

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,

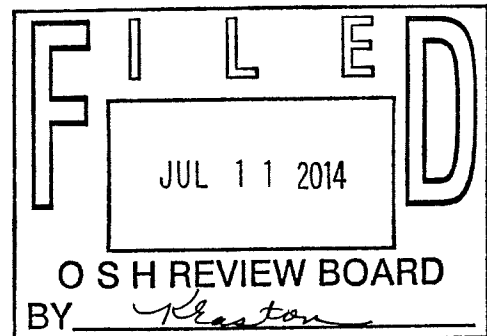
Docket No. LV 14-1692

Complainant,

12 vs.

13 NATIONAL PIPELINE CONTRACTORS, LLC,

Respondent.



14
15 **DECISION**

16 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
17 **HEALTH REVIEW BOARD** at a hearing commenced on June 11 and 12, 2014, in
18 furtherance of notice duly provided according to law, MS. SALLI ORTIZ,
19 ESQ., counsel appearing on behalf of the Complainant, **Chief**
20 **Administrative Officer of the Occupational Safety and Health**
21 **Administration, Division of Industrial Relations** (OSHA); and MR. DAVID
22 STEPHENS, ESQ., appearing on behalf of Respondent, **National Pipeline**
23 **Contractors, LLC.**

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

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

1 Citation 1, Item 1, charges a violation of 29 CFR 1926.21(b)(2).
2 Complainant alleged the employer failed to instruct employees working
3 in an excavation on recognition and avoidance of unsafe conditions and
4 the regulations applicable to the work environment to control or
5 eliminate any hazards or exposure to injury. The alleged violation was
6 classified as "Serious" and a penalty proposed in the amount \$4,410.00.

7 Citation 1, Item 2, charges a violation of 29 CFR 1926.651(j)(2).
8 Complainant alleged the respondent employer failed to protect employees
9 from excavated or other materials that could pose a hazard by falling
10 or rolling into excavations. On the date of inspection excavated
11 material was located at the edge of an excavation approximately 10-1/2
12 feet above the bottom where an employee was operating hand-held
13 compaction equipment. The violation was classified as "Serious" and a
14 penalty proposed in the amount of \$2,520.00.

15 Citation 1, Item 3, charges a violation of 29 CFR 1926.652(a)(1).
16 Complainant alleged respondent employees were not protected while
17 working in an excavation from cave-ins by an adequate protective system
18 designed in accordance with subparagraphs of the cited standard. The
19 violation was classified as "Serious" and a penalty proposed in the
20 amount of \$3,150.00.

21 Citation 2, Item 1, charges a violation of 29 CFR 1904.32(a)(1).
22 Complainant alleged the employer did not verify log entries were
23 complete and accurate as required by the standard. The violation was
24 classified as "Other" and a zero penalty proposed. The subject
25 violation was not contested and admitted by respondent.

26 Counsel stipulated to the entry of complainant Exhibits 1 through
27 3 and respondent Exhibits A-1 and B-1.

28 Counsel for complainant presented testimony and evidence through

1 Compliance Safety and Health Officer (CSHO) Jeffery Belcher. The
2 witness identified and testified on exhibits admitted in evidence by
3 stipulation of counsel. Mr. Belcher referenced the narrative report and
4 described his investigation and findings at the respondent worksite
5 located at Silverado Ranch Road in Las Vegas, Nevada. On September 13,
6 2013 CSHO Belcher observed excavations without shoring or cave-in
7 protection, stored material ("spoils"), and respondent employees engaged
8 in work preparing the area for installation of a storm drain.

9 CSHO Belcher took samples of the soils materials; one from the
10 spoils pile near a portion of the storm drain excavation and another
11 from the spoils pile in the area identified as the water vault
12 excavation. He obtained the "boring logs" prepared from several
13 excavation locations throughout the work site. (Exhibit 2) The logs
14 included calculations of trench depths and soils consistencies. The
15 collected soils tested by Nova Geological Inspection Services were
16 reported as **type A** (loose) materials. (Exhibit 2, pages 88-92) Mr.
17 Belcher confirmed the various trench depths at locations requiring cave-
18 in protection under OSHA standards on the bases of his observations,
19 photographs and employee interview statements.

20 During the "walk around" inspection, when asked by CSHO Belcher why
21 spoils piles were not two feet back from the edge of the unshored ditch,
22 superintendent Rumsey explained the loader cleaned up the area and
23 pushed some material back near the edge of the excavation. He further
24 stated the subject work was still in process.

