

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
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6 CHIEF ADMINISTRATIVE OFFICER
7 OF THE OCCUPATIONAL SAFETY AND
8 HEALTH ADMINISTRATION, DIVISION
9 OF INDUSTRIAL RELATIONS OF THE
10 DEPARTMENT OF BUSINESS AND
11 INDUSTRY,

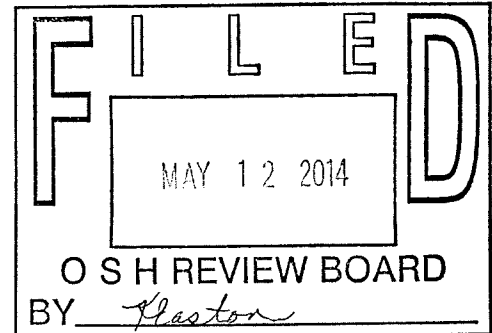
Docket No. LV 14-1687

12 Complainant,

13 vs.

14 WEST COAST ARBORISTS,

15 Respondent.
16 _____/



17 D E C I S I O N

18 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
19 **HEALTH REVIEW BOARD** at a hearing commenced on the 9th day of April 2014,
20 in furtherance of notice duly provided according to law, MS. SALLI
21 ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**
22 **Administrative Officer of the Occupational Safety and Health**
23 **Administration, Division of Industrial Relations (OSHA)**; and MR. ERNESTO
24 MACIAS, appearing on behalf of Respondent, **West Coast Arborists**, the
25 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

28 The complaint filed by OSHA sets forth allegations of violation of
Nevada Revised Statutes as referenced in Exhibit A, attached thereto.

Citation 1, Item 1 charged a "Serious" violation of Nevada Revised

1 Statute 618.375(1). Complainant alleged respondent violated the cited
2 Nevada Revised Statute commonly known as the "General Duty Clause" by
3 utilizing polyvinyl chloride (PVC) pipe to transport compressed air to
4 multiple locations in the company shop area. Complainant charged the
5 air pressure in the PVC pipe operated at 150 psi and exposed employees
6 working in close proximity on a daily basis to possible serious injury
7 from potential PVC pipe explosion and resulting shrapnel hazards. The
8 violation as classified as "Serious" and a penalty proposed in the
9 amount of Two Thousand Nine Hundred Seventy-Five Dollars (\$2,975.00).

10 Citation 1, Item 2 charged a "Serious" violation of Nevada Revised
11 Statute 618.375(2). Complainant alleged respondent violated the cited
12 Nevada Revised Statute commonly known as the "General Duty Clause" by
13 allowing employees to unsafely attempt clearing a tree limb entangled
14 in a high voltage line resulting in exposure to possible serious injury
15 or death from an electrocution hazard. The violation was classified as
16 "Serious" and a penalty proposed in the amount of Three Thousand Five
17 Hundred Dollars (\$3,500.00).

18 The parties stipulated to the admission of evidence at
19 complainant's Exhibit 1 through 3 and respondent's A, B, C and D.

20 Counsel for the Chief Administrative Officer presented testimony
21 and documentary evidence with regard to the alleged violations.

22 Compliance Safety and Health Officer (CSHO) Jeff Belcher identified
23 the complainant evidence packet containing Exhibits 1 through 3 and
24 testified from and on the information. Mr. Belcher described his
25 findings and determination of violation at Citation 1, Item 1. At the
26 respondent's shop in North Las Vegas, Nevada he observed and
27 photographed 3/4" PVC pipe utilized to transport compressed air to
28 multiple locations in the employee work area. Mr. Belcher interviewed

1 employees working in direct proximity to the pressurized PVC pipe and
2 confirmed the air pressure operated at 150 psi. He identified the
3 witness statement at Exhibit 1, page 16 and testified the employee
4 worked in proximity to the pipe all day on a daily basis.

5 CSHO Belcher testified that use of PVC pipe to transport compressed
6 air is a **recognized hazard** as determined by manufacturers, the American
7 National Standards Institute (ANSI) and Federal OSHA. The actual hazard
8 exposure to employees for serious injuries occurs from potential failure
9 of the pipe resulting in shrapnel type injuries. He identified the
10 Federal OSHA interpretation letters at Exhibit 2, pages 63-68. He
11 further identified and testified to ANSI safety requirements at Exhibit
12 2, pages 69-71, the Oregon OSHA Fact Sheet, Thermoplastic Piping
13 article, and the Labor & Industries article at pages 72-75.

