

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH

2 REVIEW BOARD

3
4 CHIEF ADMINISTRATIVE OFFICER OF
5 THE OCCUPATIONAL SAFETY AND
6 HEALTH ADMINISTRATION OF THE
7 DIVISION OF INDUSTRIAL RELATIONS
8 OF THE DEPARTMENT OF BUSINESS
9 AND INDUSTRY, STATE OF NEVADA,

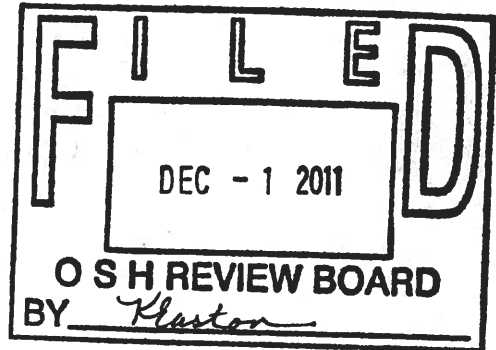
Docket No. RNO 11-1501

Complainant,

vs.

10 CAMPBELL CONSTRUCTION CO., INC.,

Respondent,



11
12 DECISION

13 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
14 **HEALTH REVIEW BOARD** at a hearing commenced on the 9th day of November
15 2011, in furtherance of notice duly provided according to law, MR.
16 MICHAEL TANCHEK, ESQ., counsel appearing on behalf of the Complainant,
17 **Chief Administrative Officer of the Occupational Safety and Health**
18 **Administration, Division of Industrial Relations (OSHA)**; and MR. TODD
19 SHAW, Corporate Vice President, appearing on behalf of Respondent,
20 **CAMPBELL CONSTRUCTION CO., INC.**; the **NEVADA OCCUPATIONAL SAFETY AND**
21 **HEALTH REVIEW BOARD** finds as follows:

22 Jurisdiction in this matter has been conferred in accordance with
23 Chapter 618 of the Nevada Revised Statutes.

24 The complaint filed by the OSHA sets forth allegations of violation
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 as follows:

RECEIVED
DEC 02 2011
DIR LEGAL
CARSON CITY OFFICE

1 **Citation 1, Item 1:** 29 CFR 1926.652(a)(1): Each employee in
2 an excavation was not protected from cave-ins by an adequate
3 protective system designed in accordance with paragraph (b)
4 or (c) of this section:

5 The employer failed to ensure that each employee in an
6 excavation was protected from cave-in by an adequate
7 protective system designed in accordance with paragraph (b)
8 or (c) of this section in the following instance:

9 a. At the work site, an employee had been working in an
10 excavation 20 feet by 24 feet with a depth of between 11 and
11 15 feet. The excavation had vertical walls and was in type
12 "C" soil. There was no sloping or shoring in place to
13 provide the employee with protection from cave-in.

14 The violation was classified as "Serious". The proposed penalty
15 for the alleged violation is in the amount of \$2,295.00.

16 Prior to the presentation of evidence and testimony, complainant
17 and respondent stipulated to the admission of documentary evidence at
18 complainant's Exhibit 1 and 2, and respondent's photos A through I.

19 Complainant presented testimony and documentary evidence with
20 regard to the alleged violation. Mr. Chris Carling, a certified safety
21 and health officer (CSHO) testified as to his inspection and the
22 citation issued to the employer.

23 Mr. Carling conducted inspection of respondent's worksite located
24 in Sparks, Nevada based upon a supervisor referral due to a complaint
25 on March 1, 2011. After a "walkaround" inspection conducted with
26 respondent superintendent Mr. Preston, CSHO Carling returned to the job
27 site to conduct additional interviews. During the lunch break, while
28 no employees were working, Mr. Carling observed an unshored open
excavation at the job site with dimensions of approximately 24' X 20'
at the street, 11' in depth with and earthen ramp from the street
leading into the excavation. He obtained the specific dimensions of the
excavation from the owner of the project, Truckee Meadows Water
Authority representative and engineer Juan Esparza who was at the site.

