continuous.

28 At the conclusion of complainant's case respondent presented

1 testimony from Mr. Phil Arias, the safety director of respondent. He
2 testified to the existence and extent of respondent's safety program;
3 he described document training, "tool box" meetings with employees on
4 a weekly basis and foremen monthly. He testified employee Antee had
5 been trained on a variety of matters, including ladder use safety. He
6 identified and testified with regard to documentary evidence of safety
7 meeting attendance establishing employee Antee as present. He further
8 testified that Mr. Antee admitted he was wrong to stand on the top of
9 the ladder in violation of his training and the company safety policy.

10 Mr. Noveal Antee testified he is a three year employee of
11 respondent with ten years experience in the construction industry. He
12 identified the photographic exhibits in evidence depicting him standing
13 on top of the ladder and admitted the existence of his violative
14 conduct. He further testified that it was improper to stand on the top
15 of ladder, that he had been trained by respondent and his union to avoid
16 same, that he did not do it deliberately but was trying to finish a job
17 and stepped briefly ". . . probably five minutes . . ." on the top of
18 the ladder.

19 The foreman of respondent, Mr. Doug Burtz, testified that he
20 conducts safety training for respondent, including toolbox meetings, and
21 schedules all work for the company. He further testified that he has
22 provided ladder training to respondent employees. He testified that he
23 merely stopped by the subject job site on the day of the inspection to
24 check on employees as he was responsible for supervision on another job
25 site nearby. He identified himself in photographic Exhibit 2, photo
26 number 1 talking to another employee during the incident. He testified
27 he did not recall seeing Mr. Antee standing on the top of the ladder and
28 that he was not supervising Mr. Antee at the time of the incident. He

1 serious citation. No employer could comply with a responsibility to
2 either know or enforce the brief instant of violation of a non-
3 continuous nature which clearly evidences employee misconduct. Counsel
4 argued that while the violative facts are admitted, existence of the
5 company's safety plan, testimony of the witnesses regarding operation
6 and enforcement of the company safety plan, and the brief instant of
7 violation satisfies the elements for the defense of unpreventable
8 employee misconduct under established occupational safety and health
9 law.

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

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

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

18 To establish a prima facie case, the Secretary
19 (Chief Administrative Officer) must prove the
20 existence of a violation, the exposure of
employees, the reasonableness of the abatement
21 period, and the appropriateness of the penalty.
Bechtel Corporation, 2 OSHC 1336, 1974-1975 OSHD
22 ¶18,906 (1974); Crescent Wharf & Warehouse Co., 1
OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).

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
from a condition which exists or from one or more
practices, means, methods, operations or processes
28 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,

1 know the presence of the violation."

2 The testimony and evidence are unequivocal with regard to the
3 existence of violative conduct in contravention of the cited standard.
4 Respondent admits the facts of violation but asserts the recognized
5 defense of unpreventable employee misconduct.

6 The burden of proof rests with OSHA under Nevada law (NAC
7 618.798(1)); but after establishing same, the burden shifts to the
8 respondent to prove any recognized defenses. See Jensen Construction
9 Co., 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, Marson Corp., 10
10 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

11 The elements required for the defense of unpreventable employee
12 misconduct are:

- 13 (1) The employer must establish work rules designated to
14 prevent the violation
- 15 (2) The employer must adequately communicate these rules to
16 its employees
- 17 (3) The employer must take steps to discover violations
- 18 (4) The employer must effectively enforce the rules when
19 violations have been discovered.

20 Based upon the weight of testimony, evidence and established
21 occupational safety and health law, the board finds:

22 1. The testimony of three respondent witnesses, under oath,
23 including the offending employee, must be given reasonable weight and
24 credibility. The testimony was not impeached. The company employees
25 all testified credibly with regard to an **existant safety program and**
26 **work rules on ladder use** to satisfy the first requirement for the
27 defense of unpreventable employee misconduct. Documentary evidence was
28 admitted to corroborate the sworn testimony of the company employees and
demonstrated work rules and a safety program.

