

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

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

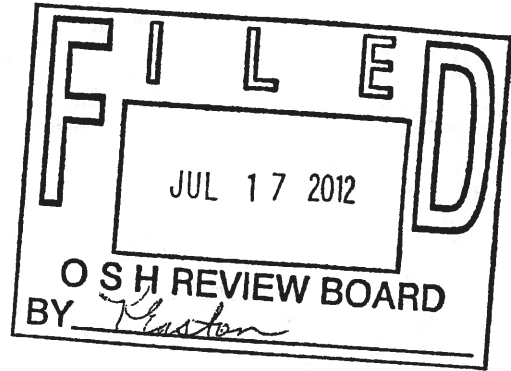
Docket No. RNO 12-1594

Complainant,

vs.

10 AMERICAN TIRE PROS,

11 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 14th day of June,
16 2012, in furtherance of notice duly provided according to law, MR.
17 MICHAEL TANCHEK, ESQ., counsel appearing on behalf of the Complainant,
18 **Chief Administrative Officer of the Occupational Safety and Health**
19 **Administration, Division of Industrial Relations (OSHA)**; and MR. MICHAEL
20 MCGRIFF and MR. ANDREW MCGRIFF, owners on behalf of Respondent, **AMERICAN**
21 **TIRE PROS**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds
22 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, charges a violation of 29 CFR

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1 1910.305(b)(2)(I). The complainant alleged the respondent employer
2 failed to provide covers on electrical "junction" boxes as required by
3 the referenced standard. The alleged violation was classified as
4 "Serious". The proposed penalty for the alleged violation is in the
5 amount of TWO THOUSAND FOUR HUNDRED DOLLARS (\$2,400.00).

6 Citation 2, Item 1, charges a violation of 29 CFR
7 1910.303(b)(7)(iv). The complainant alleged the respondent employer did
8 not securely mount a four plex electrical receptacle which was burned
9 and affecting the safe operation of the outlet. Employees used the
10 receptacle to provide power for various tools. The violation was
11 classified as "Other". A zero (\$0.00) penalty was proposed.

12 Citation 2, Item 2, charges a violation of 29 CFR 1910.304(g)(5).
13 The complainant alleged control panel buttons in bay 1 of its work
14 operation was energized for a horizontal lift in violation of the cited
15 standard. The violation was classified as "Other" and a zero (\$0.00)
16 penalty proposed.

17 Prior to presentation of evidence and testimony, the parties agreed
18 and stipulated that only Citation 1, Item 1 would be contested and that
19 Citation 2, Item 1 and Citation 2, Item 2 constitute admitted
20 violations.

21 The parties agreed and stipulated the principal issue subject of
22 contest to be the element of employer knowledge for a finding of
23 violation and/or classification of any violation found as "serious".

24 The parties stipulated to complainant's Exhibit 1, the Inspection
25 Report and related documents, Exhibit 2, three photographs, respondent's
26 Exhibit A, the Citation and Notification of Penalty and Exhibit B, an
27 electrical contractor proposal for corrective work to be performed.

28 Counsel for complainant through compliance safety and health

1 officer (CSHO) Jennifer Cox, presented evidence and testimony of the
2 violation and proposed penalty. Ms. Cox testified she inspected the
3 subject site located in Reno, Nevada on February 15, 2012. She met with
4 Mr. Andy McGriff, co-manager, performed her "walk-around" inspection and
5 obtained photographs of the violative conditions identified in Exhibits
6 1 and 2. Ms. Cox interviewed employees Lambert and Norey in the course
7 of the inspection as referenced in her investigation report at Exhibit
8 1. Ms. Cox tested the cited electrical boxes for "live" elements and
9 found same to exist. She testified employees had direct "access" to the
10 electrical boxes; one near a wall where tools were located and the other
11 near a hydraulic lift utilized for raising vehicles. She testified
12 there was nothing obstructing the view of the boxes, identified as
13 photos 1, 2 and 3 which clearly demonstrated no covers and exposed
14 wires. Ms. Cox testified picture 3 also shows the evidence of "arch
15 flash" residue which occurs when wires come in contact with conductive
16 materials, and which could be prevented by electrical box covers. CSHO
17 Cox further testified that the hazard to which the employees were
18 exposed is contact with wires in uncovered electrical boxes by tools or
19 otherwise accidentally bumping or coming into direct contact with the
20 exposed wires. All electrical box areas subject of the citation were
21 in "plain view". Ms. Cox did not ask the employer/owners if they knew
22 the boxes were uncovered but testified ". . . they should have known
23 . . ." given the unobstructed and plain view.

