

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD

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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,

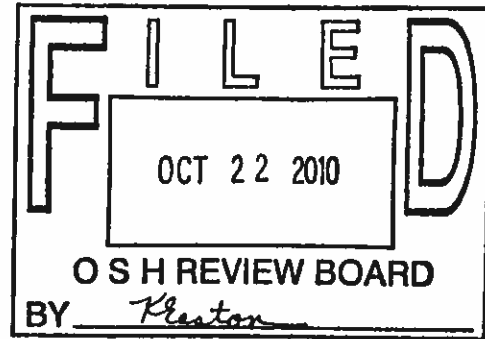
Docket No. LV 10-1422

Complainant,

vs.

10 LONE MOUNTAIN EXCAVATION &
11 UTILITIES, LLC,

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 11th day of August,
16 2010, and continued on September 8, 2010, in furtherance of notices duly
17 provided according to law, MR. JOHN WILES, ESQ., counsel appearing on
18 behalf of the Complainant, **Chief Administrative Officer of the**
19 **Occupational Safety and Health Administration, Division of Industrial**
20 **Relations** (OSHA); and MR. RICK D. ROSKELLEY, ESQ., appearing on behalf
21 of Respondent, **Lone Mountain Excavation and Utilities**; the **NEVADA**
22 **OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** 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 Citation 1, Item 1, alleges a violation of 29 CFR 1926.652(a)(1).

1 The employer was charged with failing to provide exposed employees with
2 cave-in protection. The violation was classified as "Serious" and a
3 penalty proposed in the amount of ONE THOUSAND FIVE HUNDRED DOLLARS
4 (\$1,500.00).

5 Counsel for complainant through Safety and Health Representative
6 (SHR) Shane Buchanan, presented evidence and testimony as to the alleged
7 violation and appropriateness of the proposed penalty. Mr. Buchanan
8 identified and testified with regard to Exhibits 1 through 6 admitted
9 in evidence without objection. On or about February 3, 2010, SHR
10 Buchanan was directed by his supervisors to inspect an excavation where
11 employees were reportedly exposed to cave-in hazards. The property was
12 owned by the Rio Hotel and Resort located on 3700 West Flamingo Road in
13 Las Vegas, Nevada. Mr. Buchanan entered the property through an opening
14 in a construction barricade large enough to accommodate truck traffic
15 but not posted or otherwise reflecting restricted entry.

16 Mr. Buchanan observed excavation-trenching work underway. He
17 identified himself to the superintendent of the respondent contractor,
18 presented his OSHA credentials and requested permission to conduct an
19 inspection. The superintendent refused permission for inspection as
20 described in Exhibit 1, page 2. SHR Buchanan then contacted the risk
21 manager of the property owner, Rio Hotel and Resort, and requested
22 access to the construction site to conduct his assigned OSHA inspection.
23 He was granted access and accompanied to the actual excavation area by
24 Mr. Hayden Walker, the risk manager representative of the property
25 owner. Mr. Buchanan referenced Exhibit 3, page 4 and confirmed the
26 details of his citation which provided:

27 "29 CFR 1926.652(a)(1): Each employee in an
28 excavation was not protected from cave-ins by an
adequate protective system designed in accordance
with paragraph (b) or © of this section:

1 The employer did not protect employees from cave-
2 ins as follows:

3 a. At the Rio All-Suite Hotel & Casino, on the
4 north east side of the property, employees
5 were exposed to cave-in hazards. The
6 employees were installing pipes in an
7 excavation that was approximately 7 feet 6
8 inches deep. The east excavation was
9 partially protected from cave-in by vertical
10 shores but the excavation that ran north and
11 south that the exposed employees were working
12 in did not have any cave-in protection."

13 SHR Buchanan identified photographs depicting the subject premises
14 and the barricade open area he utilized to initially enter the property
15 site at Exhibits 6, 7, 8 and 9. He identified photographs at Exhibit
16 5, pages 1 through 3, depicting equipment, gloves, and a water bottle
17 in the excavation. At Exhibit 5, pages 4 and 5 photos depicted a
18 measuring tape showing the depth of the trench. Mr. Buchanan testified
19 he saw hard hats in the ". . . deep end of the trench . . ." when he
20 first entered the site from outside the area, and referenced
21 photographic Exhibit 6 depicting ". . . where the trench turns."