14 CSHO Belcher testified the office of respondent supervisor Mr.
15 Angel Rincon was near and in **plain view** of the pressurized PVC pipe line
16 in the general shop area. He testified it was **feasible** to correct and
17 remedy the hazardous condition by installation of galvanized pipe
18 instead of the PVC. On notification of the CSHO findings through email
19 exchanges with supervisor Rincon, Mr. Belcher was informed the cited
20 condition had been promptly remedied in approximately 40 minutes time.

21 CSHO Belcher continued testimony from Exhibit 1 to establish his
22 classification of the hazard as serious; and the gravity, severity and
23 probability factors. He particularly testified how serious injuries
24 would likely result in the event of an accident.

25 Mr. Belcher concluded his direct testimony on the Citation 1, Item
26 1, penalties and referenced the credits provided to the respondent in
27 accordance with the NOSH Operations Manual.

28 Counsel continued direct examination of CSHO Belcher on Citation

1 1, Item 2. He conducted an inspection of another worksite of respondent
2 on September 20, 2013 at 3545 Pueblo Way in Las Vegas, Nevada. OSHA
3 received a referral complaint that respondent employees had been
4 instructed to unsafely remove a tree limb entangled in high voltage
5 lines. Mr. Belcher discovered through employee interviews and admissions
6 by the company duty foreman, Mr. Terrell Otis, Jr., that respondent
7 employees were instructed to ". . . throw a rope over upper
8 communication lines . . ." in an effort to reach a height that would
9 allow an employee to remove a tree limb entangled in the underlying high
10 voltage line. He referenced Exhibit 1, page 30, and testified Mr. Otis
11 admitted instructing employees to use a "rope toss" method over the
12 wires because it seemed like the fastest and safest way to get the job
13 done and restore power to the area. He testified the rope was thrown
14 over the upper phone and cable lines to hoist an employee to within
15 access range to the tree limb and facilitate removal from the underlying
16 power line. He testified Mr. Otis admitted understanding the ANSI and
17 company safety policies that ". . . every wire must be considered live".

18 Mr. Belcher referenced Exhibit 1, page 71, and read the applicable
19 ANSI standard which provided:

20 ". . . all overhead and underground electrical
21 conductors and all communication wires and cables
22 shall be considered to be energized with
potentially fatal voltages and should never be
touched either directly or indirectly."

23 Mr. Belcher testified the ANSI standard established the hazard as
24 "**recognized**" in the industry; but also found from his investigation the
25 actual hazard to be particularly known by the employer and within the
26 power line clearance industry. Mr. Belcher testified there was no
27 company employee disciplinary policy provided to him upon request at the
28 time of his inspection; nor any evidence of discipline rendered to Mr.

1 Otis as the company foreman who gave the instructions for employees to
2 utilize a rope hoist for access to the impeded power line.

3 Mr. Belcher testified on the **feasibility** of utilizing alternate
4 methods to access the power line, as opposed to the rope toss, which he
5 found were ultimately implemented when the rope toss method failed.

6 CSHO Belcher concluded his direct testimony on classification of
7 the violation and probable serious injuries or death likely to result
8 from an accident.

9 On cross-examination Mr. Belcher responded to questions relative
10 to Citation 1, Items 1 and 2. He identified respondent's Exhibit B,
11 including a disciplinary form at page 2 and testified it appeared to
12 satisfy both the OSHA requirements and respondent disciplinary action
13 policies. Referencing respondent's Exhibit A, page 4, he testified
14 communication lines carry only low voltage and not classified under the
15 ANSI standard in evidence for high voltage lines. He explained the
16 similarities between versions of the ANSI standard referenced by
17 complainant and respondent. Mr. Belcher denied the respondent could
18 safely rely upon the Nevada Energy repair call to establish the power
19 was out. He testified the hazard remains because a broken limb could
20 ". . . trip a switch and reactivate power . . ." creating the same
21 potential hazard for serious electrical injuries or death.

