

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,

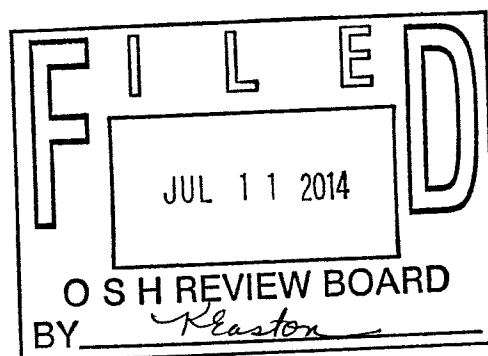
Docket No. LV 14-1688

12 Complainant,

13 vs.

14 NEVADA TRUCK AND TRAILER REPAIR,

15 Respondent.
16 _____/



17 **DECISION**

18 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
19 **HEALTH REVIEW BOARD** at a hearing commenced on the 11th day of June 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. JASON
24 JAVITZ, ESQ., appearing on behalf of Respondent, **Nevada Truck and**
25 **Trailer Repair.**

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

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

1 Citation 1, Item 1 charges a violation of 29 CFR
2 1910.252(a)(2)(vi)(C). Complainant alleges the employer permitted
3 welding operations to occur in the presence of explosive atmospheres on
4 improperly prepared and uncleaned tanks which had previously contained
5 such materials. A GDiesel Truck Tank was not properly prepared and free
6 of hazardous atmospheres prior to an employee welding on the tank.
7 Company internal policies as well as industry standards required a purge
8 time of at least four hours up to as long as twenty-four hours prior to
9 performing work. Only approximately 30 minutes were spent preparing the
10 tank. On May 17, 2013, an employee was killed when the tank exploded
11 almost immediately after the employee began welding operations on the
12 tank. The violation was classified as "willful" and a penalty proposed
13 in the amount of \$28,000.00.

14 Citation 1, Item 2 charges a violation of 29 CFR 1910.252(a)(3)(i).
15 Complainant alleges the respondent employer permitted welding operations
16 to be performed on used tanks without required cleaning to thoroughly
17 assure no flammable materials were present or any substances subjected
18 to heat by flammable or toxic vapors. A GDiesel Tanker Truck was not
19 properly thoroughly cleaned to assure there were no flammable materials
20 or vapors present prior to welding a crack on the tank. Only thirty
21 minutes were spent cleaning and purging the tank which was insufficient.
22 Only one of five compartments of the tanker were drained, cleaned and
23 purged prior to welding on the tank. On May 17, 2013 an employee was
24 killed when a tank exploded almost immediately after the employee began
25 welding operations on the tank. The violation was classified as
26 "willful" and a penalty proposed in the amount of \$28,000.00.

27 Citation 1, Item 3 charges a violation of 29 CFR
28 1910.252(a)(3)(ii). The standard requires all containers be vented to

1 permit the escape of air or gases before preheating or welding. A
2 GDiesel truck tank was not properly vented to permit the escape of
3 residual diesel vapors from the tank. No inert gas was used to purge
4 the tank. Approximately 30 minutes were spent cleaning and purging the
5 truck tank, however company internal policies as well as industry
6 standards require a purge time of at least four hours, up to 24 hours
7 prior to performing welding. Only one compartment out of five was
8 actually cleaned and purged. On May 17, 2013 an employee was killed
9 when the tank exploded almost immediately after the employee began to
10 perform welding operations on the tank. The violation was classified as
11 "willful" and a penalty proposed in the amount of \$28,000.00.

12 Citation 2, Item 1 charges a violation of 29 CFR 1910.243(c)(3).
13 The standard requires safety guards on portable grinders located so as
14 to be between the operator and the wheel during use. The guard shall
15 be configured such that pieces of an accidentally broken wheel will be
16 deflected away from the operator. The complainant alleges the respondent
17 permitted an employee to utilize a Makita Angle Grinder without a guard
18 in place. Operation of the grinder with the guard removed exceeds the
19 maximum exposure angle of 180 degrees and subjects the employee
20 operating the grinder to serious injury should the wheel break or allow
21 sparks and other materials to be thrown at the operator. The violation
22 was classified as "serious" and a penalty proposed in the amount of
23 \$2,800.00.

24 Citation 2, Item 2 charges a violation of 29 CFR
25 1910.252(a)(2)(iv). The standard requires authorization before cutting
26 or welding is permitted and the area inspected by an individual
27 responsible for authorizing cutting and welding operations. The
28 complainant alleges the area to be welded on May 17, 2013 was not

1 inspected by the individual responsible for authorizing welding
2 operations. No written permit to weld was executed by the shop manager
3 who merely viewed pictures of the crack to be welded. The manager did
4 not ensure the tank space was properly purged and prepared prior to
5 allowing the work to continue. The violation was classified as
6 "serious" and a penalty proposed in the amount of \$2,800.00.

7 Citation 2, Item 3a charges a violation of 29 CFR
8 1910.253(b)(2)(iv). The complainant alleges valve protection caps where
9 a cylinder is designated to accept a cap shall always be in place, hand-
10 tight, except when cylinders are in use or connected for use. The
11 complainant failed to ensure the valve caps for the oxygen and acetylene
12 cylinders located on the welding carts at the Southwest side of the
13 repair bay adjacent to the GDiesel Tanker Truck were in place and
14 tightened and the cylinders were not in use. The violation was
15 classified as "serious" and a penalty proposed in the amount of
16 \$2,800.00.