1 Mr. Carling reported all the walls around the excavation to be vertical
2 except for the ramp leading to the floor of the excavation from the
3 street. He testified that he observed a grade laser on a tripod toward
4 the rear wall in the middle of the excavation. He also observed on the
5 east side of the of the excavation "a trench stick" with the receiver
6 attached leaning against the vertical wall of the excavation. Mr.
7 Carling testified that a few minutes after his observations, respondent
8 superintendent Mr. Preston returned to the excavation site and informed
9 the CSHO that he had taken the grade laser and trench stick into the
10 excavation to take a grade reading prior to the shoring being installed.
11 Mr. Carling reported that Mr. Preston stated the excavation was so wide
12 that he did not realize brief entry into the hole with the grade laser
13 placed him in an area where he was exposed to the hazards of a cave-in
14 in the event of a collapse. The CSHO also reported that Mr. Preston
15 informed him that he believed he was at least as far from the vertical
16 wall as the wall was high and it would be safe for him to enter the
17 excavation. Mr. Carling further testified that he received a photograph
18 and advisory from company vice president Mr. Shaw that shoring had been
19 installed in the excavation the day following the inspection. The CSHO
20 noted no employees working in the excavation as his observations
21 occurred during the noon lunch break. He further testified with regard
22 to respondent photos A through I and identified various conditions of
23 the excavation including the "trench stick" to confirm his testimony and
24 report.

25 CSHO Carling recommended the issuance of Citation 1, Item 1, based
26 upon his determination of the applicability of 29 CFR 1926.652(a)(1) to
27 the facts observed and confirmed at the job site. He testified the
28 standard to be applicable to the facts based upon the engineers

1 information on dimensions of the excavation and his own observation of
2 same based upon his experience and visual comparison of the height of
3 the tripod and stick to the vertical walls. He noted the excavation
4 depth dimensions of at least eleven feet (11') confirmed by the Truckee
5 Meadows Water Authority engineer substantially exceeded the requirements
6 of the standard to protect any excavation greater than five feet (5')
7 in depth. He determined the hazard exposure based upon the lack of
8 shoring and potential for cave-in or wall collapse of the recently
9 excavated material in accordance with the controlling standard. Based
10 upon previous inspection experience, Mr. Carling classified the
11 violation as serious because of the extent of injury that could occur
12 in the event of a wall failure or collapse engulfing an employee in soil
13 and debris at an eleven foot (11') depth. Given the depth of the
14 excavation and visual evidence of loose soil and large rocks, serious
15 injury or death could reasonably be expected if an employee was in the
16 excavation during an unshored state when a cave-in or collapse occurred.
17 He testified that while he observed no employee in the excavation, the
18 presence of the laser and stick, along with the statement from
19 respondent superintendent Preston that he had placed in the laser and
20 stick there previously, provided an un rebutted factual basis to
21 establish a violation of the standard and exposure to the hazardous
22 condition.

23 Mr. Carling testified as to the high **severity** rating assessed due
24 to the types of injury that could potentially occur from a cave-in or
25 collapse of the excavation at an eleven foot (11') depth relying upon
26 his experience, training and conditions observed. He assigned a
27 **probability** factor of "lesser" based upon facts presented by Mr. Preston
28 that he was in the excavation for "just a minute or so . . ."

1 Accordingly, the **duration of exposure** reduced the **probability** factor and
2 the **penalty** accordingly. The remaining aspects of the penalty were
3 assessed in accordance with the operations manual. The CSHO testified
4 further with regard to the distinctions between **severity and probability**
5 explaining the latter is an assessment of what the chances may be of
6 employee exposure while severity is based upon a consideration of the
7 extent of physical injury that could occur if something in fact did take
8 place.

9 On cross-examination respondent representative and corporate vice
10 president Mr. Shaw questioned CSHO Carling on his description the
11 excavation, conditions observed, and reasons for inspection of the job
12 site. In response to a question that the testimonial evidence was
13 circumstantial in nature, Mr. Carling responded that his observations
14 were supplemented by the statements provided to him during the
15 inspection by respondent superintendent Preston, engineer Esparza and
16 photographic evidence. Mr. Carling confirmed he saw no employee in the
17 excavation at the time of his inspection. He further testified that he
18 observed shoring on the job site but not proximate to the subject
19 excavation. He further responded that it his practice to obtain a
20 signed statement from persons interviewed during an inspection but he
21 did not do so with Mr. Preston but merely made notations of his
22 statements given at the time. Mr. Carling further testified that he did
23 not personally measure the vertical wall, but rather relied upon the
24 information from the owner engineer, while confirming same from his
25 visual observation and comparing the depth to the laser tripod and stick
26 in the trench to reasonably conclude that it was well over five feet
27 requiring protection under the cited standard.

28 Complainant concluded its case in chief and Mr. Shaw, on behalf of

1 respondent, elected to present no witness testimony or additional
2 documentary evidence other than the photographs Exhibits A through I.
3 Mr. Shaw reserved the right to conclude his case during closing
4 argument.

