NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

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

Complainant,

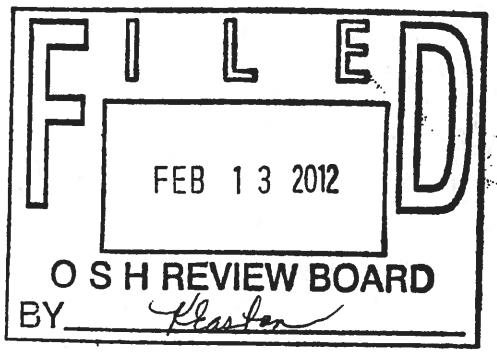
vs.

PRECISION PIPELINE OF WISCONSIN, LLC, a foreign limited-liability company,

Respondent,

_____/

Docket No. RNO 11-1493



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 14th and 15th day of December, 2011, 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. JASON MILLS, ESQ., appearing on behalf of Respondent, **Precision Pipeline of Wisconsin, LLC**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

Jurisdiction in this matter has been conferred in accordance with Nevada Revised Statute 618.315.

The complaint filed by the OSHA sets forth allegations of violation of Nevada Revised Statutes as referenced in Exhibit "A", attached thereto. The alleged violations in Citation 1, Item 1, charges a Serious violation of NRS 618.375(1). Complainant alleges

the respondent violated the cited Nevada Revised Statute by failing to ensure that employees were furnished employment at a place of employment which were free from recognized hazards causing or likely to cause death or serious physical harm.

At Citation 2, Item 1 charges a violation of 29 CFR 1904.40(a). The complainant alleges the employer failed to ensure that OSHA 301 forms or the equivalent form C-4 were provided within four hours when requested by the inspecting OSHA inspecting safety officer.

Counsel stipulated to the admission of complainant Exhibits A1 through A3. Respondent Exhibits B1 and B2 were also admitted on stipulation of counsel.

Counsel for the Chief Administrative Officer presented testimony and documentary with regard to the alleged violations. Certified safety and health officer (CSHO) Kurt Garrett testified he was assigned to investigate a reported accident and inspect the respondent worksite located in a rural area outside of Elko, Nevada in October of 2010. He had been directed to the site after receiving information that the driver of a "stringer truck" loaded with two 80' long 24,000 lb. gas pipes lost control on a steep downhill grade of dirt road and impacted several work vehicles injuring seven employees, two of whom were transported by Care Flight to a hospital in Salt Lake City Utah. The other five employees were treated and released after receiving treatment at the local hospital.

Mr. Garrett met with the appropriate respondent representative and interviewed witnesses, injured employees and conferred with the Nevada Highway Patrol investigating officers. Mapping of the site was completed by the Nevada Highway Patrol utilizing information from witnesses and observations at the scene to reconstruct the accident.

Mr. Garrett received information that an inspection of the subject truck revealed the steering, braking and other systems were all in working condition and/or within acceptable limits of maintenance.

CSHO Garrett continued his investigation as to workplace procedures and safety measures in place by reviewing another of the company's site operations located in Winnemucca, Nevada. He noted differences in the operation, particularly in the methodology of how stringer trucks were being loaded for transport. He also described the Winnemucca procedures whereby truck drivers were required to be **winched up and down** any steep hills to prevent losing a truck or load whenever the grade or slope required same. He made visual observations with regard to the grade at the Elko site subject of the accident being greater than what he has observed during his inspection of the Winnemucca site. He reported the stringer foreman at the Elko location did not require trucks be **winched down** a steep grade but did require same to be **winched up** the grades. CSHO Garrett noted other distinctions made between the two sites with regard to truck loading, determinations of grade requirements for winching, width of the right-a-way and other aspects in his analysis of determining the safety of the workplace operations.

After completing his investigation CSHO Garrett recommended two citations. He referenced the general duty clause after he determined the employer should have furnished to each of its employees a place of employment which was free from recognized hazards. He testified that he believed various precautionary measures could have been effectuated similar to that practiced at the Winnemucca site, as well as others, because a runaway truck should be considered a **recognized** hazard in the pipeline industry operating in rural terrain with high

slopes and grades.

