

NEVADA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW BOARD

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CHIEF ADMINISTRATIVE OFFICER  
OF THE OCCUPATIONAL SAFETY AND  
HEALTH ADMINISTRATION, DIVISION  
OF INDUSTRIAL RELATIONS OF THE  
DEPARTMENT OF BUSINESS AND  
INDUSTRY,

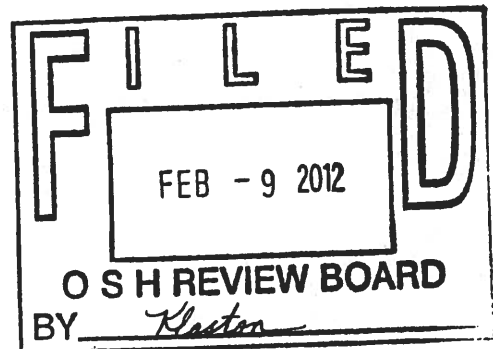
Docket No. LV 11-1506

Complainant,

vs.

VICTORY WOODWORKS, INC.,

Respondent.



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 11<sup>th</sup> day of January 2012, in furtherance of notice duly provided according to law, MR. MICHAEL TANCHEK, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (OSHA)**; and MR. JOHN SKOWRONEK, SR., appearing on behalf of Respondent, **Victory Woodworks, Inc.** the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

The complaint filed by the OSHA sets forth allegations of violation

1 of Nevada Revised Statutes as referenced in Exhibit "A", attached  
2 thereto.

3 Citation 1, Item 1, charges a violation of 29 CFR 1926.304(f). The  
4 complainant alleged the respondent employer failed to protect employees  
5 from electrical hazards related to use of a table saw. The violation  
6 was classified as serious and a penalty proposed in the amount of Two  
7 Thousand Three Hundred Eighty Dollars (\$2,380.00).

8 Prior to presentation of evidence and testimony, complainant and  
9 respondent stipulated to the admission of complainant's Exhibits 1, 2  
10 and 3 as well as respondent Exhibits B-1 through 4.

11 Complainant presented testimony and documentary evidence with  
12 regard to the alleged violation. Mr. Shane Buchanan, a Certified Safety  
13 and Health Officer (CSHO), testified as to his inspection and the  
14 citation issued to the respondent employer.

15 Mr. Buchanan was directed to conduct a comprehensive inspection at  
16 a job site in Las Vegas Nevada where respondent was providing  
17 subcontractor services in a facility identified as the Metro  
18 Headquarters Building Site. Approximately ten contractors were working  
19 on the premises, including the respondent. On the second day of his  
20 inspection, CSHO Buchanan informed the general contractor safety  
21 director that he wanted to inspect subcontractor Victory Woodworks, Inc.  
22 as they were not on the premises or engaged in work during the time he  
23 commenced his inspection. Arrangements were made for the respondent  
24 general foreman Mr. Curtis Quintana to meet CSHO Buchanan at the  
25 worksite. Mr. Buchanan observed a table saw which had been utilized by  
26 respondent according to Mr. Quintana and determined it was not  
27 appropriately equipped with an "anti-restart device". He took a  
28 photograph of the table saw admitted in evidence as Exhibit 1. On

1 inspection of the respondent "job box" he noted a portable GFCI anti-  
2 restart device and took a photo of same admitted in evidence as Exhibit  
3 2.

4 Mr. Buchanan testified that Mr. Quintana informed him he was not  
5 aware the saw was not equipped with an anti-restart device. Based upon  
6 the statement, Mr. Buchanan determined the employer was aware of the  
7 requirement for same. Mr. Buchanan was informed the saw was not in use  
8 at the time of his inspection nor were respondent employees actually  
9 engaged in any work on the site at the time. Employees Quintana and  
10 Marshall were specifically called to the job site only to meet with the  
11 CSHO. The saw had been used by a respondent employee on the previous  
12 day. Mr. Buchanan obtained statements from respondent employees, Mr.  
13 Michael Marshall, the foreman at Exhibit B-1, and Mr. Curtis Quintana,  
14 the general foreman at Exhibit B-2.

15 During his initial inspection Mr. Buchanan observed the respondent  
16 employer did in fact have a GFCI anti-restart device in the company "job  
17 box", but it was not hooked up to the saw.