22 At the conclusion of complainant's case respondent presented
23 witness testimony from Mr. Terrell Otis, Jr., the foreman who directed
24 the attempted line clearance by use of a rope toss and hoist procedure
25 over the top lines. He described the difficulties confronted at the
26 subject site to safely remove the broken tree limb from the power line,
27 and his reasons for attempting access by use of a rope hoist. He was
28 unable to reach the limb with the pruner tool because he believed no

1 extension was available. He also believed the tree was unsafe to climb
2 due to a "canker" showing rotting conditions. Mr. Otis testified that
3 in 18 years of field experience, he never encountered any serious
4 injuries. He made a determination that a rope toss over the upper low
5 voltage phone line would also bring down the lower power line where the
6 limb was entangled to within employee reach. He believed there was no
7 voltage in the power line based upon the reason his company was called
8 to the site by Nevada Energy to remove the limb and permit them to
9 **restore** the area power outage. After realizing the rope method would
10 not work, he effectuated a typical procedure by eventually locating
11 pruner extensions, and instructing an employee climb a portion of the
12 tree. He testified that ". . . I probably broke the standard but . .
13 . if you read the ANSI (I). . . did not believe use of the rope could
14 lead to injury because the line was not hot . . .". He testified the
15 employer discipline for his conduct was verbal. He always considers
16 lines "hot" but did not believe there was any dangerous conduct
17 undertaken because he knew the line was not energized.

18 Respondent presented additional witness testimony from Mr. Angel
19 Rincon, the company supervisor. Mr. Rincon testified the respondent is
20 the ". . . main contractor for Nevada Energy . . . and regularly
21 removes hundreds of limbs from power lines . . .". He testified the
22 company provides extensive safety training for its employees with
23 average 10 years of experience, and enforces a company progressive
24 discipline program.

25 At the conclusion of presentation of evidence and testimony
26 complainant and respondent provided closing arguments.

27 Complainant asserted there were two general duty clause violations
28 clearly supported by the evidence. The employer was responsible for

1 ensuring the workplace be **free of recognized hazards**. At Citation 1,
2 Item 1, the use of the PVC pipe to transport compressed air was a widely
3 known recognized hazard and respondent admitted the violation. The
4 violative conditions were corrected promptly and the respondent given
5 all allowable credits for a "quick fix". The ANSI standard, industry
6 literature and company safety policies establish the hazard is
7 **recognized**. The evidence demonstrated the PVC pipe carried 150 psi and
8 employees worked in direct proximity. **Employer knowledge** was satisfied
9 because the supervisor's office was nearby and provided a **plain view** of
10 the PVC pipe. Multiple **employees were exposed** on a regular basis daily.
11 The hazard demonstrated a probability for very serious injuries in the
12 event of an accident from explosion or failure of the PVC pipe. Counsel
13 referenced the supporting Federal OSHA interpretation letters and
14 documents stipulated in evidence at Exhibit 2.

15 At Citation 1, Item 2, counsel argued employee use of a rope in
16 contact with power lines is a **recognized hazard** in the respondent
17 industry, and **confirmed as such by ANSI**. The company foreman instructed
18 employees to attempt a rope toss and hoist method for access to an
19 entangled tree limb in a high voltage line, which is a direct violation
20 of ANSI and a hazard recognized by the respondent company, foreman Otis
21 and the industry. The foreman admitted he "broke the standard" yet
22 contends he acted in a safe manner. There were alternate feasible means
23 to remedy the problem which were eventually effectuated after the
24 earlier rope toss attempts failed. The conduct was unsafe and in
25 violation of ANSI, respondent and industry safety practices and the
26 Nevada Revised Statute requiring maintenance of a safe workplace.

27 Respondent representative Macias argued the PVC pipe issue was
28 corrected within 30 or 40 minutes after discovered. He asserted the

1 company only recently purchased the shop site and simply unaware of the
2 violative condition until noted during the OSHA inspection.

3 At Citation 1, Item 2, respondent representative argued the
4 employer did not know of the rope toss/hoist attempt until it was
5 reported by the OSHA inspector during the investigation. He argued the
6 referenced ANSI standard was not controlling because the line was "not
7 energized". There was no "violation of ANSI" which deals with high
8 voltage power lines. He argued there was no evidence of a "recognized
9 or actual hazard" because there was no "hot line". He asserted that if
10 the line was hot the tree limbs would have shown burn marks, but they
11 did not. Mr. Otis had no company authority to use a rope hoist. The
12 respondent should not be held responsible for improper conduct of which
13 it was unaware. Mr. Macias asserted the company is the prime contractor
14 for Nevada Energy and trims "thousands of trees for them each year
15 . . .". Even if Mr. Otis did not follow ANSI there could be no
16 violation because the line was not energized based on the facts in
17 evidence that Nevada Power was nearby ready to "restore power" once the
18 line was cleared.