Mr. Garrett also testified there were various other protective measures that could have been undertaken to warn employees, including use of spotters, and air horns as well as making it a mandatory requirement that all loaded vehicles be **winched up and down** grades. He classified the violation as serious referring to the Nevada Statute defining same after considering the physical injuries and damage occurring at the site after the accident. He proposed a penalty in the amount of $7,000.00.

CSHO Garrett also recommended and issued Citation 2, Item 1, for a failure of the respondent through its safety representative to provide the requested OSHA 301 or equivalent C-4 forms within four hours after request. He classified the violation as "other" and proposed a penalty of $1,000.00.

Respondent conducted cross-examination of Mr. Garrett. He testified on inquiry that over a span of two days, ten trucks were driven down the hill without a problem until the eleventh occurrence which resulted in the subject accident. He further testified that no one could determine the cause of the accident but it was reported by the driver and respondent representatives that the operator "blacked out" and could not recall how or why he lost control of the vehicle. In response to a question requesting a definition of "recognized hazard" Mr. Garrett responded that various elements of the worksite demonstrated the hazards of a run away vehicle and should be recognized by respondent. He testified the steepness of the hill, lack of visibility of the bottom of the hill from the truck being driven down, individuals working in the area of the path without any warning system in place to protect them from an accident, and the

nature of the terrain all provided bases for hazard recognition and the need to protect the employees at the worksite. Mr. Garrett testified that individual truck drivers had the option to request winching up and/or down hills depending upon their judgment, the conditions, weather, or any other aspects for same.

Respondent presented testimony and evidence in defense of the citations and alleged violations. Counsel conducted direct examination of respondent superintendent Mr. James Allen Cunningham. He testified that safety is a very important aspect of respondent operations. He drives the "right-of-way" site where the trucks and other equipment operate to install underground pipe two hours of each day looking for hazards, analyzing weather conditions and assessing the site for operations and safety. He testified there is no industry standard to winch trucks up and/or down hills and that it is part of his job to review all the conditions and decide, along with the truck drivers, as a team effort whether a hill or grade is a "winch hill" or one that can be safely driven. Weather is an important element for evaluation of the need for winching. He testified the subject hill was not a "winch hill" or a "tow hill". He described the differences between towing and winching stating that both represent a method for enabling a loaded truck and driver to be assisted up or down the hill under various conditions. He testified the driver involved in the subject accident never raised an issue over the conditions of the hill nor expressed any desire to winch or be towed.

Mr. Cunningham testified that the subject truck driver was well known and selected for mountain terrain work based upon his experience and reputation. He opined that it is not good practice to simply winch or tow all trucks up and down hills on many sites for a variety

of reasons including unnecessary wear on the equipment. He further testified that he never in his career of over 25 years experienced a runaway truck on a hill similar to that which occurred in the accident.

Counsel for complainant conducted cross-examination of Mr. Cunningham. He testified there was no industry standard for winching or towing trucks up or down hills because it is necessarily a judgment call based upon experience and conditions. He confirmed that it was not possible to see the bottom of the hill depicted at pictorial Exhibit 3 from the cab of the truck given the nature of the terrain.

On redirect examination by respondent counsel, Mr. Cunningham testified there was no reason based upon his opinion and experience to winch on the subject hill, despite the occurrence of the accident. After the accident he inspected the area and saw no skid marks or conditions on the terrain to demonstrate that winching or towing would have been appropriate. The terrain was dry. He could only explain the cause of the accident as the claimed "black out" of the driver which made sense. He further testified that he would never sacrifice safety for the speed of the job or wear of the equipment.

On re-cross-examination by complainant counsel, various questions were raised as to safety measures that might have been taken to avoid the accident or the resultant damage and injuries occurring from same. Counsel reviewed various alternative options, such as use of sounding horns, spotters, radios, or other precautions. He inquired as to whether those were not done simply because this was not a "winch or tow hill - just a drivable hill so no extra precautions were taken . . ." The witness answered in the affirmative. Counsel inquired if once the witness identifies hazards on any hill is it then he decides

whether to tow or winch. The witness answered affirmatively.