22 Mr. Buchanan obtained verbal statements from respondent employees
23 O'Connell and Grijalva. He transcribed their statements, read them back
24 to the employees and obtained their signatures.

25 SHR Buchanan identified the written statement of employee Jose
26 Grijalva at tab 127 of Exhibit A, and testified he (Grijalva) informed
27 him that he had been working in the trench three to four hours applying
28 grease to bolts and wrapping plastic material around pipe. Mr. Grijalva
29 required a Spanish to English language translator to assist him when his
30 statement was given at the site. Mr. Buchanan did not recall the
31 identity of the translator.

32 Mr. Buchanan identified the written statement of employee Patrick
33 O'Connell at tab 128 of Exhibit A and summarized the written document

1 signed by Mr. O'Connell to state ". . . (he) had been working in the
2 trench all day . . . there was shoring in the trench to the elbow or
3 turn area . . . but removed by the time of the inspection . . ."

4 Mr. Buchanan testified he found the existence of violative
5 conditions based upon his observations, employee statements, and
6 photographs at Exhibit 4, pages 2 and 3, depicting a partial view of a
7 respondent employee working in the excavation. He measured and
8 photographed the excavation depth to be approximately 7 foot 6 inches
9 without cave-in protection in violation of the cited standard. Mr.
10 Buchanan explained that the standard is intended to protect employees
11 in excavations over 5 foot in depth. He determined "employer knowledge"
12 based upon the presence on site of respondent superintendent Mr. Barry
13 Cavanagh, who identified himself as being in charge of the work
14 underway. Mr. Buchanan further testified that he was informed by Mr.
15 Cavanagh the soil was Type C which requires a "slope and bench" unless
16 shoring is installed. He classified the violation as "serious" because
17 the trench measured 7 foot 6 inches in depth without shoring and
18 constituted a dangerous condition for the potential hazard of collapse
19 and suffocation of an exposed employee(s).

20 Complainant presented witness testimony from Mr. Hayden Walker who
21 identified himself as the risk manager for the property owner, Rio Hotel
22 and Resort. Mr. Walker testified he allowed SHR Buchanan to enter the
23 Rio property so he could identify the subcontractor and inspect the
24 excavation operations on the site. He testified the site layout
25 included a construction barricade around the actual work area but with
26 an opening large enough through which to drive a truck. He further
27 testified the property is bordered by Viking Road which is a public
28 street depicted at photographic Exhibit 2.

1 Complainant counsel presented additional testimony from hostile
2 witness, Mr. Patrick O'Connell who identified himself as a laborer on
3 the site employed by the respondent. He identified Exhibit A, tab 128,
4 as the statement he signed the day of the inspection at the request of
5 SHR Buchanan. He testified Mr. Barry Cavanagh was the superintendent
6 on the site while he (O'Connell) was setting pipe in the excavation.
7 He testified the lower pipe was set in place on the day previous
8 (February 2nd) to the inspection which occurred on February 3rd. He
9 testified that tabs 110 and 111 at Exhibit A do not depict photographs
10 of him, but tab 111 may be that of co-employee Grijalva. He testified
11 the work he performed on the day of the inspection, February 3rd,
12 consisted of setting the upper pipe and using soap and grease but, noted
13 the lower pipe had been set on the previous day.

14 Complainant counsel presented additional testimony from hostile
15 witnesses Mr. Jose Grijalva and Mr. Barry Cavanagh.

16 Mr. Grijalva, with the assistance of a court qualified interpreter,
17 identified himself in the photo referenced at Exhibit A, tab 112. At
18 tab 110 of Exhibit A depicting only the top of a hard hat, Mr. Grijalva
19 testified he did not believe that to be his picture because the
20 particular hard hat appeared different from what he wore the day of the
21 inspection. Mr. Grijalva testified that contrary to his written
22 statement at the time of the inspection identified as tab 127 of Exhibit
23 A, he did no work on the lower pipe the morning of the inspection.

24 Mr. Barry Cavanagh, respondent superintendent, testified there were
25 five respondent employees working on the site the day of the inspection
26 but denied anyone was working from the floor of the trench or in any
27 area over 5 feet in depth.