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

22 A serious violation can be established under Nevada occupational
23 safety and health law in accordance with Nevada Revised Statutes.

24 (NRS) 618.625(2) provides:

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

1 not, with the exercise of reasonable diligence,
2 know of the presence of the violation. (emphasis
added)

3 N.A.C. 618.788(1) provides:

4 In all proceedings commenced by the filing of a
5 notice of contest, the burden of proof rests with
the Administrator.

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

8 ". . . Every employer shall:

9 1. Furnish employment and a place of employment
10 which are **free from recognized hazards** that are
11 **causing or are likely to cause death or serious
physical harm** to his employees . . ." (emphasis
added)

12 When the Secretary has introduced evidence showing
13 the existence of a hazard in the workplace, the
14 **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).
15 (emphasis added)

16 The board finds a preponderance of evidence to confirm the
17 violation alleged at Citation 1, Item 1.

18 In citing an employer under the General Duty
19 Clause, it is specifically necessary to demonstrate
20 the existence of a **recognized hazard** as mandated by
21 the statute; whereas citing an employer under a
22 specific standard does not carry such a requirement
23 because Congress has, in codification, adopted the
24 recognition of (certain) hazards for the particular
25 industry. To establish a violation of the General
26 Duty Clause, the complainant must do more than show
27 the mere presence of a hazard. The General Duty
28 Clause, ". . . obligates employers to **rid their
workplaces of recognized hazards** . . ." *Whitney
Aircraft v. Secretary of Labor*, 649 F.2d 96, 100
(2nd Cir. 1981). (emphasis added)

"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
*National Realty and Construction Co., Inc. v.
OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973), the court

1 listed three elements that OSHA must prove to
2 establish a general duty violation; the Review
3 Commission extrapolated a fourth element from the
4 court's reasoning: (1) a **condition or activity in**
5 **the workplace presents a hazard** to an employee; (2)
6 the condition or activity is **recognized as a**
7 **hazard**; (3) the hazard is causing or is **likely to**
8 **cause death or serious physical harm**; and (4) a
9 **feasible means exists to eliminate or materially**
10 **reduce the hazard**. The four-part test continues to
11 be followed by the courts and the Review
12 Commission. E.g., *Wiley Organics Inc. v. OSHRC*,
13 124 F.3d 201, 17 OSH Cases 2125 (6th Cir. 1997);
14 *Beverly Enters., Inc.*, 19 OSH Cases 1161, 1168
15 (Rev. Comm'n 2000); *Kokosing Constr. Co.*, 17 OSH
16 Cases 1869, 1872 (Rev. Comm'n 1996). The *National*
17 *Realty*, decision itself continues to be routinely
18 cited as a landmark decision. See, e.g., *Kelly*
19 *Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321,
20 11 OSH Cases 1889 (5th Cir. 1984); *Ensign-Bickford*
21 *Co. v. OSHRC*, 717 F.2d 1419, 11 OSH Cases 1657
22 (D.C. Cir. 1983); *St. Joe Minerals Corp. v. OSHRC*,
23 647 F.2d 840, 845 n.8, 9 OSH Cases 1946 (8th Cir.
24 1981); *Pratt & Whitney Aircraft Div. v. Secretary*
25 *of Labor*, 649 F.2d 96, 9 OSH Cases 1554 (2d Cir.
26 1981); *R.L. Sanders Roofing Co. v. OSHRC*, 620 F.2d
27 97, 8 OSH Cases 1559 (5th Cir. 1980); *Magma Copper*
28 *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)