1 2. The employer **adequately communicated** safety rules to its
2 employees as demonstrated by the safety meeting minutes and the sworn
3 testimony of three (3) witnesses, including Mr. Antee, the offending
4 employee. While the identified safety program and extent of the
5 communication may be less than desirable, there was sufficient testimony
6 and evidence corroborated by the documentation that the respondent
7 employer "adequately" communicated applicable safety rules to its
8 employees, both verbally and in written form.

9 3. The employer took **steps to discover violations**. Respondent
10 safety director employee Arias credibly testified, as did the other
11 respondent witnesses to support employer discovery compliance. Employee
12 Antee is an experienced union trained workman. The employer could not
13 reasonably foresee a brief violation on the part of Mr. Antee when all
14 witnesses, including the SHR, agree there was no **extended or continuous**
15 violative conduct; only a few minutes of standing on the top of the
16 stepladder. No employer can absolutely assure or police every moment
17 of an employee's workday to guarantee compliance. The established case
18 law has long recognized the required element of "foreseeability". Mr.
19 Antee's admitted momentary action to stand on the top of the ladder to
20 finish a task was brief, isolated, non-continuous and not reasonably
21 foreseeable.

22 4. The employer **effectively enforced work rules** when violations
23 were discovered. Again, the sworn unimpeached witness testimony,
24 including that of the offending employee Mr. Antee, established the
25 existence of a program for notices of warning and discipline. Although
26 the testimony on uniformity of and thus **effective** enforcement appeared
27 limited, it was supported by the weight of evidence. For example, a
28 cumbersome search of personnel files was required to discover evidence

1 of foreman disciplinary action as testified to by Mr. Arias. While this
2 area of the respondent safety program, like others, appeared arguably
3 minimal by comparable or desired standards, it was sufficient under the
4 established recognized occupational safety and health law to demonstrate
5 effective enforcement.

6 Evidence that the employer effectively communicated
7 enforced safety policies to protect against the
8 hazard permits an inference that the employer
9 justifiably relied on its employees to comply with
10 the applicable safety rules and that violations of
11 these safety policies were not foreseeable or
12 preventable. Austin Bldg. Co. v. Occupational
13 Safety & Health Review Comm., 647 F.2d 1063, 1068
14 (10th Cir. 1981). When an employer proves that it
15 has effectively communicated and enforced its
16 safety policies, serious citations are dismissed.
17 See Secretary of Labor v. Consolidated Edison Co.,
18 13 O.S.H. Cas. (BNA) 2107 (OSHRC Jan. 11, 1989);
19 Secretary of Labor v. General Crane Inc., 13 O.S.H.
20 Cas. (BNA) 1608 (OSHRC Jan. 19, 1988); Secretary of
21 Labor v. Greer Architectural Prods. Inc., 14 O.S.H.
22 Cas. (BNA) 1200 (OSHRC July 3, 1989).

23 National Realty and Construction Co., Inc. v.
24 OSHRC, 489 F.2d 1257 (D.C. Cir. 1973), is the
25 fountainhead case repeatedly cited to relieve
26 employers responsibility for the allegedly
27 disobedient and negligent act of employees which
28 violate specific standards promulgated under the
Act, and sets forth the principal which has been
confirmed in an extensive line of OSHC cases and
reconfirmed in Secretary of Labor v. A. Hansen
Masonry, 19 O.S.H.C. 1041, 1042 (2000).

An employer cannot in all circumstances be held to
the strict standard of being an absolute guarantor
or insurer that his employees will observe all the
Secretary's standards at all times. An isolated
brief violation of a standard by an employee which
is unknown to the employer and is contrary to both
the employer's instructions and a company work rule
which the employer has uniformly enforced does not
necessarily constitute a violation of [the specific
duty clause] by the employer. *Id.*, 1 O.S.H.C. at
1046.