18 Mr. Buchanan explained the difference between an ANSI Standard  
19 which is "advisory" but when incorporated by reference into a standard  
20 codified in federal regulations (CFR) it then becomes an enforcement  
21 standard. Mr. Buchanan testified he recommended a citation be issued  
22 for a violative condition based upon the lack of the anti-restart device  
23 being equipped on the saw identified at Exhibit 1. He testified the  
24 hazard exposure to employees includes a potential for an automatic  
25 restart after a power failure when the power returns. An employee could  
26 be engaged in changing a blade or his hand near the blade when the power  
27 returned and thus suffer an injury. He testified as to the serious  
28 classification of the hazard based upon the potential for loss of a

1 finger or a limb during the occurrence of an automatic restart. Mr.  
2 Buchanan rated the Severity as Medium and Probability Lesser, based upon  
3 a potential for a non-death injury in the former and the probability of  
4 an accident actually happening being less than high. He further  
5 testified the Gravity was not rated very high based upon the information  
6 and analysis contained in his computer reference materials. Mr.  
7 Buchanan identified his investigative report, Exhibit 1, page 4, with  
8 regard to information relied upon during the investigation in rendering  
9 penalty calculations and assessment. He arrived on his penalty  
10 calculations based on employer history and application of all credit  
11 factors within his knowledge or research at the time of issuing the  
12 citation.

13 On cross-examination Mr. Buchanan testified that he first became  
14 aware of the referenced ANSI Standard incorporated in the cited  
15 enforcement standard when assuming his position as a CSHO but had never  
16 previously cited same. He testified that an inline GFCI device  
17 satisfies the anti-restart requirements of the standard and that Exhibit  
18 A-2 is an "inline GFCI device". Counsel directed questions to Mr.  
19 Buchanan as to the similarity of functions between an anti-restart  
20 device and an inline GFCI device to which he responded that both  
21 provided the same protection against a restart after a power failure.

22 Mr. Buchanan testified that he did not observe any respondent  
23 employee performing work utilizing the saw but was informed that Mr.  
24 Marshall had used it on the previous day. He also testified that he  
25 never checked the wall outlet to determine whether it was GFI protected.

26 At the conclusion of complainant's case in chief, respondent moved  
27 to dismiss the case based upon complainant's failure to satisfy the  
28 burden of proof to demonstrate applicability of the standard to the

1 facts given the outdated ANSI Standard and lack of any employer exposure  
2 to a hazard. The board considered the motion but denied same informing  
3 the parties to proceed with respondent's presentation of evidence and  
4 testimony prior to the board reaching a decision.

5 Respondent presented direct testimony of Mr. Curtis Quintana who  
6 identified himself as the respondent general carpenter foreman at the  
7 time of the inspection. He testified no one was working on the job for  
8 respondent either day of the inspections conducted by OSHA. The  
9 respondent was 90% complete with their contract assignment on the  
10 subject site and all their tools and equipment located in the company  
11 job box. Mr. Quintana testified that he was called to the site for the  
12 specific reason to meet with OSHA. When he arrived for the inspection  
13 he opened the job box for review because no tools were readied for work  
14 as there was no work scheduled to be performed. He testified that when  
15 he met with inspector Buchanan he (Buchanan) asked that the power cord  
16 on the saw be connected to conduct a restart test. However, during the  
17 initial test he merely disconnected the saw from an extension cord  
18 rather than at the wall outlet where the GFCI device was connected. The  
19 power remained on because the wall connection to the GFCI and the power  
20 cord was not interrupted. Mr. Quintana explained his written statement  
21 as to the lack of an anti-restart device being on the table saw. He  
22 further testified that he did perform a test demonstration for CSHO  
23 Buchanan by plugging the saw into the wall with the GFCI device in place  
24 to demonstrate the saw was always utilized when working with the GFCI  
25 protection. He further testified that they always use an inline GFCI  
26 on jobs whenever they power up tools. He testified the wall outlet  
27 attached GFCI protected any employees from restart. Mr. Quintana  
28 testified the table saw was never used by anyone without GFCI

1 protection.