OSHA must prove that the employer **actually knew, or**
could have known with the exercise of reasonable
diligence, of the physical circumstances that
violate the Act. **This element must also be proved**
in general duty clause cases. The element requires
OSHA to establish the **employer's actual or**
constructive knowledge of the physical
circumstances that comprise the violation. OSHA is
not required to show that an employer knew the
conditions violated the Act or posed hazard to
employees. E.g., *New York State Elec. & Gas Corp.*
v. Secretary of Labor, 88 F.2d 98, 105, 17 OSH
Cases 1650 (2d Cir. 1996); *Pennsylvania Power &*
Light Co. v. OSHRC, 737 F.2d 350, 11 OSH Cases 1985
(3d Cir. 1984); *Ragnar Benson Inc.*, 18 OSH Cases
1937, 1939 (Rev. Comm'n 1999); *Continental Elec.*,
13 OSH Cases 2153, 2154 (Rev. Comm'n 1989)
(knowledge is a required element even for
nonserious violations). See, *United States Steel*
Corp., 12 OSH Cases 1692, 1699 (Rev. Comm'n 1986).
East Tex. Motor Freight v. OSHRC, 671 F.2d 845,
849, 10 OSH Cases 1457 (5th Cir. 1982); *Omaha Paper*

1 *Stock Co. v. Secretary of Labor*, 19 OSH Cases 1584
2 (Rev. Comm'n 2001), *aff'd*, 304 F.3d 779, 19 OSH
3 Cases 2039 (8th Cir. 2002); *Ormet Corp.*, 14 OSH
4 Cases 2134, 2138 (Rev. Comm'n 1991); *Southwestern*
5 *Acoustics & Specialty Inc.*, 5 OSH Cases 1091 (Rev.
6 Comm'n 1977) (employer need be shown only to have
7 **had knowledge of "physical conditions which**
8 **constitute a violation,"** F.2d 1265, 1272, 15 OSH
9 Cases 1238 (11th Cir. 1991) (employers are charged
10 with knowledge of matters duly published in Federal
11 Register). Occupational Safety and Health Law,
12 Bloomberg BNA 2013, 3rd Ed., page 90. (emphasis
13 added)

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

17 "A condition may be **recognized** as a [recognized
18 hazard] only when the evidence shows that it is
19 **commonly known by the public in general or in the**
20 **cited employer's industry as a hazard** of such
21 type." *Consolidated Engineering Co., Inc.*, 2 OSHC
22 1253, 1974-1975 OSHD ¶ 18,832, at page 22,670
23 (1974). Also see *National Realty and Construction*
24 *Company, Inc. v. OSAHRC*, 489 F.2d 1257, 1265 n. 32
25 (D.C. Cir. 1973); *Atlantic Sugar Association*, 4
26 OSHC 1355, 1976-1977 OSHD ¶ 20,821 (1976).
27 (emphasis added)

28 "The Secretary (administrator) may also prove
industry knowledge through publications and other
materials that reflect industry knowledge or
practice. As the commission has stated '[b]oth the
Commission and appellate courts have consistently
held that voluntary industry codes and guidelines
are evidence of industry recognition.' Thus, in
Kokosing Construction Co. The Commission **found a**
standard published by the American National
Standards Institute (ANSI) and a **guideline**
published by the Scaffold, Shoring and Forming
Institute to be **compelling evidence of industry**
recognition. Similarly, in *Reich v. Arcadian*
Corp., the Secretary pointed to **industry-specific**
information to establish that the alleged hazard
involved pressure vessels was recognized. . . ." 17
OSH Cases 1869, 1873 (Rev. Comm'n 1996), 110 F.3d
1192, 17 OSH Cases 1929 (5th Cir. 1997).
Occupational Safety and Health Law, Bloomberg BNA
2013, 3rd Ed., page 106.

To establish a violation of the Nevada general duty clause, Nevada

1 OSHA is required to prove by a preponderance of the evidence that:

- 2 (1) The employer failed to render its workplace
"free" of a hazard;
- 3 (2) The hazard was **recognized**;
- 4 (3) The recognized hazard **is causing or likely to**
cause death or serious physical harm;
- 5 (4) There was a **feasible and useful** method to
correct the hazard which the employer had not
undertaken; and
- 6 (5) The **employer knew or could have known with due**
diligence of the circumstances in violation of the
7 OSHA.