17 Citation 2, Item 3b charges a violation of 29 CFR
18 1910.253(b)(4)(iii). The complainant alleges oxygen cylinders in
19 storage were not separated from fuel-gas cylinders or combustible
20 materials, a minimum distance of 20 feet or by a noncombustible barrier
21 at least five feet in height having a fire-resistance rating of at least
22 one-half hour. The complainant further alleges the employer failed to
23 ensure the oxygen and acetylene containers supplying the cutting torch
24 in the welding shop were separated at least 20 feet from each other.
25 The cylinders were directly adjacent to each other as they were being
26 stored on a welding cart at the Southwest side of the repair bay
27 adjacent to the GDiesel truck tank being welded. The violation was
28 classified as "serious" and a penalty proposed, grouped with and

1 inclusive to Citation 2, Item 3a.

2 Citation 3, Item 1 charges a violation of Nevada Revised Statute
3 (NRS) 618.379(1). The statute requires that in the event of a fatal
4 accident occurring during the course of employment, caused in whole or
5 in part by any equipment located at the site of the accident, no person
6 may dismantle or otherwise move the equipment until the Division has
7 investigated the accident and authorized dismantling or removal of same.
8 The complainant alleges the employer, in spite of multiple instances of
9 advisement otherwise, did not preserve the accident scene in its
10 original configuration until the Division released the scene. The
11 violation was classified as "regulatory" and a penalty proposed in the
12 amount of \$400.00. The subject violation was withdrawn from contest,
13 the violation admitted, and the proposed penalty paid.

14 FACTS

15 On May 17, 2013 at approximately 9:40 to 9:45 a.m., a tanker truck
16 utilized for the transportation of diesel fuel was dropped at the
17 worksite of respondent, Nevada Truck and Trailer Repair. Performance
18 of warranty repair work was scheduled to weld two small holes and a v-
19 shaped crack on the shell of the tank which normally contains diesel
20 fuel. At approximately 9:45 a.m., Scott Thompson, Shop Manager for
21 respondent, washed a compartment of the tank in the area where the
22 scheduled repairs were required. There were five storage compartments
23 within the tanker truck, but only one was washed. The area to be
24 repaired was an approximate 6-8 inch crack in the tank body itself. To
25 purge the compartment a small blower inside the shop was utilized. The
26 tank compartment was purged for approximately 30 minutes. Mr. Thompson
27 notified employee Greg Wong the tank was ready for him to commence
28 welding repairs.

1 The company safety policies proscribed the length of time a tank
2 should be purged prior to performing maintenance or repair work when a
3 tank previously contained a flammable or combustible material. The
4 company written safety program required forced air ventilation pumping
5 and particularly that "Tanker Vessels must be washed down, blown down,
6 and measured for vapors prior to repairs inside or out." Additional
7 company safety policies provide notice that truck tanks carrying fuel
8 have the potential to contain flammable or explosive atmospheres.

9 Respondent had recently provided training to its employees,
10 including management employees, on its confined space program and
11 focused on combustible gas detection practices. At that time it
12 discovered the combustible gas detection equipment was broken and out
13 of service.

14 Interviews of the Shop Manager provided information that the
15 purging process for non-entry repairs is identical to the confined space
16 procedures regarding combustible materials and the cautionary measures
17 required by the company. Manufacturer notification on the TIG welding
18 machine provided additional notice that "welding on closed containers
19 such as tanks, drums or pipes can cause them to blow up. Check and be
20 sure the area is safe before doing this welding." Shop Manager Thompson
21 admitted this was not the first time welding had occurred on the subject
22 type tanker trucks as it had been previously performed on three or four
23 truck exteriors.

24 A notice was posted on the wall of the shop entitled "Procedures
25 for Flammable Tank Maintenance" and provided "Under no circumstances
26 will truck, tank, or trailer be entered, maintained, or repaired unless
27 said truck, tank or trailer has been degassed in the manner set forth
28 in the following procedures. . . . All vessels will be drained in open

1 air prior to being brought to wash bay . . . after cold water rinsing
2 vessel will be taken to evacuation area and connected to approved high
3 volume fresh air fan . . . All compartments will be treated as if
4 maintenance is required . . . A minimum of four (4) hours is required
5 for the stated procedure . . .".

6 Shop Manager, Scott Thompson, allowed welding operations to occur
7 within approximately 30 minutes of the tank delivery to the respondent
8 worksite. He did not designate precautions to be followed when granting
9 authorization to proceed. He issued no written permit for the welding
10 to commence. The interaction for inspection between the Shop Manager
11 and the employee responsible for conducting the welding consisted of
12 viewing the results of the preparatory grinding on the employee cell
13 phone before the welding was permitted to commence. The purging was not
14 performed in accordance with company safety policies. The tank
15 atmosphere was not measured to ensure that it was safe to begin welding
16 operations on the tank which previously contained diesel fuel. Only one
17 of five compartments was cleaned and purged during a 30 minute time
18 frame.