28 Respondent counsel conducted cross-examination of SHR Buchanan.

1 respondent he conducts safety training and constantly reviews excavation
2 safety, working within boundaries of shoring, related safety issues.,
3 and that all respondent employees have a minimum of 10 hours of OSHA
4 training (OSHA 10). He testified he has an OSHA 30 card as a supervisor
5 and all employees are trained not to work in a trench over 5 foot
6 without cave-in protection. He testified that Messrs. Grijalva and
7 O'Connell were trained in excavation safety. He further testified
8 shoring was onsite when the pipes were being installed in the excavation
9 but removed from the subject portion area the day before the inspection
10 after the installation phase of the work had been completed. He
11 described the work effort on the day of inspection as including ". . .
12 placing a layer of sand between the installed upper and lower pipes, and
13 in the floor of the trench . . . sand would be below and next to the
14 lower pipe . . . the sand between the pipes serves the purpose of
15 cushioning the pipes . . . the sand below raises the floor of the trench
16 to the bottom of the lower pipe . . ." He further testified that
17 whenever a man is in any deep end area of the trench, shoring is in
18 place. He further testified that employees Grijalva and O'Connell were
19 disciplined for being in the trench excavation.

20 At the conclusion of complainant's case respondent counsel
21 presented testimony from witness Mr. Charles Remine who identified
22 himself as an equipment operator and the respondent lead man the day of
23 the inspection. Mr. Remine testified he did not see Messrs. Grijalva
24 or O'Connell in an unshored area of the trench excavation.

25 At the conclusion of respondent's case, both counsel presented
26 closing arguments.

27 Complainant counsel identified the defense of a warrantless search
28 asserted by respondent counsel in his opening statement and argued there

1 was no violation of Fourth Amendment Constitutional rights or case law
2 interpreting restrictions upon OSHA during inspections relative to
3 search warrants. He argued that both the well established "plain view"
4 and "lack of any expectation of privacy" legal doctrines negate the
5 requirement for obtaining a search warrant. He asserted the subject
6 worksite was in plain view from a public street and the construction
7 barricade was neither signed nor restricted. Counsel cited applicable
8 case law in support of the "plain view" and "lack of expectation of
9 privacy" doctrines.

10 Complainant counsel further referenced Exhibit A, tabs 127 and 128
11 the respective statements of respondent employees Grijalva and
12 O'Donnell. He argued the employees testimony conflicted with their
13 written statements and therefore not credible. Counsel asserted it is
14 not believable that two employees could work for two to four hours while
15 standing on top of the lower or upper pipes 30 inches in diameter and
16 that they must have been standing and working from the floor of the
17 trench. He argued it was more credible to accept the written statements
18 signed by the employees at the time of the inspection than their
19 testimony before the board. Counsel referenced testimony from SHR
20 Buchanan that he saw an employee working at a violative depth and
21 because both superintendent Cavanagh and the lead man supervisor were
22 on site, the defense of unpreventable employee misconduct cannot be
23 applied.

24 Respondent counsel presented closing argument first asserting a
25 warrantless search prohibited by the Fourth Amendment of the United
26 States Constitution and cited case law interpreting same. He argued
27 there was no permission sought or given to enter the site until well
28 into the inspection. The SHR's observations and photographic exhibits

1 were legally tainted and must be excluded from evidence thereby so
2 limiting the facts upon which the board could rely to prevent any
3 finding of a violation. Counsel argued that the actual worksite was
4 behind a barricade, not in a public area, nor was there any right of the
5 public including the SHR to be on the premises without permission.

6 Counsel further argued there was no evidence of any hazardous
7 conditions. He referenced tab 113 of Exhibit A and argued that employees
8 were merely shown working from the upper pipe three to four feet below
9 ground level. He argued the sworn testimony of respondent's witnesses
10 were credible and should be accepted as truthful together with the
11 supporting photograph showing them only working while standing on the
12 upper and lower pipes both of which were above depths violative of the
13 cited standard. He argued there were no hazardous conditions and
14 therefore if the search warrant requirement is rejected, there was still
15 a failure of a critical legal element needed to find a violation.

16 Counsel referenced Exhibit A, tab 110 and argued the photograph does not
17 demonstrate any work at a lower depth, asserting the photo angle to be
18 misleading and therefore no evidence of a respondent employee working
19 on the floor of the trench where measured. There is no evidence to
20 permit any finding employees were engaged in a work effort beyond 5 foot
21 depths as controlled by the standard requiring cave-in protection.