25 When a hand-held compactor known as a "jumping jack" or "Wacker"
26 was observed and photographed by CSHO Belcher in an unshored area of the
27 excavation at a depth over five feet and showing evidence of recent
28 compaction work, Mr. Rumsey stated ". . . there would be no reason for

1 the Wacker to be there without someone operating it. . .".

2 Upon CSHO inquiry to verify the trench depths, Mr. Rumsey stated
3 an agreeable measurement for the deeper locations was 9-1/2 feet as
4 measured from the bottom of the excavation to the first bench station.
5 CSHO Belcher confirmed the trench depth where the "Wacker" was located
6 was far in excess of the five foot requirement for cave-in protection
7 or shoring and identified the photographic exhibit at page 74 in
8 evidence.

9 During employee interviews on the day of the inspection, respondent
10 foreman Mr. Fernando Torres admitted he observed an employee "running
11 the Wacker today". Mr. Belcher testified there was no shoring in the
12 excavation on the day of inspection as depicted in the photographic
13 evidence. Mr. Torres conceded to CSHO Belcher the excavation should
14 have been sloped better for cave-in protection.

15 Mr. Belcher interviewed three employees utilizing Spanish
16 interpretation. He identified the interview statements in his report
17 signed by respondent employees # 1, 2 and 3 in evidence at Exhibit 1,
18 pages 18-20. Employee # 1 stated the excavation should have had ". .
19 . a wider bench and there was never shoring in the trench where the
20 employees were working . . .". Employee # 1 further stated the "trench
21 is above my head . . . I am about 5'7" . . . the bench is no good . . .
22 I received training with other companies but not this one . . . they
23 rely solely on if you have an OSHA card - if you have it - you are
24 trained . . .".

25 Employee # 2 stated "We are supposed to have a wider bench . . .
26 I know it's not right . . .". He further stated "there was never any
27 shoring in the trench . . . today was the only day employees were in the
28 trench . . . National Pipeline (respondent) hasn't trained me . . .I get

1 OSHA 10 hour training . . . no training on how to dig a trench . . .".

2 Employee # 3 stated he was operating the compactor "Wacker" in the
3 excavation for about ½ hour but only "15 minutes where it was deep".
4 He further stated "there hasn't been any protection or shoring . . . I
5 had previous training for this type work . . .".

6 CSHO Belcher testified with regard to the photographs at Exhibit
7 1, pages 70-87 and explained the depictions confirm his observations of
8 violative unprotected conditions at the excavation site under the OSHA
9 standards.

10 Mr. Belcher testified the three employee interview statements
11 confirmed they had not been instructed by respondent as required under
12 the cited standard. He also testified their interview
13 responses demonstrated inability to "identify or explain . . . the OSHA
14 cave-in protection requirements . . ." and verified their exposure to
15 hazardous conditions of working in unprotected excavations. The
16 respondent was unable to provide OSHA any competent evidence to confirm,
17 verify or support employee excavation safety instruction training as
18 required under the cited OSHA standards.

19 Mr. Belcher testified with regard to the serious classifications
20 of the violations and the ratings for severity, probability and gravity
21 calculated in accordance with the operations manual and based upon the
22 factual evidence found from his investigation. He identified Exhibit
23 1, photographs 79a and 80 depicting the excavation vertical walls
24 without shoring. Photograph 74 depicts the "Wacker" in the trench,
25 although no employee operating same, but showing the results of
26 compacting work performed at a depth in the excavation beyond five feet
27 without cave-in protection. He testified the observed violative
28 conditions were supported by the pictorial evidence of work, the

1 statement of Mr. Rumsey indicating an employee had to be there operating
2 the Wacker, the statement of Mr. Torres and the employee #3 interview
3 statement that he operated the Wacker in the unshored area for "15
4 minutes" the day of the inspection. He testified respondent employee(s)
5 had been working in the excavation and exposed to the hazards of cave-in
6 without the OSHA required protection. Mr. Belcher further testified the
7 respondent employees working on the excavation site, as well as
8 subcontractor employees working in the "water vault" area were
9 constructively exposed to the violative conditions through the rule of
10 **hazard access.**

11 On cross-examination CSHO Belcher admitted he did not observe an
12 employee operating the "Wacker". He also confirmed the excavation logs
13 showed trench depths varied throughout the length of the excavation.
14 He also explained his private part-time job as an estimator for
15 competitive underground contractors and testified it did not cause or
16 create any prejudice on his part toward the respondent.