19 Respondent welder employee Greg Wong was killed after following
20 Shop Manager Thompson's instructions to perform welding repairs on the
21 tank. He commenced the work within 30 minutes after delivery and washing
22 of one compartment of the tank at the respondent worksite.

23 The regulatory violation at citation 3 was admitted and withdrawn
24 from contest. The citation charged the accident scene was altered,
25 including removal of the procedures for flammable tank maintenance, the
26 grinder lodged under a truck after the explosion and was removed by the
27 respondent, a cord was moved to permit insurance investigator inspection
28 and the welding machine used by the decedent was moved from the original

1 location.

2 Nevada OSHA Compliance Safety and Health Officer (CSHO) James
3 Andrews and Industrial Hygienist (IH) Supervisor John Hutchinson
4 determined the existence of violative conditions under specific
5 provisions of 29 CFR 1910 and recommended OSHA citations against the
6 respondent employer for unsafe welding working conditions. Additional
7 worksite violations discovered and recommended for citations included
8 the Makita Angle Grinder utilized by the decedent prior to welding
9 operations was not equipped with a guarding device. Oxygen and acetylene
10 cylinders were not capped with valve protection nor separated by 20 feet
11 when not in use. The area for welding had not been inspected by the
12 individual responsible for authorizing welding operations.

13 Nevada OSHA issued eight citations and assessed penalties in the
14 total amount of \$92,800.00.

15 Complainant and respondent stipulated to the admission of evidence
16 contained in complainant's Exhibits 1, 2 and 3. Evidence and testimony
17 were presented through complainant witnesses CSHO James Andrews and IH
18 Supervisor John Hutchison.

19 Respondent presented witness testimony through Mr. Brad Folkins,
20 General Manager for River City Petroleum, the parent company of Nevada
21 Truck and Trailer Repair.

22 Findings of violations for cited standards requires proof by a
23 preponderance of evidence and applicable law promulgated and developed
24 under the Occupational Safety & Health Act.

25 In all proceedings commenced by the filing of a
26 notice of contest, the burden of proof rests with
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. *Armor
Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958

(1973).

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

A "**willful**" violation is established upon a preponderance of evidence based upon NRS 618.635 which provides in pertinent part:

Any employer who **willfully** or repeatedly violates any requirements of this chapter, any standard, rule, regulation or order promulgated or prescribed pursuant to this chapter, may be assessed an administrative fine of not more than \$70,000 for each violation, but not less than \$5,000 for each willful violation. (emphasis added)

A "**serious**" violation is established upon a preponderance of evidence in accordance with NRS 618.625(2) which provides in pertinent part:

. . . a **serious** violation exists in a place of employment if there is a **substantial probability** that death or serious physical harm 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 at that place of employment unless the employer did not and could not, with the exercise of reasonable diligence, know the presence of the violation. (emphasis added)

The **burden of proof** to confirm a violation rests with OSHA under Nevada law (NAC 618.788(1)); but after establishing same, **the burden shifts to the respondent to prove any recognized defenses**. See *Jensen Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶ 23,664 (1979). Accord,

1 Marson Corp., 10 OSHHC 2128, 1980 OSHC 1045 ¶ 24,174 (1980).

2 An employer has the affirmative duty to anticipate
3 and protect against **preventable** hazardous conduct
4 by employees. *Leon Construction Co.*, 3 OSHC 1979,
5 1975-1976 OSHD ¶ 20,387 (1976). **Employee**
6 **misbehavior, standing alone, does not relieve an**
7 **employer.** Where the Secretary shows the existence
8 of violative conditions, an employer may defend by
9 showing that the employee's behavior was a
10 deviation from a uniformly and **effectively enforced**
11 **work rule,** of which deviation the employer had
12 neither actual **nor constructive** knowledge. *A. J.*
13 *McNulty & Co., Inc.*, 4 OSHC 1097, 1975-1976 OSHD ¶
14 20,600 (1976). (emphasis added)

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

20 Evidence that the employer effectively communicated
21 and enforced safety policies to protect against the
22 hazard permits an inference that the employer
23 justifiably relied on its employees to comply with
24 the applicable safety rules and that violations of
25 these safety policies were not **foreseeable or**
26 **preventable.** *Austin Bldg. Co. v. Occupational*
27 *Safety & Health Review Comm.*, 647 F.2d 1063, 1068
28 (10th Cir. 1981). (emphasis added)

When an employer proves that it has effectively
communicated and enforced its safety policies,
serious citations are dismissed. See *Secretary of*
Labor v. Consolidated Edison Co., 13 O.S.H. Cas.
(BNA) 2107 (OSHRC Jan. 11, 1989); *Secretary of*
Labor v. General Crane Inc., 13 O.S.H. Cas. (BNA)
1608 (OSHRC Jan. 19, 1988); *Secretary of Labor v.*
Greer Architectural Prods. Inc., 14 O.S.H. Cas.
(BNA) 1200 (OSHRC July 3, 1989).