5 Complainant presented closing argument and asserted the burden of
6 proof had been met in accordance with the governing law to confirm a
7 serious violation and imposition of the assessed penalty. He argued the
8 evidence demonstrated the excavation at a dangerous depth and with
9 dimensions subject to required shoring or alternate cave-in protection.
10 The laser and "stick" in the hole along with sworn testimony of CSHO
11 Carling established respondent superintendent Preston was in the hole
12 before it was shored when he placed the laser and stick in the areas
13 depicted in photographic Exhibit 2. The testimony and evidence
14 established shoring was not installed in the excavation until the day
15 following the inspection. He noted there was no defense witness
16 testimony nor any documentary evidence to counter or rebut the sworn
17 testimony of CSHO Carling. He asserted that photographic Exhibit 2
18 established the existence of violative conditions and when coupled with
19 the unrebutted testimony of Mr. Carling as to Mr. Preston's having
20 placed the equipment in the hole prior to shoring showed a clear case
21 for violation. Counsel argued CSHO testimony subject of direct and
22 cross-examination could possibly show that employee proximity to one
23 side or the other of the excavation during a collapse or cave-in might
24 reduce some severity but speculation on probability or severity factors
25 does not negate the existence or seriousness of the subject violation.

26 Respondent representative Shaw presented closing argument. He
27 admitted the laser and stick were placed in the hole by somebody but
28 disputed it had been done by superintendent Preston. He further

1 challenged the serious classification of the violation stating that
2 simply because the laser was there and CSHO stated Mr. Preston placed
3 it there is not persuasive evidence that superintendent Preston or any
4 other employee who might have been near the wall might have been in a
5 dangerous position. He questioned at what point do you need to protect
6 an employee from imminent danger and submitted there were insufficient
7 facts in evidence as to severity and probability to establish the
8 potential of serious injury or death to any respondent employee. He
9 argued that if Mr. Preston entered the unshored hole based upon his own
10 experience that it was safe to place the laser there that his judgment
11 should be taken into consideration to reduce the serious classification.

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

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

17 To prove a violation of a standard, the Secretary
18 must establish (1) the applicability of the
19 standard, (2) the existence of noncomplying
20 conditions, (3) employee exposure or access, and
21 (4) that the employer knew or with the exercise of
22 reasonable diligence could have known of the
23 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.
2003).

24 A respondent may rebut the evidence by showing:

- 25 1. That the standard was inapplicable to the
26 situation at issue;
- 27 2. That the situation was in compliance; or lack
28 of access to a hazard. See, Anning-Johnson
Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690
(1976).

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

3 . . . a serious violation exists in a place of
4 employment if there is a substantial probability
5 that death or serious physical harm could result
6 from a condition which exists or from one or more
7 practices, means, methods, operations or processes
8 which have been adopted or are in use at that place
9 of employment **unless the employer did not and could
10 not, with the exercise of reasonable diligence,
11 know the presence of the violation.** (emphasis
12 added)

13 The board finds at Citation 1, Item 1, that complainant's initial
14 burden to prove the violation was met by the un rebutted sworn testimony
15 of CSHO Carling, the photographs at Exhibits A through I, and the
16 interview statements in Exhibit 1 furnished by respondent superintendent
17 Preston.

18 ". . . (A) supervisor's knowledge of deviations
19 from standards . . . is properly imputed to the
20 respondent employer. . ." *Division of Occupational
21 Safety and Health vs. Pabco Gypsum*, 105 Nev. 371,
22 775 P.2d 701 (1989).

23 The applicability of the standard, existence of noncomplying
24 conditions, employee potential exposure to recognized cave-in hazards,
25 and employer knowledge (constructive) confirms the violation.

26 Here respondent chose not to introduce testimonial evidence from
27 supervisory employee Preston or any others. Accordingly the testimony
28 of CSHO Carling was un rebutted and must be accepted under governing law.
Further, respondent failed to assert or argue any defense of employee
misconduct. Employer knowledge, foreseeability, and lack of safety
enforcement by supervisory personnel prevents reliance upon the defense
of unpreventable employee misconduct to relieve respondent of liability.
However, even had respondent asserted or argued the defense of
unpreventable employee misconduct the burden to satisfy same is

1 substantial under applicable law and no evidence was submitted to
2 support such a defense.