2 Mr. Michael Marshall provided additional testimony on behalf of  
3 respondent. He testified CSHO Buchanan wanted to perform a test on the  
4 saw so they first plugged in the GFCI device (identifying the photo at  
5 Exhibit 2) according to normal practice. He testified that he and  
6 respondent employees always use a GFCI device unless an outlet is  
7 equipped with GFI. On further direct examination Mr. Marshall testified  
8 as to his written statement saying he utilized the saw for five minutes  
9 during the CSHO test but he was not performing actual work with the saw.  
10 He further testified that he always tells his employees that an outlet  
11 must be equipped with a GFI or GFCI device utilized before any use. Mr.  
12 Marshall stated that if it had been a workday when the CSHO was there,  
13 rather than merely a test, then the GFCI would have been out of the job  
14 box and plugged into the wall outlet. Mr. Marshall explained his  
15 written statement and testified that he was not aware that an "anti-  
16 restart" device was required to be part of the table saw.

17 Mr. Steven Bibby identified himself as the general manager of  
18 respondent. He testified he had never heard of any requirement for  
19 table saws to be equipped with anti-restart protection and contacted  
20 various manufacturers who had also never heard of such a requirement.  
21 He identified Exhibit B-4 as a letter from the saw maker Bosch  
22 reflecting there was no applicability of the cited standard ANSI  
23 reference to the subject table saw.

24 At the conclusion of the presentation of evidence and testimony,  
25 complainant respondent presented closing argument.

26 Complainant argued that the standard is to be enforced as written  
27 which includes the incorporation of the identified ANSI Standard  
28 regardless of any revisions not incorporated. Counsel further argued

1 the evidence in the record established the saw was not equipped with an  
2 anti-restart device based upon the testimony of CSHO Buchanan and the  
3 violation proven. Counsel acknowledged the penalty calculation was  
4 incorrect and should have included an additional 15% reduction and moved  
5 to amend the penalty calculation portions accordingly.

6 Counsel for respondent presented closing argument. He asserted the  
7 burden of proof had not been met by the complainant. There was no  
8 evidence that the employer was aware of an outdated ANSI Standard, which  
9 is no longer in print and now revised. The current revisions exclude  
10 the subject saw and therefore the cited standard is not applicable to  
11 the facts in evidence. The current ANSI Standard specifically excludes  
12 table saws. He argued OSHA should never enforce a standard with an  
13 outdated reference and the fact that this standard was never corrected  
14 by Congress cannot provide a basis for finding a violation against the  
15 respondent employer.

16 Counsel further argued there was no **employee exposure** to satisfy  
17 the basic element for a violation under the complainant's burden of  
18 proof. There was no respondent work underway during the time of the  
19 inspection. Two employees testified they never used the saw without a  
20 GFCI device. The employees further testified they always utilized the  
21 GFCI device when working with the saw. Their testimony explained the  
22 interpretation given by complainant to their written statements to the  
23 CSHO as not accurate to establish violative conduct. There was  
24 misinterpretation between a saw equipped with anti-restart and use of  
25 a GFCI at the electrical outlet. He further argued that there was no  
26 way for the saw to restart because of the GFCI use. Whether employees  
27 knew or did not know if the saw was equipped with an anti-restart device  
28 there was no ability for a restart due to the GFCI device at the wall

1 outlet which prevented the existence of any hazard; therefore no  
2 exposure to a hazard.

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 All facts forming the basis of a complaint must be  
10 proved by a preponderance of the evidence. See  
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD  
11 ¶16,958 (1973).

12 To prove a violation of a standard, the Secretary  
13 must establish (1) the applicability of the  
14 standard, (2) the existence of noncomplying  
15 conditions, (3) employee exposure or access, and  
16 (4) that the employer knew or with the exercise of  
17 reasonable diligence could have known of the  
18 violative condition. See Belger Cartage Service,  
19 Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
20 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);  
21 Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC  
22 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
23 (No. 76-1408, 1979); American Wrecking Corp. v.  
24 Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.  
25 2003).