22 DISCUSSION

23 At **Citation 1, Item 1**, the credible testimony of Messrs. Andrews
24 and Hutchison, the stipulated documentary evidence, including the
25 unrefuted time line for delivery of the tanker truck to respondent for
26 commencement of the welding work, and the employee interview statements
27 at Exhibit 1, pages 22-37, particularly those of Shop Manager Thompson,
28 at Exhibit 1, pages 36 and 37, established the elements of violation at

1 Citation 1, Item 1 by a preponderance of evidence. The cited standard
2 was **applicable** to the welding work conducted by the respondent employer
3 at its worksite. There was no challenge to any particular citation
4 references. The non-compliant **violative conditions** leading to the
5 accident were unrefuted. Respondent admitted company safety policies
6 were not followed by the Shop Manager, Mr. Scott Thompson. He did not
7 follow safety requirements to properly prepare the tank subject of
8 welding nor clean and fully purge hazardous atmospheres prior to
9 authorizing employee Wong to commence welding operations. Mr. Thompson
10 did not issue the required permit for the welding to proceed. **Employee**
11 **exposure** was clearly established based upon the evidence including
12 witness statements, investigative findings, and the undisputed resultant
13 death of employee Wong who was following the shop manager's instructions
14 by conducting welding operations on the tank at the respondent worksite.
15 **Employer knowledge** both direct and constructively by imputation was
16 unrefuted. Company issued safety policies and requirements were not
17 only provided and available but also notifications posted throughout the
18 shop area. Mr. Thompson was the titular, recognized, and only identified
19 supervisory employee for welding at the worksite. Mr. Folkins was the
20 responsible regional executive safety officer of the respondent company.
21 The testimony and documentary evidence clearly established the company
22 and welding employees were aware of dangerous conditions associated with
23 welding work on tanks potentially containing explosive atmospheres
24 without the required preparation, cleaning, purging and particularly the
25 required time lapse before performance of work.

26 At **Citation 1, Item 2** the unrefuted testimonial and documentary
27 evidence, together with witness statements, established the tanks were
28 not properly cleaned; and at **Citation 1, Item 3** not vented or purged of

1 the hazardous atmospheres for the required safe time period or under the
2 safety policies established by the respondent company. The elements of
3 proof of violation were met at Citation 1, Items 2 and 3 as also
4 referenced at Item 1.

5 The obligations imposed upon the employer under the Occupational
6 Safety and Health Act at Citation 1, Items 1, 2 and 3, required **specific**
7 **and affirmative action** by the respondent to assure and maintain
8 recognized safe welding conditions imposed by law and under its own
9 safety program.

10 Mr. Thompson identified himself as the "Shop Manager", held a
11 company business card reflecting same, and recognized from the
12 preponderant evidence to occupy a supervisory role. Respondent witness
13 Folkins admitted Mr. Thompson was "Shop Manager but . . . with a limited
14 role . . .". The evidence is substantial, clear, convincing and
15 preponderant that the managerial responsibilities and authority for
16 overseeing the company direct shop welding work were vested in Mr.
17 Thompson. The evidence is clear notwithstanding testimony of general
18 safety manager Folkins that he (Thompson) did not occupy an "executive
19 management . . . level," and ". . . without the right to fire
20 employees". There was no welding supervisory employee other than Mr.
21 Thompson at the subject site to oversee the welding operations, provide
22 authorization to commence welding, call in and assign welder Wong to his
23 duties, inspect the area to be welded, or issue the required permit to
24 allow welding to commence. General safety manager Folkins, a senior
25 level company officer with eight facilities to oversee, was not on the
26 subject site regularly. He inspected or visited each of the company
27 plant facilities only approximately once each month. There was no
28 evidence Mr. Folkins or any other company management personnel

1 supervised or assessed Mr. Thompson's work, competence or safety
2 practices despite the dangerous working conditions.

3 The credible evidence on the record was clear, convincing,
4 substantial and preponderant that Shop Manager Thompson believed only
5 one of the five tank chambers required purging, **even after the explosion**
6 **and death occurred.** He maintained that position notwithstanding the
7 company safety policy at Exhibit 3, page 286, which **specifically**
8 **required all chambers be purged** regardless of the particular area to be
9 welded and **all treated as if they were subject to maintenance.**

10 To confirm a **willful violation** under recognized Occupational Safety
11 and Health Law, a preponderance of evidence must support the finding
12 that violations were committed with **intentional knowing, or voluntary**
13 **disregard** for the requirements of the act, **or with plain indifference**
14 **to employee safety.**

15 *E.g., National Eng'g & Contracting Co. v. Herman,*
16 *181 F.3d 715, 18 OSH Cases 2114 (6th Cir. 1999);*
17 *Caterpillar Inv. v. Herman, 122 F.3d 437, 17 OSH*
18 *Cases 2121 (7th Cir. 1997); Valdak Corp. v. OSHRC,*
19 *73 F.3d 1466, 17 OSH Cases 1492 (8th Cir. 1996);*
20 *Conie Const v. Reich, 73 F.3d 382, 17 OSH Cases*
21 *1409 (D.C. Cir. 1995); Reich v. Trinity Indus., 16*
22 *F.3d 1149, 16 OSH Cases 1670 (11th Cir. 1994);*
23 *Universal Auto Radiator Mfg. Co. v. Marshall, 631*
24 *F.2d 20, 8 OSH Cases 2026 (3d Cir. 1980);*
25 *Pepperidge Farm, Inc., 17 OSH Cases 1993, 1998-2000*
26 *(Rev. Comm'n 1997). Occupational Safety and Health*
27 *Law, 3rd Ed., Bloomberg BNA, page 264*