17 CSHO Belcher concluded his testimony describing the dangers of
18 serious injury or death that could result from a cave-in of the
19 excavation without protection, the potential for falling spoils material
20 near the trench edge onto employees and the hazard exposures to
21 employees working in excavations without instructional training.

22 Respondent presented witness testimony and referenced Exhibits A
23 and B.

24 Mr. Jeremie Rumsey identified himself as the respondent project
25 manager and superintendent at the time of the inspection. He identified
26 the company training program, the level of training expected from
27 employees upon hire and the instructional training details of the
28 "weekly safety tailgate meetings". He testified the weekly safety

1 meetings are given in English and Spanish every Friday, as a rule, at
2 the job site. He described the lengthy safety policies read to the
3 employees at each meeting which lasted for approximately 15-20 minutes;
4 and video presentations ". . . given in the office when available". Mr.
5 Rumsey stated that all the employees interviewed by the CSHO had
6 attended the weekly tailgate safety meetings, ". . . signed the
7 attendance sheets and saw videos".

8 Mr. Rumsey testified Exhibit 1, pages 70-75A, depicts the bench and
9 spoils near the edge. He explained the loader was engaged in cleanup
10 work so the materials shown were "in process" of being removed from near
11 the edge. He described the "Wacker" placement as ". . . typically set
12 in the trench by a machine . . . does not require an employee standing
13 inside the trench to detach . . . where it was photographed because of
14 a J hook and rigging." He testified Exhibit 1, pages 86-87A, does not
15 depict any employee exposure; "I never saw an employee in the trench
16 with the Wacker".

17 Mr. Rumsey testified he classified the excavated material as **type**
18 **B** soil by performing a "hand test". Further, there were no employees
19 in the water vault excavation area of the trench ". . . on the day of
20 the inspection".

21 On cross-examination Mr. Rumsey identified respondent's Exhibit B,
22 page 17, as the company safety plan in English, and testified it is also
23 provided in the Spanish language. He admitted the attendance
24 verifications at Exhibit B were not signed by the three (3) Spanish
25 speaking employees interviewed by the CSHO at Exhibit 1, pages 18-20.
26 During continued cross-examination Mr. Rumsey testified he could not
27 provide documentary evidence on training in the Spanish language nor any
28 given to Spanish speaking employees to support his testimony. He

1 admitted there were no videos presented in the Spanish language. Mr.
2 Rumsey testified the company foreman would translate the English
3 training presentation at the tailgate meetings into Spanish, but had no
4 documentary evidence or other support for his testimony.

5 In continued cross-examination, Mr. Rumsey admitted the "spoils
6 . . . were too close to the edge . . . but the loader . . . was in
7 process of removing them . . . and some of that . . . spilled off during
8 the cleaning . . .".

9 When questioned on his reported statement to CSHO Belcher during
10 the investigation at the time they both observed the Wacker in the deep
11 (beyond five feet) unshored area of the trench, Mr. Rumsey testified the
12 location of the Wacker does not mean employees were working there. He
13 admitted employees were working the Wacker in the shallow area but could
14 not explain the depicted Wacker location in the deep (beyond five feet)
15 area. He testified the photographs depicting compacted soil near the
16 Wacker in the deep area were not evidence of unprotected employee work.
17 Mr. Rumsey also testified respondent had no responsibility for employees
18 of other employers working in the water vault excavation area, but
19 admitted the respondent dug the trench where the subcontractor employees
20 had been working. He testified the respondent was not responsible nor
21 in control of that area because it had been ". . . turned over to
22 another subcontractor for its . . . (trade) work . . .".

23 At the conclusion of evidence and testimony, both counsel presented
24 argument.

25 Complainant argued there was overwhelming evidence to prove the
26 cited violations. There were "multiple pictures" of the cited violative
27 working conditions, all supported by the sworn testimony of CSHO Belcher
28 and other documentary evidence. At Citation 1, Item 1, counsel asserted

1 that while there was some employee training and a company safety
2 program, the evidence proved the respondent simply did not do what the
3 company policies or OSHA required. There was no evidence of training
4 for the three (3) interviewed Spanish speakers, nor any corroboration
5 to support the testimony of Mr. Rumsey. There were three (3) written
6 employee witness statements establishing none received the required
7 training. The three (3) employees could not explain the excavation
8 safety requirements, nor demonstrate to CSHO Belcher an understanding
9 of the protections needed. There were no typical attendance
10 verifications signed by the three (3) Spanish speaking employees
11 interviewed to substantiate they had been trained on the excavation
12 safety work as claimed by Mr. Rumsey.