22 Counsel argued it is not reasonable for the board to believe that
23 four respondent witnesses lied under oath. He further argued the board
24 must give greater weight to the live witness testimony under oath over
25 statements written by the SHR at the site and signed by the employees.
26 He asserted the employee testimony demonstrated the difficulties that
27 existed at the time of inspection; witness Grijalva impaired by a
28 language barrier, and witness O'Connell simply confused as to whether

1 the SHR questions pertained to his work the day before the inspection
2 when excavation protection existed or on the day of the inspection when
3 the protection had been removed from the subject area of the excavation.

4 Counsel argued there was no "employer knowledge" established to
5 support the requirement to prove a serious violation. No evidence
6 showed that respondent knew anything was being done by employees in
7 violation of the standard.

8 Counsel further argued that even if the board could find that an
9 employee did step down to the floor of the trench, as Mr. O'Connell
10 indicated could have briefly occurred, then because of the safety
11 policy, training meetings, and testimony on enforcement all without
12 rebuttal, the recognized defense of **unpreventable employee misconduct**
13 should apply. He argued the criteria was met and proved the employees
14 were trained, safety meetings conducted and enforcement imposed. The
15 employees testified they were trained, as did the superintendent.
16 Counsel concluded his closing arguments and asserted that the mere fact
17 employees may have been over-disciplined does not demonstrate inadequate
18 enforcement to rebut or negate the defense of employee misconduct.

19 For the board to reach a determination of violation, the threshold
20 issue for review is whether the subject inspection conducted without a
21 search warrant was in violation of the Fourth Amendment to the United
22 States Constitution.

23 "In May of 1978, the Supreme Court ruled that
24 warrantless non-consensual searches by compliance
25 officers of the Occupational Safety and Health
26 Administration violate the Fourth Amendment of the
27 Constitution. Marshall v. Barlow's Inc., 436 U.S.
28 307 (1978). Thus, when an inspection is objected
to by an employer, a warrant is required. The
Court read Section 8(a) of the Act as providing
statutory authority for the issuance of a warrant.
Additionally, the Court stated that probable cause
in the criminal sense was not required to be shown
by the Secretary in order to obtain a warrant. A

1 warrant may be issued when the Secretary based the
2 inspection on either, (1) specific evidence of an
3 existing condition, or (2) a showing that
4 reasonable legislative or administrative standards
for conducting an inspection are satisfied with
regard to the particular inspection sought to be
made.

5 It is well settled that the Fourth Amendment only
6 protects against intrusions into areas where an
7 employer has a reasonable expectation of privacy.
8 Tri-State Steel Constr. Inc., 15 BNA OSHC 1903,
9 1991-93 CCH OSHD ¶29,852 (No. 89-2611, 1992). The
10 Federal Review Commission has held that there is no
11 reasonable expectation of privacy when activities
12 are conducted out of doors and not closed off to
13 the public. Id. The work site in this case was a
14 multi-employer construction site, on which both ECS
15 and Town and Country conducted activities
16 observable by the public. ECS could not reasonably
17 have had any expectation of privacy on the job
18 site. The COs' testimony was properly admitted.
19 The evidence establishes employee exposure to the
20 unguarded pits. ECS, as the creating and
21 controlling employer, is responsible for the cited
22 hazard; therefore, it is irrelevant that the
23 Secretary failed to establish whether the exposed
24 employees were ECS or Town and Country Employees.
25 Engineered Construction Systems, Inc., April 16,
26 1998. OSHRC Docket No. 97-1949. (Emphasis added)"
27 Rabinowitz, Occupational Safety and Health Law, 2nd
28 Ed. 2008.

18 The Engineered case, *supra*, recognized the "plain view doctrine"
19 and defined public area criteria where employers should have no
20 "expectation of privacy." An SHR may enter onto a construction work
21 site, investigate and cite an employer if he observes violations from,
22 e.g. a street, sidewalk or other "public area." The Commission ratified
23 the "plain view" doctrine and provided guidelines under a "lack of
24 expectation of privacy" criteria where employers could not assert Fourth
25 Amendment Constitution protection and thus any requirement for a search
26 warrant if activities are conducted "out of doors and not closed off to
27 the public." Engineered Construction Systems, supra.