22 A focal point of the willful classification is evidence of the
23 employer's state of mind.

24 A willful violation is distinguished from a
25 nonwillful violation by "an **employer's heightened**
26 **awareness** of the illegality of the **conduct or**
27 **conditions** and **by a state of mind, i.e. conscious**
28 **disregard or plain indifference for the safety and**
health of employees." *General Motors Corp., 14 OSH*
Cases 2064 (Rev. Comm'n 1991). A showing of evil
or malicious intent is not necessary to establish
willfulness. McKie Ford, Inc. v. Secretary of

1 Labor, 191 F.3d 853, 18 OSH Cases 1905 (8th Cir.
2 1999). Occupational Safety and Health Law, 3rd Ed.,
Bloomberg BNA, page 264 (emphasis added)

3 An employer's knowledge of an applicable legal
4 requirement also can be demonstrated through an
5 **employer's communications with OSHA personnel, or**
6 **a supervisor's admission of familiarity with the**
7 **standards.** *Interstate Erectors Inc.*, 74 F.3d 223,
229, 17 OSH Cases 1522 (10th Cir. 1996; *Pentecost*
Contracting Corp., 17 OSH Cases 1953, 1955 (Rev.
Comm'n 1997). *Conie Constr. Inc.*, 73 F.2d 382, 384
17 OSH Cases 1409 (D.C. Cir. 1995).

8 The overwhelming preponderant evidence in the record established
9 Shop Manager Thompson blatantly disregarded each of the critical company
10 work safety policies and standard requirements charged in Citation 1,
11 Items 1, 2 and 3. He acted with **plain indifference** to employee safety.
12 He voluntarily **disregarded** the safety requirements to allow venting and
13 purge the tanks. At Exhibit 1, page 286 the company safety policy
14 specifically requires the purging of all tank chambers rather than only
15 one even if it's the sole subject of the welding work. Mr. Thompson
16 reconfirmed his belief that only one tank needed purging in his opinion
17 notwithstanding the company policy and OSHA standards even **after the**
18 **accident.**

19 **Intentional noncompliance with a standard will**
20 **usually be characterized as willful even if that**
21 **noncompliance is based on the employer's belief**
22 **that compliance was unnecessary for employee safety**
23 **or that the methods implemented by the employer**
24 **were superior to those called for by OSHA's**
25 **standard.** *Conie*, 73 F.3d 382; *Donovan v. Capital*
City Excavating Co., 712 F.2d 1008, 1010, 11 OSH
26 Cases 1581 (6th Cir. 1983) (foreman's belief that
trench was safe); *F.X. Messina Constr. Corp. v.*
OSHRC, 505 F.2d 701, 2 OSH Cases 1325 (1st Cir 1974)
(same). *Fluor Daniel v. OSHRC*, 295 F.3d 1232,
1241, 19 OSH Cases 1945, 1951 (11th Cir. 2002).
Occupational Safety and Health Law, 3rd Ed.,
Bloomberg BNA, page 266 (emphasis added)

27 **Intentional disregard for the requirements of a**
28 **standard and plain indifference to employee safety**
are independent elements of willfulness. Thus,

1 even if an employer did not actually know of the
2 specific requirements of a standard or the Act,
3 willfulness can be found if the **employer's conduct**
4 **or attitude exhibits plain indifference to employee**
5 **safety.** In *A. E. Staley v. Secretary of Labor*, the
6 District of Columbia Circuit clarified the
7 difference between the two independent elements of
8 willfulness: intentional disregard of the
9 requirements of the regulation and plain
10 indifference to employee safety. While **intentional**
11 **disregard requires employer knowledge** of the
12 specific violative condition, **plain indifference**
13 **does not require direct evidence that the employer**
14 **knew of each individual violation.** Instead, plain
15 indifference **substitutes for knowledge** of the
16 specific condition as a means of inferring the
17 employer's willful intent. *Beta Constr Co.*, 16 OSH
18 Cases 1435, n.7 (Rev. Comm'n 1993). *Valdak Corp.*
19 *v. OSHRC*, 73 F.3d 1466, 17 OSH Cases 1492 (8th Cir.
20 1996); *National Eng'g & Contracting Co.*, 18 OSH
21 Cases 1075, 1080-81 (Rev. Comm'n 1997), *aff'd*, 181
22 F.3d 715, 721-22 (6th Cir. 1999). 295 F.3d 1341, 19
23 OSH Cases 1937 (D.C. Cir. 2002). Occupational
24 Safety and Health Law, 3rd Ed., Bloomberg BNA, page
25 267 (emphasis added)

14 The burden of proof to establish willfulness need not show that an
15 employer was aware of the illegality of its acts or omissions and
16 consciously disregarded the requirements of the act but rather **only**
17 **plainly indifferent to employee safety and health.** (*A. E. Staley*, supra
18 at page 14.)