Respondent presented testimony from Ms. Kelley Edmier who identified herself as the safety coordinator for respondent. She provided background information as to her experience including one and one-half years with the company, a master's degree in construction safety and training, an OSHA instructor for 22 years and responsible for the respondent company safety program. She testified that the program for Nevada work included training and verification of compliance. Ms. Edmier described the distinctions in company practices for winching and towing in mountain compared to desert terrain. She addressed the differences between the subject site safety and operational measures described by CSHO Garrett in his comparisons of the Elko job site (scene of the accident) and the Winnemucca job site. She further testified in defense of Citation 2, Item 1 regarding the failure to furnish documentation within the four hour time proscription of the cited standard. Ms. Edmier stated she had a great working relationship with OSHA during the inspection after the accident and provided all documents requested over time. She testified that she could not deliver the subject documents within the four hour time frame because there was a great deal of confusion after the accident due to the many injuries and company first time event for such a catastrophic occurrence. She further testified that the requested C-4 forms had to be first generated and then completed with people who were in the hospital. The information required in the forms is HIPPA protected. She explained the extensive work effort required to provide the information on the appropriate forms and testified it was delivered within a reasonable time from request. No information was withheld and she made the best good faith effort to

provide the documentation as quickly as possible and in full cooperation with the OSHA inspector while addressing the other job safety needs as a result of the accident.

On completion of the evidence and testimony both counsel provided closing argument.

Complainant referenced the definition of the general duty clause and argued the core issue to be existence of a "recognized hazard." He asserted that uncontrolled trucks going up and down steep hills in rural terrain must be a recognized hazard for the respondent's industry and therefore the general duty clause applies. Counsel asserted that he could not contemplate any reasonable way to safely operate on the hill under the circumstances other than to winch or tow a heavily loaded truck. He questioned whether the respondent practices and protocols along with a driver option for winching/towing were enough to address what should have been a recognized hazard to adequately safeguard the workplace and employees who could have been better protected from injuries.

Counsel asserted the respondent must realize that steep hills and heavy trucks portray a recognized hazard should loss of control occur for any reason. He questioned whether the respondent **sufficiently protected** its employees from the potential hazards of a runaway truck. When respondent winches or tows a truck it uses spotters and radios, but when driving, even where there are blind spots, no extra precautions are taken. These facts alone establish sufficient hazardous conditions for recognition by the employer and industry and should have been subject of protection. Counsel concluded his argument by representing that OSHA is not trying to tell this or other respondents how to do their job and not saying they need to winch or

tow on every hill; but some extra level of care and precaution should have been taken with either horns, radios, spotters, or alarms, like when blasting operations are underway, to protect the employees from the recognized hazard of a potential runaway vehicle.

Respondent presented closing argument. He asserted there has been no standard promulgated by congress for the unique work of operating large trucks and heavy equipment through rough rural terrain in mountains and deserts. The experience of specialty employers engaged in the field, as the respondent, should not be substituted simply because there was an accident. He argued that OSHA could not identify an actual "recognized hazard." CSHO Garrett said it comprised a bundle of factors that then became a recognized hazard. Because they could find no basis for the accident, and nothing else wrong at the site, they simply referenced the general duty clause and issued a citation to the respondent employer notwithstanding its excellent reputation for safety and long experience in the specialized field of installing pipelines over a wide variety of terrain throughout the United States. He argued the evidence showed the driver simply "blacked out" as he claimed, and no one can protect against that in any industry or workplace. Just because an accident occurred does not authorize OSHA to allege that an employer did wrong. No specific industry standard has been codified by Congress because there is no way to foresee an illness, a blackout or something unusual or extraordinary such as that which purportedly caused the accident. Counsel concluded argument by asserting that complainant's entire case was based upon hearsay as reported by CSHO Garrett and attributed to various individuals including some employees of respondent. He asked whether the board should find a violation just because "OSHA said so"?