28 In the instant case the testimony, evidence, and particularly the

1 photographs established that while the construction worksite did include
2 a barricade, an area large enough for a truck to pass through was
3 unrestricted, unsigned nor otherwise limited from entry by the public.
4 Neither the property owner nor employers on the worksite should have had
5 any **expectation of privacy**. Accordingly, the board finds there was no
6 Fourth Amendment Violation of the United States Constitution or case law
7 interpreting same. There was no legal requirement for SHR Buchanan to
8 obtain a search warrant before entering or inspecting the subject
9 worksite premises.

10 In reviewing the testimony, exhibits, arguments of counsel, and all
11 evidence in the record, the board is required to measure same against
12 the elements to establish violations under Occupational Safety & Health
13 Law based upon 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 evidence confirmed there were employees working in an unshored
3 area of the excavation on the day of inspection; however facts, and
4 testimony were equivocal as to the actual location of working employees,
5 the day the employees were in the trench installing or working on the
6 pipes, and the depth at which work was performed. Testimonial
7 descriptions of employee work efforts on the date of inspection included
8 standing on the top of one of two pipes while completing final
9 connections, wrapping, tightening bolts and/or other related tasks but
10 not installation. A sand barrier was in place beneath and between the
11 pipes as a cushion but also raised the trench depth. Sworn testimony
12 of four respondent employees, must be given due weight if credible and
13 unimpeached to fairly determine violative facts or conditions. The
14 sworn testimony of Mr. Buchanan was credible, unimpeached and must also
15 be given weight in the review process. However, notwithstanding the
16 credibility of Mr. Buchanan, the facts and testimony in evidence show
17 his observations were limited and the witness statements obtained were
18 less than clear. Most importantly, the burden of proof is upon OSHA and
19 thus Mr. Buchanan to establish violative conditions by a **preponderance**
20 **of evidence.**

21 It can be inferred from the evidence, referring particularly to the
22 testimony of employee O'Connell that at some point in time, while
23 working from atop the two pipes in place after the shoring was removed,
24 he may have stepped down inadvertently or momentarily to the floor area
25 of the trench. However it is unclear whether he stepped beyond the sand
26 barrier level to the bottom of the trench floor at a violative depth.
27 Reasonable interpretation of the standards under case and commission law
28 guidance, does not support findings of violation by implication or

1 presumption. There must be a preponderance of evidence. If a brief
2 transgression occurred, violative conduct can be excused under the
3 recognized defense of unpreventable employee misconduct.

4 In reviewing the evidence, the board finds the testimony of SHR
5 Buchanan credible and supported by the admission, albeit equivocal, of
6 Mr. O'Connell that a brief step to the trench floor occurred in
7 violation of the standard. However, notwithstanding such a finding, the
8 evidence in total and weight of testimony, particularly the credibility
9 factors demonstrated by four respondent witnesses under oath at the
10 hearing, compels a final determination to deny the cited violation based
11 upon proof of the recognized defense under occupational safety and
12 health law of unforeseeable/unpreventable employee misconduct.

13 The evidence presents a construction site on the day of inspection
14 where two employees were working while standing on one or two very large
15 30 inch circumference pipes in a trench excavation. Sand had been
16 placed between the pipes and below the lower pipe. While finishing work
17 associated with the job task one employee stepped down briefly to a
18 depth in violation of the standard. There was however no evidence such
19 conduct was continuous. The only direct evidence of violative conduct
20 was the testimony by Mr. O'Connell that he may have briefly stepped off
21 the pipe into the trench (floor). Further, there was no evidence that
22 simply because supervisor Cavanagh was overseeing the general work
23 effort on the site that the defense of unpreventable employee misconduct
24 cannot apply.

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

1 (10th Cir. 1981). When an employer proves that it
2 has effectively communicated and enforced its
3 safety policies, serious citations are dismissed.
4 See Secretary of Labor v. Consolidated Edison Co.,
5 13 O.S.H. Cas. (BNA) 2107 (OSHRC Jan. 11, 1989);
6 Secretary of Labor v. General Crane Inc., 13 O.S.H.
7 Cas. (BNA) 1608 (OSHRC Jan. 19, 1988); Secretary of
8 Labor v. Greer Architectural Prods. Inc., 14 O.S.H.
9 Cas. (BNA) 1200 (OSHRC July 3, 1989).