19 The evidence and testimony by a preponderance established the
20 employer maintained safety programs and policies but failed to
21 reasonably implement or enforce them. Shop Manager Thompson, the **only**
22 employee directly supervising the welding operations at the site,
23 completely disregarded the procedures and precautionary measures
24 required by the act. Mr. Thompson improperly cleaned the tanks, did not
25 allow sufficient time for purging, did not believe all chambers required
26 purging, and authorized the commencement of welding by Mr. Wong without
27 satisfying the specific safety requirements. The employer respondent
28 had no other welding supervisory employee on the premises for safety

1 oversight, and permitted the operations to occur through its safety and
2 supervisory personnel. There was no competent evidence the respondent
3 or its regional safety representative Folkins monitored, reviewed
4 enforced or periodically assured Mr. Thompson the manager directly
5 responsible for extremely dangerous working conditions was following
6 company or OSHA welding safety requirements. The respondent admitted
7 the inappropriate and disobedient conduct of Shop Manager Thompson, yet
8 asserted, without any supporting evidence, that respondent should not
9 be liable under the facts in evidence and applicable law.

10 Courts and the Commission continue to base willful
11 violations on the **imputed knowledge** and **willful**
12 **actions or omissions** of a company's officers or
13 **other supervisory personnel. Corporate knowledge,**
14 **although imputed through individuals,** is
15 institutional in nature and is **charged to the**
16 **corporation** even after individual supervisors have
17 transferred or departed. *A.E. Staley Mfg. Co. v.*
18 *Secretary of Labor*, 295 F.3d 1341, 1347-48, 19 OSH
19 Cases 1937 (D.C. Cir. 2002); *Caterpillar Inc.*, 122
20 F.3d at 440, 17 OSH Cases 2121; *Donovan v. Capital*
21 *City Excavating Co.*, 712 F.2d 1008, 11 OSH Cases
22 1581 (6th Cir. 1983); *Rawson Contractors, Inc.*, 20
OSH Cases 1078, 1080 (Rev. Comm'n 2003); *Revoli*
23 *Constr. Co.*, 19 OSH Cases 1682, 1684 (Rev. Comm'n
24 2001); *CBI Servs., Inc.*, 19 OSH Cases 1591, 1607
25 (Rev. Comm'n 2001); *Fiore Constr.*, 19 OSH Cases
26 1408 (Rev. Comm'n 2001). See also *United States v.*
27 *Ladish Malting Co.*, 135 F.3d 484, 18 OSH Cases 1133
28 (7th Cir. 1998) (imputing knowledge of nonsupervisory
employees with duty to report safety violations).
Caterpillar Inc., 122 F.3d at 441, 17 OSH Cases
2121. Occupational Safety and Health Law, 3rd Ed.,
Bloomberg BNA, page 265

23 In the present case, the testimony and evidence established the
24 egregious voluntary disregard and plain indifference to employee safety
25 on the part of Shop Manager Thompson is imputed to the respondent Nevada
26 Truck and Trailer Repair. Members of respondent management
27 knowledgeable in welding dangers and safety requirements, including Mr.
28 Folkins, knew or should have known in the exercise of reasonable

1 diligence that its shop manager and other employees were carelessly
2 engaged in welding and related work on practices well recognized highly
3 flammable tank vessels requiring **extraordinary** measures of safety
4 protection. In spite of this imputed knowledge, no adequate or
5 meaningful safety measures were **implemented**, no reasonable **oversight** in
6 place, no appropriate reasonable safety **assurance monitoring** nor
7 adequate enforcement implemented to provide a place of employment safe
8 from the hazards identified in the specific standards cited at Citation
9 1, Items 1, 2 and 3.

10 A willful violation is differentiated from a non-willful violation
11 by a heightened awareness, a conscious disregard, or plain indifference
12 to employee safety. Warning signs were posted all through the shop so
13 respondent demonstrated a "heightened awareness" of the dangerous
14 working conditions. However, the company general safety manager Folkins
15 only inspected each site monthly on average, yet permitted a lowly
16 regarded shop manager to oversee extremely dangerous work. The conduct
17 shows a conscious disregard for employee safety. Mr. Thompson, whose
18 actions are imputed to respondent, demonstrated **before and after the**
19 **accident a "conscious disregard"** for employee safety.

20 The respondent employer knew, or with the exercise of reasonable
21 diligence, could and should have known of the violative conditions. All
22 of the charged violations occurred in **plain view**, with the **direct**
23 **supervision** of the **company Shop Manager** and under the company **executive**
24 **safety managers' oversight and general responsibility**.

25 ". . . (A) **supervisor's knowledge** of deviations
26 from standards . . . is properly **imputed to the**
27 **respondent employer. . .**" *Division of Occupational*
Safety and Health vs. Pabco Gypsum, 105 Nev. 371,
775 P.2d 701 (1989). (emphasis added)

28 The penalty calculation procedures for willful violations have been

1 subject of review by the Federal courts and establish legal case
2 precedent guidelines for appropriate assessment of penalties under
3 multiple willful violations. The penalty assessment at Citation 1, Item
4 1 for the willful violation of \$28,000.00 is reasonable and approved.
5 However the penalty assessment at Citation 1, Item 2 of \$28,000.00 is
6 grouped with that at Citation 1, Item 1. While the violation was
7 **technically independent**, the violative conduct involving lack of
8 **cleaning** and properly **preparing uncleaned** tanks is very similar. The
9 penalty is duplicitous, merely punitive in nature, and does not warrant
10 the additional independent monetary assessment. The penalty at Citation
11 1, Item 3, is reasonable, appropriate and approved at \$28,000.00.