24 Ms. Cox rated the subject violation at low levels and gave all
25 available credits based upon her own determination as to exposure;
26 however testified she was ". . . trying to keep the fines down . . ."
27 She further testified that wire caps can stop some shock contact but
28 cannot resolve the hazard exposure problems because conductors were

1 exposed. They can be struck or hit by tools and detached allowing
2 accidental contact.

3 Ms. Cox testified as to her penalty assessments in furtherance of
4 the operations manual and explained why she did not render a credit for
5 "good history" based upon there having been no inspection of the
6 respondent's facility within five years. She explained no credit could
7 be processed through the federal OSHA computer system. However, a 40%
8 penalty reduction was rendered for the small company size.

9 On cross-examination, Ms. Cox testified the electrical boxes were
10 "junction" type containing insulated wire tied together and capped, but
11 still a violation because the caps can be easily knocked out of place
12 allowing an individual to come in contact with the bare wires and
13 potential electrical shock hazards. She testified that a simple cover
14 is designed to prevent same and could easily avoid the hazard.

15 Respondent owner representative Mr. Michael McGriff initially
16 represented he would not be presenting evidence or testimony and agreed
17 to proceed with closing arguments.

18 On closing argument, complainant counsel asserted the burden of
19 proof had been met and unrebutted by any respondent documentary or
20 testimonial evidence. He argued the board must find a violation in
21 accordance with the prayer of the complaint.

22 Respondent presented closing argument. Mr. McGriff argued the
23 electric box covers were placed on the electrical outlets the day after
24 inspection; and every other item noted during the investigation,
25 including the violations found subject of stipulation, were all
26 corrected within one week. He admitted the electrical box covers were
27 missing and now understands the serious hazard, but at the time believed
28 that because they were only "junction boxes", not really dangerous. He

1 asserted the definition for a finding of "serious" as ". . . an employer
2 knew or could know with reasonable diligence . . ." to be the guidance;
3 but that he did not have sufficient knowledge to determine that **junction**
4 **type** boxes without covers to so qualify.

5 After the completion of the closing arguments, complainant counsel
6 and respondent representative requested the board re-open the
7 evidentiary portion of the hearing to permit respondent owner
8 representative Mr. Michael McGriff be sworn as a witness to testify
9 rather than act only as company representative. The parties urged the
10 board to consider that Mr. McGriff is not an attorney, qualified safety
11 representative, experienced in OSHA matters nor adversary proceedings.
12 The board reviewed the matter and ruled on the mutual request to reopen
13 the evidentiary hearing in the interest of fairness to all parties after
14 admonishing Mr. McGriff that his testimony under oath would be subject
15 to cross-examination could be held against him.

16 Mr. McGriff testified that he requested an electrical contractor
17 inspect his shop in October 2011, well before the subject inspection
18 occurred, and obtained a proposal for corrective work to be performed.
19 However he did not authorize the work to be performed. He testified in
20 accordance with Exhibit B, stipulated in evidence, that because the
21 electrical box cover plates were not listed by the contractor for
22 corrective work he did nothing about them. He testified that
23 accordingly he had no "notice" there was a potential of serious
24 violation. He asserted because of his lack of notice from the
25 contractor proposal (Exhibit B), there can be no finding of **employer**
26 **knowledge** as required under Nevada Revised Statutes (NRS 618.625) to
27 establish employer knowledge for the classification of a violation as
28 "serious".

1 Complainant counsel cross-examined Mr. McGriff and asked why,
2 simply because the proposal contained nothing as to the cover plates,
3 same could possibly constitute a lack of **notice and employer knowledge**
4 for correction work to be performed. Mr. McGriff had no direct answer.
5 Counsel also asked how the entire defense could be based upon a lack of
6 employer knowledge in reliance upon simply a contractor having provided
7 a proposal without referencing the cover plates, when Mr. McGriff never
8 authorized any of the work identified for correction. Mr. McGriff had
9 no direct response.

10 To find a violation of the cited standards, the board must consider
11 the evidence and measure same against the established applicable law
12 promulgated and developed under the Occupational Safety & Health Act as
13 incorporated by reference in Nevada Revised Statutes.

14 . . . All federal occupational safety and health
15 standards which the Secretary of Labor promulgates,
16 modifies or revokes, and any amendments thereto,
17 shall be deemed Nevada occupational safety and
18 health standards unless the Division, in accordance
19 with federal law, adopts regulations establishing
20 alternative standards that provide protection equal
21 to the protection provided by those federal
22 occupational safety and health standards. (NRS
23 618.295(8))

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

27 All facts forming the basis of a complaint must be
28 proved by a preponderance of the evidence. The
decision of the hearing examiner shall be based
upon a consideration of the whole record and shall
state all facts officially noticed and relied upon.
It shall be made on the basis of a preponderance of
reliable and probative evidence. 29 CFR 1905.27(b).
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD
¶16,958 (1973). *Olin Construction Company, Inc. v.*
OSHARC and Peter J. Brennan, Secty of Labor, 525
F.2d 464 (1975).