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

20 An employer cannot in all circumstances be held to
21 the strict standard of being an absolute guarantor
22 or insurer that his employees will observe all the
23 Secretary's standards at all times. An isolated
24 brief violation of a standard by an employee which
25 is unknown to the employer and is contrary to both
26 the employer's instructions and a company work rule
27 which the employer has uniformly enforced does not
28 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
that "employers, however, have an affirmative duty
to protect against preventable hazards and
preventable hazardous conduct by employees. *Id.*
See also, Brock v. L.E. Meyers CO., 818 F.2d 1270
(6th Cir.), cert. denied 484 U.S. 989 (1987).

The controlling cases make clear the existence of
an employer's defense for the unforeseeable
disobedience of an employee who violates the
specific duty clause. However, the disobedience
defense will fail if the employer does not
effectively communicate and conscientiously enforce
the safety program at all times. Even when a
safety program is thorough and properly conceived,
lax administration renders it ineffective. P.
Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 110-
111 (1st Cir. 1997). Although the mere occurrence
of a safety violation does not establish

1 ineffective enforcement, Secretary of Labor v. Raytheon Constructors Inc., 19 O.S.H.C. 1311, 1314
2 (2000) the employer must show that it took adequate
3 steps to discover violations of its work rules and
4 an effective system to detect unsafe conditions
5 control. Secretary of Labor v. Fishel Co., 18
6 O.S.H.C. 1530, 1531 (1998). Failure to follow
7 through and to require employees to abide by safety
8 standards should be evidence that disciplinary
9 action against disobedient employees progressed to
10 levels of punishment designed to provide
11 deterrence. *Id.* See also, Secretary of Labor v. A&W Construction Services, Inc., 19 O.S.H.C. 1659,
12 1664 (2001); Secretary of Labor v. Raytheon Constructors Inc., 19 O.S.H.C. 1311, 1314 (2000).
13 A disciplinary program consisting solely of verbal
14 warnings is insufficient. Secretary of Labor v. Reynolds Inc., 19 O.S.H.C. 1653, 1657 (2001);
15 Secretary of Labor v. Dayton Hudson Corp., 19
16 O.S.H.C. 1045, 1046 (2000). Similarly, disciplinary
17 action that occurs long after the violation was
18 committed may be found ineffective.

19 The duration of a violative act is relevant to
20 finding whether a supervisor's lack of knowledge
21 should be imputed to an employer. Compare R.P. Carbone Constr. Co. V. OSHRC, 166 F.3d 815, 818, 18
22 OSH Cases 1551, 1554 (6th Cir. 1998) (safety belt
23 violations **occurring over a two week period** should
24 have been observed), with Ragnar Benson Inc., 18
25 OSH Cases 1937, 1940 (Rev. Comm'n 1999)
26 (insufficient indication of **how long the violative**
27 **conditions existed**). Texas A.C.A. Inc., 17 OSH
28 Cases 1048, 1050-51 (Rev. Comm'n 1995). In
Secretary of Labor v. Westar Energy, 20 BNA OSHC
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
was lax. *Id.* See also, Secretary of Labor v. L.E. Meyers CO., No. 90-0945, slip op. At 7-8
(Occupational Safety & Health Review Commission
March 31, 1993 (citation omitted.) (Emphasis added)

Proof of the defense of unpreventable employee misconduct may be

1 "more difficult" when a supervisor is nearby, but the defense is not
2 prohibited after proof of an **isolated, individual, brief non-continuous**
3 **violative act**. Rabinowitz, Occupational Safety and Health Law, 2008,
4 2nd Ed. at pg. 68 (emphasis added). Citing Danis Shook Joint Venture,
5 19 OSH Cases 1497, 1502 (Rev. Comm'n 2001).

6 The board finds the elements of a violation were established but
7 rebutted by a preponderance of evidence of unforeseeable/unpreventable
8 employee misconduct. The board concludes, as a matter of law, that no
9 violation occurred and the proposed penalty denied.

10 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
11 **REVIEW BOARD** that no violation of Nevada Revised Statutes did occur as
12 to Citation 1, Item 1, 29 CFR 1926.652(a)(1) and the proposed penalty
13 denied.

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

24 DATED: This 22nd day of October, 2010.

25 NEVADA OCCUPATIONAL SAFETY AND HEALTH
26 REVIEW BOARD

27 /s/

28 TIM JONES, CHAIRMAN