12 In *Kaspar Wire Works v. Secretary of Labor*, 268
13 F.3d 1123, 19 OSH Cases 1661 (D.C. Cir. 2001),
14 *aff'g* 18 OSH Cases 2178 (Rev. Comm'n 2000), the
15 court rejected the employer's argument that because
16 "egregious and willful" violations are not within
17 the OSH Act's specific enumeration of violations,
18 Congress did not authorize **the assessment of per**
19 **instance penalties**. The court found that Section
20 17(a) could not be clearer in providing for the
21 assessment of a civil penalty "for **each violation**."
22 *Id.* at 1130. The court observed that the
23 availability of such penalties under the OSH Act is
24 consistent with general principles applicable to
25 violations of statutory duties and that the
26 statutory language is for "egregious and willful"
27 violations as defined by OSHA. *Id.* at 1130-31.

21 At Citation 2, Item 1, 29 CFR 1910.243(c)(3), the evidence was
22 undisputed, unequivocal, and established by a preponderance that
23 employee Wong was utilizing a Makita Angle Grinder without the
24 manufacturer guard in place. He was working under the authority and
25 direct supervision of Shop Manager Thompson. The grinder was new; the
26 guard was found in the original box that contained the grinder. After
27 the accident the grinder was located without the guard. While Mr. Wong
28 was a trained employee, the employer knew or should have known that he

1 was performing, grinding work without the guard in place. The evidence,
2 both direct and by lawful inference, is that Shop Manager Thompson
3 oversaw the grinding work and approved its completion prior to
4 authorizing the commencement of welding.

5 The potential serious injury or harm that can occur through
6 operation of a grinder without the guard was established through the
7 testimonial evidence. Serious injury or harm that can result from a
8 wheel breaking off a grinder without a guard or causing sparks to strike
9 the operator is recognized and supported by the direct evidence and
10 reasonable lawful inference.

11 Respondent admitted that both employees Wong and Thompson were
12 guilty of violating the company safety policies but argued it was not
13 the fault of respondent. However, the violative conduct of Mr. Thompson
14 as Shop Manager is imputed to the respondent employer as well as the
15 lack of meaningful safety enforcement by general safety manager Folkins
16 under well-recognized and established occupational safety and health
17 law.

18 Respondent asserted the recognized defense of **unpreventable**
19 **employee misconduct.**

20 In order to establish an unpreventable employee
21 misconduct defense, the employer must establish
22 that it had: established work rules designed to
23 prevent the violation; **adequately communicated**
24 **those work rules** to its employees (including
25 **supervisors**); taken **reasonable steps to discover**
26 **violations of those work rules**; and **effectively**
27 **enforced those work rules** when they were violated.
28 *New York State Electric & Gas Corporation*, 17 BNA
OSHC 1129, 1195 CCH OSHD ¶ 30,745 (91-2897, 1995).
(Emphasis added)

26 Although there is a similar doctrine of **supervisory**
27 **misconduct**, some cases characterize it not as an
28 affirmative defense but as **a rebuttal of the**
imputation to the employer of the supervisor's
knowledge. The Commission has stated that

1 involvement by a supervisor in a violation is
2 "strong evidence that the employer's safety program
3 was lax." "Where a supervisory employee is
4 involved, the proof of unpreventable employee
5 misconduct is more rigorous and the defense is more
6 difficult to establish since it is the supervisors'
7 duty to protect the safety of employees under their
8 supervision." *Daniel Constr. Co.*, 10 OSH Cases
9 1549, 1552 (Rev. Comm'n 1982). *Consolidated*
10 *Freightways Corp.*, 15 OSH Cases 1317, 1321 (Rev.
11 Comm'n 1991). *Seyforth Roofing Co.*, 16 OSH Cases
12 2031 (Rev. Comm'n 1994). Rabinowitz Occupational
13 Safety and Health Law, 2008, 2nd Ed., page 157.
14 (emphasis added)

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

20 It is well settled that the knowledge, actual or
21 constructive, of an employer's supervisory
22 personnel will be imputed to the employer, unless
23 the employer establishes substantial grounds for
24 not doing so. *Ormet Corp.*, 14 BNA OSHC 2134, 1991-
25 93 CCH OSHD ¶ 29,254 (No. 85-531 1991). The
26 Commission held that once there is a prima facie
27 showing of employer knowledge through a supervisory
28 employee, the employer can rebut that showing by
establishing that the failure of the supervisory
employee to follow proper procedures was
unpreventable. In particular, the employer must
establish that it had relevant work rules that it
adequately communicated and effectively enforced.
Consolidated Freightways Corp., 15 BNA OSHC 1317,
1991-93 CCH OSHD ¶ 29,500 (No. 86-531, 1991).
(emphasis added)