To prove a violation of a standard, the Secretary
must establish (1) the applicability of the

1 standard, (2) the existence of noncomplying
2 conditions, (3) employee exposure or access, and
3 (4) that **the employer knew or with the exercise of**
4 **reasonable diligence could have known of the**
5 **violative condition.** See *Belger Cartage Service,*
6 *Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
7 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
8 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC
9 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
10 (No. 76-1408, 1979); *American Wrecking Corp. v.*
11 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
12 2003). (emphasis added)

13 The board finds a preponderance of evidence to support a finding
14 of violation at Citation 1, Item 1 referencing 29 CFR 1910.305(b)2) (I).
15 The board further finds, a preponderance of evidence to establish the
16 violation classification as serious.

17 The photographic exhibits in evidence clearly depict **non-complying**
18 **conditions** at the worksite. The **standard was applicable** to the
19 electrical outlets based upon the photographs, unrefuted testimony and
20 personal observations of CSHO Cox. **Employee exposure** was established
21 through the photographic exhibits depicting the conditions, observations
22 by CSHO Cox, and information obtained during the inspection from
23 employees Lambert and Norey. Those employees identified the location of
24 their work areas and the electrical boxes to be in sufficient proximity
25 to expose them to **access to the hazardous** conditions. **Employer**
26 **knowledge** must be confirmed based upon the plain view of the violative
27 conditions and the admissions of Mr. McGriff that he observed them
28 although did not understand junction boxes without cover plates could
cause electrocution or serious injury and death.

29 An unaccepted work proposal prior to the inspection which did not
30 identify the need for cover plates is not competent evidence to mitigate
31 employer knowledge of the respondent or rebut proof of that element for
32 violation. Further, both Michael and Andrew McGriff are co-owners of

1 the company and therefore supervisory personnel for which the imputation
2 of knowledge or expected awareness is the responsibility of the cited
3 employer regardless of its legal status.

4 Actual knowledge is not required for a finding of
5 a serious violation. Foreseeability and
6 preventability render a violation serious provided
7 that a **reasonably prudent employer, i.e., one who**
8 **is safety conscious and possesses the technical**
9 **expertise normally expected in the industry**
10 **concerned, would know of the danger.** *Candler-*
11 *Rusche, Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723
12 (1976), appeal filed, No. 76-1645 (D.C. Cir. July
13 16, 1976); *Rockwell International*, 2 OSHC 1710,
14 1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d
15 1283 (6th Cir. 1976); *Mountain States Telephone &*
16 *Telegraph Co.*, 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365
17 (1973).

18 Under Occupational Safety and Health Law, there
19 need be no showing of **actual** exposure in favor of
20 a rule of **access** based upon reasonable
21 predictability - (1) the zone of danger to be
22 determined by the hazard; (2) access to mean that
23 employees either while in the course of assigned
24 duties, personal comfort activities on the job, or
25 while in the normal course of ingress-egress will
26 be, are, or have been in the zone of danger; and
27 (3) the **employer knew or could have known of its**
28 **employees' presence so it could have warned the**
employees or prevented them from entering the zone
of danger. *Gilles & Cotting, Inc.*, 3 OSHC 2002,
1975-1976 OSHD ¶ 20,448 (1976); *Cornell & Company,*
Inc., 5 OSHC 1736, 1977-1978 OSHD ¶ 22,095 (1977);
Brennan v. OSAHRC and Alesea Lumber Co., 511 F.2d
1139 (9th Cir. 1975); *General Electric Company v.*
OSAHRC and Usery, 540 F.2d 67, 69 (2d Cir. 1976).
(emphasis added)

21 See *Belger Cartage Service, Inc.*, 79 OSAHRC 16/B4,
22 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400,
23 p.28,373 (No. 76-1948, 1979); *Harvey Workover,*
Inc., 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90,
24 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408,
25 1979); *American Wrecking Corp. v. Secretary of*
Labor, 351 F.3d 1254, 1261 (D.C. Cir. 2003), supra.
26 Evidence that a foreman or supervisor violated a
27 standard permits an inference that the employer's
28 safety program was not adequately enforced. (See
D.A. Collins Construction Co. v. Secretary of
Labor, 117 F.3d 691, 695 (2d Cir. 1997); *Harry C.*
Crooker & Sons, Inc. V. Occupational Safety &
Health Review Commission, 537 F3 79, 85 (1st Cir.

1 2008).) *Division of Occupational Safety and Health*
2 *vs. Pabco Gypsum*, 105 Nev. 371, 775 P.2d 701
(1989).