He inquired why OSHA did not bring in other employees who were at the scene or subpoena individuals who might have provided direct testimonial evidence as to the operations, industry practices, conditions for winching or what they actually observed at the site. He asserts it is not fair to blame the employer simply because there was an accident involving something that could not be foreseen or prevented by anyone. Counsel argued reasonable safety precautions were undertaken before the truck was driven down the hill. The employer "cleared the right-of-way" of employees and equipment before the truck began the downhill drive.

Counsel concluded argument asserting the board should not allow a credible employer with an outstanding reputation for business and safety to be ". . . second guessed by an after the fact" inspection; or permit use of the general duty clause as a basis for citing a violation particularly when Congress, with all of its resources, could not create or draft a standard applicable to the industry or subject facts.

The board in reviewing the facts, documentation, testimony and other evidence must measure same against the established applicable law developed under the Occupational Safety & Health Act.

NRS 618.375(1) commonly known as the "General Duty Clause" provides in pertinent part:

> ". . . Every employer shall:
>
> 1. Furnish employment and a place of employment which are free from **recognized hazards** that are causing or are likely to cause death or serious physical harm to his employees . . ." (emphasis added)
>
> In citing an employer under the General Duty Clause, it is specifically necessary to demonstrate the existence of a **recognized hazard** as mandated by the statute; whereas citing an

> employer under a **specific standard** does not carry such a requirement because Congress has, in codification, adopted the recognition of (certain) hazards for the particular industry. To establish a violation of the General Duty Clause, the **complainant must do more than show the mere presence of a hazard.** The General Duty Clause, ". . . obligates employers to rid their workplaces **not of possible or reasonably foreseeable hazards**, but **recognized hazards** . . ." Whitney Aircraft v. Secretary of Labor, 649 F.2d 96, 100 (2nd Cir. 1981). (emphasis added)

At Citation 1, Item 1, complaint cited respondent for a violation of NRS 618.375(1), the "General Duty Clause".

> "The elements of a **general duty clause** violation identified by the first court of appeals to interpret Section 5(a)(1) have been adopted by both the Federal Review Commission and the courts in subsequent cases. The court in National Realty and Construction Co., Inc. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973), listed three elements that OSHA must prove to establish a general duty violation; the Review Commission extrapolated a fourth element from the court's reasoning: (1) a condition or activity in the workplace presents a hazard to an employee; (2) the condition or activity is **recognized** as a hazard; (3) the hazard is causing or is **likely to cause** death or serious physical harm; and (4) a feasible means exists to eliminate or materially reduce the hazard. The four-part test continues to be followed by the courts and the Review Commission. E.g., Wiley Organics Inc. v. OSHRC, 124 F.3d 201, 17 OSH Cases 2125 (6th Cir. 1997); Beverly Enters., Inc., 19 OSH Cases 1161, 1168 (Rev. Comm'n 2000); Kokosing Constr. Co., 17 OSH Cases 1869, 1872 (Rev. Comm'n 1996). The National Realty, decision itself continues to be routinely cited as a landmark decision. See, e.g., Kelly Springfield Tire Co. v. Donovan, 729 F.2d 317, 321, 11 OSH Cases 1889 (5th Cir. 1984); Ensign-Bickford Co. v. OSHRC, 717 F.2d 1419, 11 OSH Cases 1657 (D.C. Cir. 1983); St. Joe Minerals Corp. v. OSHRC, 647 F.2d 840, 845 n.8, 9 OSH Cases 1946 (8th Cir. 1981); Pratt & Whitney Aircraft Div. v. Secretary of Labor, 649 F.2d 96, 9 OSH Cases 1554 (2d Cir. 1981); R.L. Sanders Roofing Co. v. OSHRC, 620 F.2d 97, 8 OSH Cases 1559 (5th Cir. 1980); Magma Copper Co. V. Marshall, 608 F.2d 373, 7 OSH Cases 1893 (9th Cir. 1979); Bethlehem Steel Corp. v. OSHRC, 607 F.2d 871, 7 OSH Cases 1802 (3d Cir. 1979). Rabinowitz

> Occupational Safety and Health Law, 2008, 2nd Ed., page 91. (emphasis added)
>
> When the Secretary has introduced evidence showing the existence of a hazard in the workplace, the **employer may, of course, defend by showing that it has taken all necessary precautions to prevent the occurrence of the violation.** Western Mass. Elec. Co., 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981). (emphasis added)

Violations of the general duty clause are the most difficult to prove. Establishment of a **recognized hazard** is an essential element of proof.