8 The board finds sufficient evidence by a preponderance to meet the
9 burden of proof to establish a violation at **Citation 1, Item 1**. The
10 employer failed to render its **workplace free of the recognized hazard**
11 where employees were directly exposed to pressurized PVC pipe used for
12 the transmission of compressed air. The workplace was under the
13 respondents **control** and the hazardous condition in **plain view** of the
14 **supervisory employee** and accordingly, by imputation, **known** by the
15 respondent. The hazardous condition was **recognized** in the industry both
16 through manufacturer recommendations and specifications with regard to
17 the utilization of PVC pipe. The evidence further demonstrated the
18 hazardous condition was subject of ANSI guidance and a Federal OSHA
19 Interpretation Letter both available to the public and respondent
20 industry. The hazardous condition is also recognized as **obvious** by
21 reasonably prudent individuals engaged in shop work requiring the
22 transportation of compressed air. An explosion or material failure
23 given the nature of plastic versus a heavier duty pipe material can be
24 reasonably inferred as likely to result in serious physical harm from
25 shrapnel or fragmentation. The company superintendent, and therefore
26 the respondent by imputation, have extensive experience in the industry
27 and knew or should have known that utilization of polyvinyl piping for
28 the transportation of air up to 150 psi was a dangerous condition.

1 There was a **feasible** and reasonable method to prevent the hazard. The
2 superintendent resolved the issue promptly after notification of the
3 violative condition. Further, the use of a metallic or heavier duty
4 substance must be presumed to be within the knowledge of a reasonably
5 prudent safety conscious employer. The presumption can be inferred from
6 the evidence in the record.

7 The violation was appropriately classified as **serious**. NRS 618.625
8 provides in pertinent part:

9 " . . . a serious violation exists in a place of
10 employment if there is a **substantial probability**
11 **that death or serious physical harm could result**
12 **from a condition** which exists, or from one or more
13 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."

14 The evidence clearly demonstrated that with 150 psi on PVC pipe an
15 explosion could very well occur based upon industry warnings, Federal
16 OSHA interpretation letters, the manufacturer specifications, and
17 reasonably prudent prevention by a safety-conscious employer. Had there
18 been a simple breach in the PVC pipe or a failure in the materials given
19 the use for which it was intended as opposed to the transportation of
20 highly pressurized air, there is a **substantial probability** that serious
21 physical injury or even death could have occurred to the employee(s)
22 working in close proximity to the pipe.

23 The board finds insufficient evidence of an **unsafe workplace** to
24 satisfy the complainant's **burden of proof** to support a violation of NRS
25 618.375, the general duty clause, at **Citation 1, Item 2**. The
26 complainant demonstrated a general **recognized** hazard but did not
27 establish preponderant evidence of an **actual** hazard in the particular
28 worksite, employer **knowledge** nor a **likelihood of serious injury or death**

1 under the **facts** presented. While the determination by the CSHO
2 reflected a good faith assessment of the potential for a dangerous
3 condition based upon an employee witness complaint, that alone does not
4 constitute **proof** of a hazard. There was no evidence the power line was
5 energized. While ANSI identifies a recognized hazardous condition in
6 overhead and underground electrical conductors and all communication
7 wires and cables and directs they shall be considered energized, the
8 facts in evidence do not demonstrate the lines were energized or that
9 failure to consider same as such created an **actual** serious hazardous
10 condition in the workplace. The line was not tested nor otherwise
11 confirmed by evidence to have been energized at the time of employee
12 work. The facts in evidence demonstrated the very reason respondent was
13 at the worksite to be based upon a call from Nevada Energy for removal
14 of an entangled tree limb in the power line so it might **restore power**.
15 The evidence permits the lawful inference that with Nevada Energy
16 standing nearby the worksite to **restore power**, no indications of line
17 voltage by burn marks on the tree limb, the rope touching only
18 **communication lines** above the power line, and no employee contact with
19 the rope or the power line there was no **actual hazard** in existence.
20 Without evidence of a "**hazard**" an employer cannot be found in violation
21 of the general duty clause which requires that ". . . an employer render
22 its workplace free of a **hazard** . . .". Clearly ANSI guidance and the
23 respondent training policy serves as a warning, generic in nature, that
24 every power line should be treated as if it were energized, however

25 . . . once the existence of a recognized hazard has
26 been demonstrated, OSHA must prove that the hazard
27 is "causing or likely or like to cause death or
28 serious physical harm to employees . . ."
Occupational Safety and Health Law, Bloomberg BNA
2013, 3rd Ed., page 109, 29 U.S.C. §654(a)(1) and
NRS 618.375(1)

1 The CSHO testified that even considering the reason for the service
2 call being for removal of a tree limb to allow Nevada Energy to restore
3 power, hazardous residual power might remain or return to the line for
4 some unknown reason. However, the testimony was speculative and without
5 any foundation or evidence for such an extraordinary occurrence.