It is further noted that "employers are not liable
under the Act for an individual single act of an
employee which an employer cannot prevent." *Id.*,
3 O.S.H.C. at 1982. The OSHRC has repeatedly held

1 that "employers, however, have an affirmative duty
2 to protect against preventable hazards and
preventable hazardous conduct by employees. *Id.*
3 See also, Brock v. L.E. Meyers CO., 818 F.2d 1270
(6th Cir.), *cert. denied* 484 U.S. 989 (1987).

4 The controlling cases make clear the existence of
5 an employer's defense for the unforeseeable
6 disobedience of an employee who violates the
7 specific duty clause. However, the disobedience
8 defense will fail if the employer does not
9 effectively communicate and conscientiously enforce
10 the safety program at all times. Even when a
11 safety program is thorough and properly conceived,
12 lax administration renders it ineffective. P.
Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 110-
13 111 (1st Cir. 1997). Although the mere occurrence
14 of a safety violation does not establish
15 ineffective enforcement, Secretary of Labor v.
Raytheon Constructors Inc., 19 O.S.H.C. 1311, 1314
16 (2000) the employer must show that it took adequate
17 steps to discover violations of its work rules and
18 an effective system to detect unsafe conditions
19 control. Secretary of Labor v. Fishel Co., 18
20 O.S.H.C. 1530, 1531 (1998). Failure to follow
21 through and to require employees to abide by safety
standards should be evidence that disciplinary
action against disobedient employees progressed to
levels of punishment designed to provide
deterrence. *Id.* See also, Secretary of Labor v.
A&W Construction Services, Inc., 19 O.S.H.C. 1659,
1664 (2001); Secretary of Labor v. Raytheon
Constructors Inc., 19 O.S.H.C. 1311, 1314 (2000).
A disciplinary program consisting solely of verbal
warnings is insufficient. Secretary of Labor v.
Reynolds Inc., 19 O.S.H.C. 1653, 1657 (2001);
Secretary of Labor v. Dayton Hudson Corp., 19
O.S.H.C. 1045, 1046 (2000). Similarly, disciplinary
action that occurs long after the violation was
committed may be found ineffective.

22 While the board is reluctant to relieve the employer respondent of
23 liability for violation considering the patent violative employee
24 conduct while a supervisor was on the immediate premises and evidence
25 of a limited safety program, the respondent's burden of proof met the
26 requirements to establish the recognized defense of unpreventable
27 employee misconduct. The board finding is particularly grounded upon
28 the undisputed evidence that the violative conduct was **brief** and **non-**

1 **continuous** in time and **isolated** in the workplace. There was no evidence
2 of previous similar violations. Evidence of the experience, training
3 and credible testimonial demeanor of the violating employee Noveal
4 Antee, were compelling. The subject case, as in others heard by the
5 Nevada board or published by the federal review commission, requires a
6 realistic and fair application of the controlling law to recognize that
7 an **isolated instance of unpreventable employee misconduct** must be given
8 due consideration in the review/appellate process.

9 The brief inattentiveness of foreman Burtz, under the facts in
10 evidence is not condoned, but cannot be imputed to the employer after
11 merely an isolated instant of violative conduct. His presence on the
12 site and lack of focus during a brief moment in time when a non-
13 continuous violation occurred does not alone **prevent** the assertion or
14 establishment of the recognized defense of unpreventable employee
15 misconduct.