In the event that a recognized hazard is established by a preponderance of evidence, the respondent may rebut by proving it undertook **reasonable measures to address the recognized hazard and protected its employees** under the particular facts and circumstances presented.

The testimony of Mr. Cunningham established the company and industry safety measures implemented by the respondent to protect its employees during truck driving operations on steep hills. The testimony of CSHO Garrett confirmed the highway patrol could find no cause of the accident based upon improperly prepared terrain, weather conditions, or defective equipment on the truck itself.

The demonstrated extensive employer experience over many years installing pipelines in rough and steep terrain throughout the United States. Superintendent Cunningham testified as to the company and industry procedures and safety practices for hauling and installing pipe on steep terrain. There was no evidence of previous accidents of a similar nature. No safety experts testified the employer or its industry should have recognized or foreseen any particular hazardous conditions, or done more than respondent to protect the site and

employees. There was no evidence the truck was defective or inadequately maintained, nor the terrain improperly prepared. There was no evidence of a lack of training or qualifications of the driver. There was no competent evidence the work could have been accomplished safer or employees given additional protection. The "right-of-way" where the work was being conducted was inspected daily, "cleared" for driving, wider than usual, and berms were added on the side of the right-of-way. The vehicle was operated under the standard driver option without the assistance of winching or towing under common company practice when the soil, weather or other conditions permit what has been determined by the company and the industry as a normal safe method of operation. Respondent testimony was that no one could protect against the extraordinary event of a truck driver losing consciousness any more than that kind of unforeseeable condition could be protected anywhere else.

The legal duty of respondent is not to protect against unknown, unforseen or extreme events, but rather **recognized hazards** as defined by or developed under applicable occupational safety and health law.

> "A condition may be **recognized** as a [recognized hazard] only when the evidence shows that it is commonly known by the public in general or in the cited employer's industry as a hazard of such type." Consolidated Engineering Co., Inc., 2 OSHC 1253, 1974-1975 OSHD ¶ 18,832, at page 22,670 (1974). Also see National Realty and Construction Company, Inc. v. OSAHRC, 489 F.2d 1257, 1265 n. 32 (D.C. Cir. 1973); Atlantic Sugar Association, 4 OSHC 1355, 1976-1977 OSHD ¶ 20,821 (1976). (emphasis added)
>
> An inspector's conclusion that a hazard is recognized, without more, does not sustain a violation. See Pratt & Whitney Aircraft, 2 OSHC 1560, 1974-1975 OSHD ¶ 19,287 (1975). Only **"preventable"** hazards must be eliminated from the work site in accordance with occupational safety and health legislation and case law. National Realty and Construction Company, Inc. V. OSAHRC,

489 F.2d 1257, 1266 (D.C. Cir. 1973). (emphasis added)

> Established case law emanating from the Federal Courts of Appeal requires that the dangerous potential of a condition or activity must **actually be known either to the particular employer or general in the industry.** See Usury v. Marquette Cement Mfg. Co., 568 F.2d 902, at page 910 (2nd Cir. 1977). The question of whether a hazard is recognized goes to the **knowledge of the employer**, or if it lacks actual knowledge of the hazard, then to the **standard of knowledge in the industry. It is an objective test.** See Southern Ohio Building Systems v. OSHRC, 649 F.2d 556, 558 (6th Cir. 1981). To establish the knowledge of the industry, the chief administrator is required to carry the burden of proof. See Magma Cooper Co. v. Marshall, 608 F.2d 373, 377 (9th Cir. 1980) citing Brennan v. Smoke-Craft, Inc., 530 F.2d 843, 845 (9th Cir. 1976). The conduct of the alleged wrongdoing employer must be judged against the standards and customs of the relevant industry. S & H Riggers & Erectors, Inc. v. OSHRC, 659 F2d 1273 (5th Cir. 1981). Rabinowitz, Id. (emphasis added)