6 Nevada OSHA had to **do more than merely show that a hazard may have**
7 **been present.** *Southern Ohio Building Systems v. OSHRC*, 649 F.2d 556,
8 558 (6th Cir. 1981).

9 " . . . the existence of a hazard is established if
10 the hazard can **occur under other than freakish or**
11 **utterly implausible concurrence of circumstances."**
12 *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)). (emphasis added)

13 " . . . The Secretary's obligation to demonstrate
14 the alleged violation by a preponderance of the
15 reliable evidence of record **requires more than**
16 **estimates, assumptions and inferences . . . [t]he**
17 **Secretary's reliance on mere conjecture is**
18 **insufficient to prove** a violation . . . [findings
must be based on] 'the kind of evidence on which
responsible persons are accustomed to rely in
serious affairs.'" *William B. Hopke Co., Inc.*, 1982
OSAHRC LEXIS 302 *15, 10 BNA OSHC 1479 (No. 81-206,
1982) (ALJ) (citations omitted). (emphasis added)

19 Clearly any work near or on high voltage power lines should be
20 carefully considered. The warnings and directives of ANSI, company
21 safety plans, industry practices, and common sense, dictate that all
22 power lines should first be considered energized and treated
23 accordingly. However the particular facts in evidence here demonstrate:
24 an experienced foreman relied upon personal knowledge of the Nevada
25 Energy company on the site, the basis for the service call to facilitate
26 **restoration** of power, and the conditions observed. The facts in
27 evidence demonstrate the company foreman made an unconventional but **non-**
28 **hazardous** effort to clear the line and permit the **restoration** of high

1 voltage power. The alleged violative conduct was not **known** nor
2 authorized by the employer. All unknown violative supervisory employee
3 conduct is not imputed to the employer under occupational safety and
4 health law. The rope toss method utilized is certainly not recommended
5 or condoned by this board nor, from the evidence, by the respondent
6 employer. However the jurisdictional authority and mandate of this
7 board is to confirm only violations proven in accordance with
8 established occupational safety and health law. The burden of proof
9 must be met by a preponderance of evidence. Proof of violations under
10 the general duty clause are the most difficult to establish.

11 **The breadth of the general duty clause has made it**
12 **one of the most frequently litigated provisions of**
13 **the Act. The general duty clause is a 'catchall**
14 **provision' designed to redress hazardous conditions**
15 **that are not covered by agency standard setting.**
E.g., Reich v. Arcadian Corp., 110 F.2d 1192, 1196,
16 *17 OSH Cases 1929 (5th Cir. 1997). Anoplate Corp.,*
17 *12 OSH Cases 1678, 1687 (emphasis added)*

18 The board is unable to find a sufficient quantum of evidence and
19 proof under the facts at the worksite to find the employer in violation
20 of Citation 1, Item 2, for a ". . . failure to furnish employment and
21 a place of employment . . . free from a recognized hazard . . .".

22 Based upon the facts, evidence and testimony, it is the decision
23 of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a
24 violation of Nevada Revised Statutes did occur as to Citation 1, Item
25 1, NRS 618.375(1). The classification of the violation is Serious and
26 the proposed penalty in the total sum of Two Thousand Nine Hundred
27 Seventy-Five Dollars (\$2,975.00) are approved and confirmed.

28 The board further finds no violation of Nevada Revised Statutes as
to Citation 1, Item 2, NRS 618.375(1), the general duty clause, and the
proposed classification and penalty are denied.

1 The Board directs complainant, CHIEF ADMINISTRATIVE OFFICER OF THE
2 OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION, DIVISION OF
3 INDUSTRIAL RELATIONS, to submit proposed Findings of Fact and
4 Conclusions of Law to the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW
5 BOARD and serve copies on opposing counsel within twenty (20) days from
6 date of decision. After five (5) days time for filing any objection,
7 the final Findings of Fact and Conclusions of Law shall be submitted to
8 the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD by ordered
9 counsel. Service of the Findings of Fact and Conclusions of Law signed
10 by the Chairman of the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW
11 BOARD shall constitute the Final Order of the BOARD.

12 DATED: This 12th day of May 2014.

13 NEVADA OCCUPATIONAL SAFETY AND HEALTH
14 REVIEW BOARD

15 By /s/
16 JOE ADAMS, Chairman
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