3 A respondent may rebut evidence by showing:

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

8 The respondent employer owners are required to maintain a
9 reasonable level of safety and prudent level of knowledge over their
10 premises. The violations were in plain view. Employees were exposed
11 based upon the rule of access to the hazardous conditions.

12 In reviewing the applicable law for classification of violations
13 as "serious" the board notes NRS 618.625 as follows:

14 2. . . . a serious violation exists in a
15 place of employment if there is a **substantial**
16 **probability** that death or serious physical harm
17 could result from a **condition** which exists, or from
one or more practices, means, methods, **operations**
or processes which have been adopted or are in use
in that place of employment . . . (emphasis added)

18 The board finds a preponderance of evidence to support the
19 classification of the violation as "serious". The facts and evidence
20 demonstrate a "substantial probability" that death or serious physical
21 harm could result from the working conditions and/or operations subject
22 of the cited violation.

23 CSHO Cox testified as to her pictorial exhibits and the working
24 conditions at the site to establish **access** to the hazard by the
25 employees working in the area. The electrical outlets connected to the
26 standard power system sufficient to operate hydraulic lifts and other
27 high electrical demand equipment could, if inadvertently contacted by
28 an individual holding a tool or other object, clearly result under a

1 **substantial probability** test in serious physical harm or death.

2 The respondent's assertion that his company should not be held
3 responsible for the exposure of employees to serious injury or death
4 simply because he was not possessed of the knowledge that an uncovered
5 electrical outlet showing exposed wire connections could cause
6 electrocution, serious injury or death is not a recognized defense under
7 occupational safety and health law. Nor can violative conduct be
8 excusable merely because a contractor work proposal, which the
9 respondent never implemented, did not contain a reference to electrical
10 box cover plates being required. The facts do not relieve an employer
11 nor negate an inference of employer knowledge of serious violative
12 conditions. The respondent testimony and arguments do not constitute
13 a defense nor support any reasonable basis for mitigation and/or relief
14 from the violation under established occupational safety and health law.
15 Furthermore, Mr. McGriff chose to testify and admitted the violative
16 conditions to be serious and testified he understood his responsibility
17 for the conditions at his worksite.

18 Notwithstanding the findings of violation and serious
19 classification, the board in analyzing the proposed penalty, determined
20 the assessment requires modification and reduction of the total amount
21 proposed. The lack of rendering a good history credit of 10% based upon
22 no previous **citations** simply because there had been no prior **inspections**
23 of respondent's facility whatsoever within the last five years, cannot
24 be supported by any test of fairness, reasonableness or satisfy the
25 burden of proof. Accordingly the 10% credit for a lack of violations
26 in past history is to be rendered against the original proposed penalty.
27 Further, the evidence supports rendering a "quick fix" credit of 15%.
28 The cover plates were replaced promptly and the hazards abated.

1 Similarly, it was un rebutted that all other items noted by the CSHO
2 during inspection were corrected within one week. Based upon the
3 foregoing, the board confirms a penalty at the reduced sum after all
4 credits of \$1,400.00.

5 Based upon the evidence and testimony, it is the decision of the
6 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of
7 Nevada Revised Statute did occur as to Citation 1, Item 1, 29 CFR
8 1910.305(b)(2)(i). The classification of "Serious" is appropriate and
9 affirmed. The assessed is modified and a final penalty confirmed in the
10 amount of ONE THOUSAND FOUR HUNDRED DOLLARS (\$1,400.00).

11 A violation of Nevada Revised Statute is confirmed as admitted at
12 Citation 2, Item 1, charging a violation of 29 CFR 1910.303(b)(7)(iv).
13 The classification of "Other" and zero (\$0.00) penalty are confirmed.

14 A violation of Nevada Revised Statute is confirmed as admitted at
15 Citation 2, Item 2, charging a violation of 29 CFR 1910.304(g)(5). The
16 classification of "Other" and zero (\$0.00) penalty are confirmed.

17 The Board directs counsel for the Complainant, **CHIEF ADMINISTRATIVE**
18 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION**
19 **OF INDUSTRIAL RELATIONS**, to submit proposed Findings of Fact and
20 Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
21 **BOARD** and serve copies on opposing counsel within twenty (20) days from
22 date of decision. After five (5) days time for filing any objection,
23 the final Findings of Fact and Conclusions of Law shall be submitted to
24 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing
25 counsel. Service of the Findings of Fact and Conclusions of Law signed

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1 by the Chairman of the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW
2 BOARD shall constitute the Final Order of the BOARD.

3 DATED: This 17th day of July, 2012.

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5 NEVADA OCCUPATIONAL SAFETY AND HEALTH
6 REVIEW BOARD

7 By /s/
8 _____
9 JOE ADAMS, Chairman
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