To satisfy the burden of proof for an alleged general duty clause violation under Occupational Safety and Health Law, the division must show **by a preponderance of evidence** that there existed a **"recognized hazard"** of which the **employer had knowledge** in order to foresee and, thus, prevent injury or harm to its employees by utilizing feasible measures that would reduce the likelihood of any such injury. Accordingly, to prove that the respondent, **PRECISION PIPELINE OF WISCONSIN**, violated the general duty clause, a primary element of proof for the division is to establish that the cited employer failed to prevent a hazard in the work place that was **recognized** by the cited employer and therefore foreseeable either **actually**, or **constructively** through its industry; and that such recognized hazard likely to cause death or serious physical harm to its own employees and could have been materially reduced or eliminated by a feasible and useful means

of abatement. See Continental Oil Co. v. OSHRC, 630 F.2d 446 (6th Cir. 1980), cert. denied, 450 U.S. 965 (1981).

> "The prevailing view among the circuits is that the employer's knowledge or ability to discover a violation is an element of the secretary's case-in-chief. See, e.g. Brennan v. OSHRC (Alsea Lumber Co.), 511 F.2d 1139, 1142-43 (9th Cir. 1975). This court has held that the Secretary bears the burden of proving foreseeability when the regulation at issue can be characterized as a general safety standard. Voegele Co. V. OSHRC, 625 F.2d 1075, 1079 (3d Cir. 1980)." Pennsylvania Power & Light Company v. Occupational Safety and Health Review Commission and Raymond J. Donovan, Secretary of Labor, June 15, 1984, Docket No. 83-3263, 1984-1985 CCH OSHD ¶ 26,938, at page 34,538, 737 F.2d 350 (3rd. Cir.1 1984).

In summary, to establish a violation Nevada OSHA had to prove by a preponderance of the evidence that:

(1) The employer failed to render its workplace "free" of a hazard;
(2) The hazard was recognized;
(3) The recognized hazard foreseeable and likely to cause death or serious physical harm; and
(4) There was a feasible and useful method to correct the hazard which the employer had not undertaken.

National Realty v. OSHRC, 489 F.2d 1257, 1265, (D.C. Cir. 1973); See, also, Nevada Operations Manual, Chapter IV(A)(2)(a).

To establish a violation of the general duty clause, Nevada OSHA had to **do more than merely show that a hazard was present.** Southern Ohio Building Systems v. OSHRC, 649 F.2d 556, 558 (6th Cir. 1981). To establish the knowledge of the industry, Nevada OSHA is required to carry the burden of proof using the standard of a "**reasonably conscientious safety expert familiar with the pertinent industry.**" Magma Copper vo. v. Marshall, 608 F.2d 373, 377 (9th Cir. 1980) citing Brennan v. Smoke-Craft, Inc., 530 F.2d 843, 845 (9th Cir. 1976). (emphasis added)

In applying the unequivocal legal precedent to the evidence to determine what constitutes a **recognized hazard**, the board cannot find that Nevada OSHA proved this essential element to establish a prima facia case of violation. There exists no competent evidence that the respondent had actual knowledge, or even constructive knowledge, of the cited **recognized hazard** in the subject pipeline trucking industry operations such to constitute legal recognition. While the accident and the resultant injuries are of great concern to the public in general and this board, to require the employer to eliminate **any** potential hazard regardless of employer or industry recognition in the legally defined sense that **might or could occur** violates the well-established case law. The employer duty is to safeguard against only "foreseeable preventable" hazards which must be eliminated from the worksite to comply with the spirit and intent of the occupational safety and health act, legislation and settled case law. To prevent a hazard it must first be **recognized.** National Realty and Construction Company, Inc. v. OSAHRC, 489 F.2d 1257, 1266 (D.C. Cir. 1973). Hazard exposure to a runaway truck under the facts in evidence was an unusual and extraordinary event given the company history, safety practice, and industry procedures for safely installing pipe through unimproved mountain terrain. There was no testimony from safety experts or others in, or familiar with, the pipeline construction field nor any industry data to the contrary in evidence. To find a violation would require the employer be the general insurer of a worksite as to any and all matters impacting safety that could or might come to pass at the site whether foreseeable or recognized. National Realty and Construction Company, Inc. v. OSAHRC, Id.