19 A respondent may rebut allegations by showing:

- 20 1. The standard was inapplicable to the situation  
21 at issue;
- 22 2. The situation was in compliance; or lack of  
23 access to a hazard. See, Anning-Johnson Co.,  
24 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

24 The board does not find the cited **non-complying conditions** or  
25 employee **exposure to hazard** at the respondent job site. On the day of  
26 the inspection, there was no work underway. The employees were called  
27 in specifically to meet with the CSHO and open the job box to permit  
28 inspection of tools and equipment. They did not engage in any actual



1 work. The employees conducted an initial test for anti-restart  
2 protection at the request of the CSHO. However had the test been  
3 properly conducted it would have demonstrated the table saw, when in  
4 customary use as on prior days, was connected into a GFCI device  
5 (Exhibit 2) at the wall outlet which resulted in a **lack of any non-**  
6 **complying conditions.** The conduct of the first test by disconnecting  
7 and reconnecting the saw from an extension cord did not demonstrate a  
8 violative condition under the cited standard. The testimony by  
9 respondent witnesses who participated in the tests established the saw  
10 was safe due to the GFCI connected at the outlet. Whether ground fault  
11 protection existed through an anti-restart device in the saw or from the  
12 GFCI identified at Exhibit 2 at the wall outlet is immaterial to the  
13 issue of violative conditions.

14 The table saw was protected from restart in the event of a power  
15 failure by a GFCI device; therefore even without strict compliance with  
16 the ANSI standard incorporated in the cited enforcement standard, an  
17 **alternative method of protection** was in place.

18 When the Secretary has introduced evidence showing  
19 the existence of a hazard in the workplace, the  
20 **employer may, of course, defend by showing that it**  
21 **has taken all necessary precautions to prevent the**  
22 **occurrence of the violation.** Western Mass. Elec.  
23 Co., 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981).  
24 (emphasis added)

25 A citation may be vacated if the employer proves  
26 that: (1) the means of compliance prescribed by the  
27 applicable standard would have been infeasible  
28 under the circumstances in that either (a)  
implementation would have been **technologically or**  
**economically infeasible** or (b) necessary work  
operations would have been technologically or  
infeasible after its implementation; and (2) either  
(a) **an alternative method of protection was used** or  
(b) there was no feasible alternative means of  
protection. (emphasis added) Rabinowitz,  
Occupational Safety and Health Law, 2008, 2<sup>nd</sup> Ed.,

1 page 152. Beaver Plant Operations Inc., 18 OSH  
2 Cases 1972, 1977 (Rev. Comm'n 1999), *rev'd on*  
3 *another ground*, 223 F.3d 25, 19 OSH Cases 1053 (1<sup>st</sup>  
4 Cir. 2000); Gregory and Cook Inc., 17 OH Cases  
5 1189, 1190 (Rev. Comm'n 1995); Seibel Modern Mfg.  
6 & Welding Corp., 15 OSH Cases 1218, 1228 (1991);  
7 Mosser Constr. Co., 15 OSH Cases 1408, 1416 (Rev.  
8 Comm'n 1991); Dun-Par Engineered Form Co., 12 OSH  
9 Cases 1949 (1986), *rev'd on another ground*, 843  
10 F.2d 1135, 13 OSH Cases 1652 (8<sup>th</sup> Cir. 1988).

11 There was no **employee exposure** directly or through **access** to  
12 hazardous conditions based upon the evidence and testimony in the  
13 record. Employees were not working the day of the inspection and not  
14 directly exposed to a hazardous operation without a GFCI in use. The  
15 employees were not exposed constructively through having **access** to  
16 hazardous conditions as demonstrated by the un rebutted testimonial  
17 evidence that when the saw was utilized it was connected to a GFCI  
18 device at the outlet and therefore equipped with anti-restart  
19 protection.

20 There were no **non-complying conditions** at the respondent worksite  
21 under the cited standard.

22 There is no basis for finding a violation due to a lack of proof  
23 of the essential elements required under recognized occupational safety  
24 and health law. The board need not reach a determination as to the  
25 serious classification or penalty proposed.

26 The board finds, as a matter of fact and law, no violation as to  
27 Citation 1, Item 1, 29 CFR 1926.304(f), and the proposed penalty denied.

28 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
29 **REVIEW BOARD** that no violation of Nevada Revised Statutes did occur as  
30 to Citation 1, Item 1, 29 CFR 1926.304(f).

31 The Board directs counsel for the respondent, to submit proposed  
32 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**