3 An employer has the affirmative duty to anticipate and protect
4 against **preventable** hazardous conduct by employees. *Leon Construction*
5 *Co.*, 3 OSHC 1979, 1975-1976 OSHD ¶ 20,387 (1976). Employee misbehavior,
6 standing alone, does not relieve an employer. Where the Secretary shows
7 the existence of violative conditions, an employer may defend by showing
8 that the employee's behavior was a deviation from a uniformly and
9 effectively enforced work rule, **of which deviation the employer had**
10 **neither actual nor constructive knowledge.** *A. J. McNulty & Co., Inc.*,
11 4 OSHC 1097, 1975-1976 OSHD ¶ 20,600 (1976). (emphasis added)

12 The applicability of the standard, existence of noncomplying
13 conditions, employee exposure (constructive) to **recognized** cave-in fall
14 hazards, and employer knowledge (actual or constructive) confirms the
15 violation. **A hazard is deemed recognized when the potential danger of**
16 **a condition or practice is either actually known to the particular**
17 **employer or generally known in the industry.** *Continental Oil Co. V.*
18 *OSHRC*, 630 F.2d 446, 448 (9th Cir. 1980). Here, the recognized
19 hazardous condition presented by Mr. Preston's conduct is evident.
20 Death or physical injury could reasonably result from a cave-in or
21 collapse of the excavation at a depth of 11' with no shoring or other
22 means of protection. The legal presumption is part of the rationale in
23 codifying standards due to **recognition** by an industry (*Continental*
24 *Construction supra.*).

25 In *Sec'y of Labor v. Westar Energy*, 20 BNA OSHC 1736 (OSHC Jan. 6,
26 2004) the Occupational Safety and Health Review Commission ruled that
27 "[w]here a supervising employee is involved, the proof of unpreventable
28 employee misconduct is more rigorous and the defense is more difficult

1 to establish since it is the supervisor's duty to protect the safety of
2 employees under his supervision."

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

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

9 A respondent may rebut allegations by showing:

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

14 Based upon the evidence and testimony the standard was **applicable**
15 to the facts, **non-complying conditions** and **employee exposure** were
16 established by the sworn testimony and photographic exhibits. **Employer**
17 **knowledlge** of the violative conditions is imputed to the employer under
18 governing law because the supervisor (Preston) knew or with reasonable
19 diligence could have known of the violative conditions. The sworn
20 testimony was un rebutted.

21 The classification of the violation as serious must also be
22 confirmed. NRS 618.625 provides in pertinent part:

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

28 Congress, through enactment of the Code of Federal Regulations

1 (CFR), develops specific standards to protect employees in the workplace
2 after extensive study and determination that particular hazards are
3 known and/or **recognized** in certain industries. A hazard is deemed
4 "recognized" when the potential danger of the condition or practice is
5 either actually known to the particular employer or generally known in
6 the industry. Continental Oil Co. v. OSHRC, 630 R.2d 446, 448 (9th Cir.
7 1980). The testimonial evidence and exhibits established the serious
8 dangers associated with employee entry into an unprotected excavation.
9 The issue before the board as to the violation classification of
10 "serious" is not that any serious injury occurred but whether the
11 **substantial probability** for same existed. Supervisory employee Preston
12 had **access** to the **recognized** hazardous condition of an unshored
13 excavation. The **probability** and **severity** factors were appropriately
14 considered in the classification and penalty. There was a preponderance
15 of evidence in the record to support the classification of the violation
16 as serious.

17 The board finds, as a matter of fact and law, a violation of Nevada
18 Revised Statutes as to Citation 1, Item 1, 29 CFR 1926.652(a)(1), the
19 classification of the violation as "Serious" appropriate, and the
20 proposed penalty in the amount of TWO THOUSAND TWO HUNDRED NINETY-FIVE
21 DOLLARS (\$2,295.00) reasonable and approved.

22 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
23 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION,**
24 **DIVISION OF INDUSTRIAL RELATIONS,** to submit proposed Findings of Fact
25 and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
26 **REVIEW BOARD** and serve copies on opposing counsel within twenty (20)
27 days from date of decision. After five (5) days time for filing any
28 objection, the final Findings of Fact and Conclusions of Law shall be

1 submitted to the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD by
2 prevailing counsel. Service of the Findings of Fact and Conclusions of
3 Law signed by the Chairman of the NEVADA OCCUPATIONAL SAFETY AND HEALTH
4 REVIEW BOARD shall constitute the Final Order of the BOARD.

5 DATED: This 1st day of December, 2011.

6 NEVADA OCCUPATIONAL SAFETY AND HEALTH
7 REVIEW BOARD

8 By /s/
9 JOE ADAMS, CHAIRMAN

- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28