Whenever a General Duty Clause violation is alleged, evidence by

a preponderance of the hazard recognition and feasibility for correction are required because in theory Congress has not yet sufficiently recognized the hazard for codification. Accordingly, hazard recognition evidence must be clear and convincing to show it was **known** by the employer or the industry such that a reasonably conscientious **safety expert** could find same and subject it to economically feasible correction. The only evidence as to cause here was a reporting that the truck driver "blacked out". The condition never occurred before in the experience of the company or Mr. Cunningham who had been so employed in the industry for over 20 years. There was no evidence to the contrary. Reasonable industry safety precautions were taken based upon the unrebutted testimony of Mr. Cunningham and Ms. Edemier. The event was extraordinary, unusual, unforeseeable and not **recognized** by the respondent employer or the industry.

The testimony of Mr. Cunningham supported the arguments of respondent counsel as to the lack of **probability** for such a "catastrophic" event as that which occurred. The Federal Review Commission has rejected a **catastrophe** level for protection under probability factors:

> ". . . The existence of a hazard is established if the hazard can occur under other than a freakish or utterly implausible occurrence of circumstances." Walden Healthcare Ctr., 16 OSH Cases 1052, 1060 (Rev. Comm'n 1993) (quoting National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1265-66, 1 OSH Cases 1422 (D.C. Cir. 1973)).

The board finds insufficient evidence to meet the burden of proof to establish a violation of Citation 1, Item 1.

At Citation 2, Item 1, the evidence is unrefuted that respondent

failed to provide the required documentation within the time parameters under the strict terms of the cited standard. The sworn testimony of safety representative Edmier reflected a best effort to cooperate with OSHA and inspecting CSHO Garrett. The testimony was both credible and plausible. Many unusual circumstances were underway, emergency conditions existent after the accident, and extensive medical data and information had to be gathered. While the requested information was not provided within the four hour time limit, it was reasonably and promptly delivered given the conditions and circumstances at the worksite after such a catastrophic event.

29 USC 658(a) provides:

> ". . . The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to ***de minimis* violations** which have **no direct or immediate relationship to safety or health**." The consequence of characterizing a violation as *de minimis* is that the violation carries neither an abatement requirement nor a monetary penalty. The Commission has long asserted that it may characterize a violation as *de minimis*. (emphasis added)

Also see NRS 618.465(1):

> ". . . the Administrator may prescribe procedures for the issuance of a notice in lieu of citations with respect to: (a) **minor violations which have no direct or immediate relationship to safety or health . . .**" (emphasis added)

NAC 618.645(a) provides:

> ". . . an inspector . . or district manager (may issue) an oral notice of the violation if it is **minor and has no direct or immediate relationship to safety or health . . .**" (emphasis added)

> "The (federal) Commission has long asserted that it may characterize a violation as *de minimis*." Rabinowitz, Occupational Safety and Health Law, 2nd Ed., page 155. Citing General Electric Co. 3 OSHC 1031, 1040, Rev. Comm'n 1975. The First, Third, Fifth and Ninth Circuits have upheld the Commission's authority to characterize a violation as *de minimis*. Chao v. Symms Fruit