21 While the employer demonstrated a safety program, work rules,
22 warnings and postings on the shop wall, there was insufficient evidence
23 and proof of effective enforcement to avoid the findings of violation.
24 Respondent provided no evidence that it adequately communicated safety
25 policies and rules to employees, including supervisory employee
26 Thompson. While company training on flammable materials occurred just
27 a week before the accident, the respondent did not assure adequate
28 communication or effective enforcement of the work rules. As

1 importantly, the respondent did not demonstrate that it took **meaningful**
2 **steps to discover** violations involving shop management, welding
3 oversight procedures, and the careless disregard for safety demonstrated
4 by the conduct through Shop Manager Thompson. The defense of
5 unpreventable employee misconduct must fail because violative conditions
6 were **foreseeable, in plain view** and **reasonably preventable**. Adequate
7 communication and **meaningfully enforced** work rules could have prevented
8 the violative conditions and the citations. See *Jensen Construction*
9 *Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10
10 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

11 **Employer knowledge, foreseeability, and lack of safety enforcement**
12 **by supervisory personnel prevents reliance upon the defense of**
13 **unpreventable employee misconduct to relieve respondent of liability.**

14 The defense of unpreventable employee misconduct and the burden of proof
15 to satisfy same requires a preponderance of evidence under applicable
16 law. There was insufficient evidence to establish the defense and rebut
17 the proof of violations.

18 At Citation 2, Item 2, 29 CFR 1910.252(a)(2)(iv) there was
19 insufficient proof to establish that the area subject of welding was
20 "not inspected". The un rebutted evidence demonstrated the welding area
21 was inspected via cell phone camera picture. While the inspection was
22 certainly not at a high level, the Board must find substantial and
23 preponderant evidence to find a specific violation.

24 The Secretary's obligation to demonstrate the
25 alleged violation by a preponderance of the
26 reliable evidence of record **requires more than**
27 estimates, assumptions and **inferences** . . . [t]he
28 Secretary's **reliance on mere conjecture is**
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

1 OSAHRC LEXIS 302 *15, 10 BNA OSHC 1479 (No. 81-206,
2 1982) (ALJ) (citations omitted). (emphasis added)

3 At Citation 2, Item 3a, 29 CFR 1910.253(b)(2)(iv), there was
4 insufficient evidence by a preponderance to establish a violation the
5 valve caps were not in place under the conditions and terms of the
6 specific standard. The violation was not proven because the cylinders
7 appeared ". . . on the cart . . . in use . . . and connected". The
8 standard requires the caps to be in place when the cylinders are "not
9 in use." Here the only competent evidence available including the
10 pictorial exhibits reflected the cylinders were **not** in a stored status
11 and therefore the citation **not applicable** and the proof insufficient to
12 find a violation.

13 At Citation 2, Item 3b, 29 CFR 1910.253(b)(4)(iii), there was no
14 satisfaction of the burden of proof to establish the cited violation.
15 The available evidence demonstrated no violative conditions at
16 photographic exhibits 144a, 145, 146a and 147. There was no
17 preponderance of evidence the oxygen cylinders were "in storage" or
18 "being stored" as charged in the citation. Rather, the pictorial
19 evidence demonstrated an **unstored** condition. Accordingly the standard
20 was **not applicable** to the facts in evidence and no sufficient proof to
21 establish a violation.

22 CONCLUSION

23 Based upon the clear, convincing, substantial and preponderant
24 evidence, it is the decision of the Nevada Occupational Safety and
25 Health Review Board:

26 1. A willful violation of Nevada Revised Statutes did occur at
27 Citation 1, Item 1, 29 CFR 1910.252(a)(2)(vi)(C). A penalty in the
28 amount of TWENTY EIGHT THOUSAND DOLLARS (\$28,000.00) for the willful

1 violation is reasonable, appropriate and confirmed.

2 2. A willful violation of Nevada Revised Statutes did occur at
3 Citation 1, Item 2, 29 CFR 1910.252(a)(3)(i). The separate penalty
4 proposed in the amount of TWENTY EIGHT THOUSAND DOLLARS (\$28,000.00) is
5 denied and the penalty grouped as inclusive with that at Citation 1,
6 Item 1.

7 3. A willful violation of Nevada Revised Statutes did occur at
8 Citation 1, Item 3, 29 CFR 1910.252(a)(3)(ii). A penalty in the amount
9 of TWENTY EIGHT THOUSAND DOLLARS (\$28,000.00) is reasonable, appropriate
10 and confirmed.

11 4. A serious violation of Nevada Revised Statutes did occur at
12 Citation 2, Item 1, 29 CFR 1910.243(c)(3). The proposed penalty of TWO
13 THOUSAND EIGHT HUNDRED DOLLARS (\$2,800.00) is reasonable, appropriate
14 and confirmed.

15 5. No violation of Nevada Revised Statutes occurred at Citation
16 2, Item 2, Item 3a and Item 3b. The violations, classifications and
17 proposed penalties are denied.

18 6. A regulatory violation of Nevada Revised Statutes did occur
19 at Citation 3, Item 1, NRS 618.379(1), and the penalty of FOUR HUNDRED
20 DOLLARS (\$400.00) is confirmed.

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

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

4 DATED: This 11th day of July, 2014.

5 NEVADA OCCUPATIONAL SAFETY AND HEALTH
6 REVIEW BOARD

7 By /s/
8 JOE ADAMS, Chairman
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