16 The **duration** of a violative act is relevant to
17 finding whether a supervisor's lack of knowledge
18 should be imputed to an employer. Compare R.P.
19 Carbone Constr. Co. V. OSHRC, 166 F.3d 815, 818, 18
20 OSH Cases 1551, 1554 (6th Cir. 1998) (safety belt
21 violations **occurring over a two week period** should
22 have been observed), with Ragnar Benson Inc., 18
23 OSH Cases 1937, 1940 (Rev. Comm'n 1999)
24 (insufficient indication of **how long the violative**
25 **conditions existed**). Texas A.C.A. Inc., 17 OSH
26 Cases 1048, 1050-51 (Rev. Comm'n 1995). In
27 Secretary of Labor v. Westar Energy, 20 BNA OSHC
28 1736 (OSHC Jan. 6. 2004, the Occupational Safety
and Health Commission ruled that "[w]here a
supervisory employee is involved, the proof of
unpreventable employee misconduct is more rigorous
and the defense is **more difficult** to establish
since it is the supervisor's duty to protect the
safety of employees under his supervision."
Westar, *supra*, citing Daniel International Co. V.
OSHRC, 683 F.2d 361, 364 (11th Cir., 1982); Daniel
Construction Co., 10 BNA OSHC 1549, 1552, 1982 CCH
OSHD P26.027 at pp. 32,672 (No. 16265, 1982). Id.
A supervisor's involvement in the misconduct is
strong evidence that the employer's safety program

1 was lax. Id. See also, Secretary of Labor v. L.E.
2 Meyers CO., No. 90-0945, slip op. At 7-8,
3 Occupational Safety & Health Review Commission
4 March 31, 1993 (citation omitted); Rabinowitz,
5 Occupational Safety and Health Law, 2008, 2nd Ed.
6 pgs 156-157. (Emphasis added)

7 "The Commission recently characterized the similar
8 doctrine of **supervisory misconduct** as an
9 affirmative defense." Rabinowitz, Occupational
10 Safety and Health Law, 2008, 2nd Ed. at pg. 68
11 (emphasis added). Citing Danis Shook Joint
12 Venture, 19 OSH Cases 1497, 1502 (Rev. COmm'n
13 2001).

14 In reviewing the facts, exhibits, testimony and working conditions
15 in evidence, the board is persuaded that while proof of the defense of
16 unpreventable employee misconduct is "**more difficult**" when a supervisor
17 is nearby, the defense is established after sufficient proof of an
18 **isolated, individual, brief non-continuous violative act.**

19 ". . . An employer cannot in all circumstances be
20 held to the strict standard of being an absolute
21 guarantor or insurer that his employees will
22 observe all the Secretary's standards at all times.
23 An **isolated brief** violation of a standard by an
24 employee which is **unknown to the employer** and is
25 contrary to both the employer's instructions and a
26 **company work rule** which the employer has **uniformly**
27 **enforced** does not necessarily constitute a
28 violation of [the specific duty clause] by the
29 employer. National Realty and Construction Co.,
30 Inc. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973)
31 (emphasis added) reconfirmed in Secretary of Labor
32 v. A. Hansen Masonry, 19 O.S.H.C. 1041, 1042
33 (2000).

34 ". . . employers are not liable under the Act for
35 an **individual single act** of an employee which an
36 employer cannot prevent." Id., 3 O.S.H.C. at 1982.
37 Id. See also, Brock v. L.E. Meyers CO., 818 F.2d
38 1270 (6th Cir.), cert. denied 484 U.S. 989 (1987)."
39 (emphasis added)

40 A fair and reasonable application of the recognized law to the
41 facts in evidence is required in the appellate review process.

42 Based upon the above and foregoing, the board concludes, as a

1 matter of fact and law, there is no violation at Citation 1, Item 1, 29
2 CFR 1926.1053(b)(13) and the proposed penalty is denied.

3 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
4 **REVIEW BOARD** there is no violation of Nevada Revised Statutes as to
5 Citation 1, Item 1, 29 CFR 1926.1053(b)(13). The proposed penalty is
6 denied.

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

17 DATED: This 21st day of October, 2010.

18 NEVADA OCCUPATIONAL SAFETY AND HEALTH
19 REVIEW BOARD

20 /s/
21 _____
22 TIM JONES, CHAIRMAN
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