Ranch Inc., 242 R.3d 894, 19 OSHC 1337 (9th Cir. 2001); Donovan v. Daniel Constr. Co., 396, F.2d 818, 10 OSHC 2188 (1st Cir. 1982); Reich v. OSHRC (Erie Coke Corp.), 998 F.2d 134, 16 OSHC 1241 (3d Cir. 1993); Phoenix Roofing Inc. V. Dole, 874 F.2d 1027, 14 OSDC (5th Cir. 1989). As to what a *de minimis* violation is, the Commission has formulated a test in various ways, including asking whether the violation is "trifling". In other cases, it stated: "A ***de minimis* violation is one in which there is technical noncompliance of the standard but the departure from the standard bears such a negligible relationship to employee safety and health as to render inappropriate the assessment of a penalty or the entry of an abatement order."** Keco Indus. Inc., 11 OSHC 1932, 1934 (Rev. Comm'n 1984). Rabinowitz, Occupational Safety and Health Law, 2008, 2nd Ed., page 156. The Commission has held in effect that the employer bears the burden of proof on the *de minimis* issue." See Holly Springs Brick & Tile CO., 16 OSHC 1856 (Rev. Comm'n 1994) (rejecting *de minimis* argument for lack of evidence). (emphasis added)

Citations may also be vacated if the employer proves a lack of "feasibility".

A citation may be vacated if the employer proves that: (1) **the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances** in that either (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically 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. Beaver Plant Operations Inc., 18 OSHC 1972, 1977 (Rev. Comm'n 1999), rev'd on another ground, 223 F.3d 25, 19 OSHC 1053 (1st Cir. 2000); Gregory & Cook, Inc., 17 OSHC 1189, 1190 (Rev. Comm'n 1995); Siebel Modern Mfg. & Welding Corp., 15 OSHC 1218, 1228 (1991); Mosser Constr. Co., 15 OSHC 1408, 1416 (Rev. Comm'n 1991); Dun-Par Engineered Form Co., 12 OSHC 1949 (1986), rev'd on another ground, 843 F.2d 1135, 13 OSHC 1652 (8th Cir. 1988). (emphasis added)

The Commission has the authority to assess a penalty that is higher than that proposed by OSHA, though it exercises its power to do so only "sparingly". It also may reduce or eliminate a

> penalty by changing the citation classification or by amending the citation to a notice of a *de minimis* violation. *See* Reich v. OSCRC (Erie Coke Corp.), 998 F.2d 134, 16 OSH Cases 1241 (3d Cir. 1993) (affirming Commission's authority to reclassify violations as *de minimis*).

The testimony of respondent safety officer Ms. Edmier was unrebutted. CSHO Garrett did not provide evidence of non-cooperation, ultimate document non-delivery, or lack of substance in the documents delivered; he cited the respondent for a lack of compliance with the strict time constraints of the standard. Ms. Edmier provided testimony and explanation as to the various unusual and time consuming conditions required to comply with document delivery within the four hour time period given privacy laws, hospitalization of employees remote from the site of the accident, and the occurrence of an event which was extraordinary and unusual for the company. There was no evidence to the contrary.

The documentation requested by the CSHO during the inspection is required by the codified standard. It represents an integral and important aspect of any workplace safety program. However the unusual facts of the accident and evidence of good faith efforts by respondent to comply support reclassification of the violation to *de minimis* and elimination of the penalty. By so doing, the board confirms the importance of documentation in all work safety programs, particularly when accidents occur, but recognizes the reasonable and good faith efforts toward substantial compliance in revising the violation and penalty based upon credible evidence when ". . . departure from the standard bears a negligible relationship to employee safety . . .". Keco Indus. Inc., Id., page 19.

Based upon the above and foregoing, it is the decision of the

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD that no violation of Nevada Revised Statutes did occur under Citation 1, Item 1, NRS 618.375(1), the general duty clause, and the proposed penalty in the amount of $7,000.00 is denied.

It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of Code of Federal Regulations did occur under 29 CFR 1904.40(a) as to Citation 2, Item 1, but the violation is reclassified from "other" to "*de minimis*" and the proposed penalty in the amount of $1,000.00 reduced to zero ($0.00).

The Board directs counsel for the Respondent, **MR. JASON MILLS, ESQ.**, to submit proposed Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel within twenty (20) days from date of decision. After five (5) days time for filing any objection, the final Findings of Fact and Conclusions of Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by ordered counsel. Service of the Findings of Fact and Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

DATED: This 13th day of February 2012.

NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

By /s/
JOE ADAMS, Chairman