13 Counsel argued the photographs clearly demonstrate the spoils
14 materials near the edge to establish the violation at Citation 1, Item
15 2. Mr. Rumsey's statement that the company was in the "process" of
16 moving same is not a defense. The violative conditions existed.

17 Respondent employees were working in an unprotected excavation
18 subject to cave in hazards as the photographic evidence shows vertical
19 walls, depths exceeding five feet, recent employee work performance and
20 no shoring in place. The sworn testimony and observations of the trench
21 depths by Mr. Belcher, the photographs in evidence, the witness
22 statements of three (3) employees working in the excavation, the
23 testimony of Messrs. Rumsey and Torres, and the boring log excavation
24 data all corroborate and support the sworn CSHO testimony of the
25 violative conditions.

26 Counsel argued the testimony of Mr. Rumsey was simply not credible.
27 With regard to the employee training, he could not explain or support
28 his testimony that he read lengthy materials every week but meetings

1 lasting only 15-20 minutes. The Spanish speaking employees interviewed
2 did not sign attendance verifications of the tailgate meetings yet many
3 other employees did sign. The company had a training program but it did
4 not effectively communicate or implement the program. Mr. Rumsey's
5 testimony on the Wacker location in the deep unshored area of the
6 excavation after he admitted his statement to CSHO Belcher of needing
7 someone to run it, were simply not credible. Mr. Rumsey admitted the
8 violation of the spoils near the edge; his claim, without any evidence,
9 of work "in process" is no defense.

10 As to the excavation protection in general, the respondent
11 "created" the hazardous excavation conditions and was the "controlling
12 employer" responsible for installing shoring or other cave-in
13 protection. The respondent employees, as well as employees of the
14 subcontractor, were **constructively** exposed to the hazards of working in
15 unprotected excavation areas based upon recognized OSHA law through the
16 **rule of access.**

17 Respondent presented closing argument. At Citation 1, Item 1,
18 counsel asserted the company had a training program and the employees
19 possessed a reasonable use of the English language to understand the
20 training materials. He asserted all three employee witnesses who signed
21 the statements referenced by CSHO Belcher had OSHA 10 cards, and one
22 indicated that he had "some (excavation safety) training". He argued
23 there was no preponderant evidence to find they had "no training" as
24 charged. "There is no requirement for perfect training." The company
25 checked and all the employees had OSHA 10 cards so the employees did
26 have "some . . . instruction . . . on how to recognize and avoid unsafe
27 working conditions in an excavation . . .".

28 At Citation 1, Item 2, counsel argued the loader was moving dirt

1 away from the edge and there was no evidence the employees were in the
2 trench area when spoils were near the edge. The photograph only depicts
3 an employee farther away in a "safe area . . . someone was operating a
4 compactor and there was no evidence of that occurring at the time
5 . . .".

6 At Citation 1, Item 3, counsel argued the employee witness
7 statement Exhibit 1, page 20 reflects ". . . the Wacker was only
8 operated for ½ hour but there was no evidence the employee was in the
9 deepest area of the trench over five foot at that time . . . rather than
10 a safe area . . . but even if he was . . . the guy was in there at most
11 15 minutes . . . so that should be taken into consideration."

12 The board in reviewing the facts, documents and testimony in
13 evidence must measure same against the established law developed under
14 the Occupational Safety & Health Act, Code of Federal Regulations (CFR)
15 and Nevada Revised Statutes (NRS).

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

18 All facts forming the basis of a complaint must be
19 proved by a preponderance of the evidence. *Armor*
Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958
20 (1973).

21 To prove a violation of a standard, the Secretary
must establish (1) the applicability of the
22 standard, (2) the existence of noncomplying
conditions, (3) employee exposure or access, and
23 (4) that the employer knew or with the exercise of
reasonable diligence could have known of the
24 violative condition. (emphasis added) See *Belger*
Cartage Service, Inc., 79 OSAHRC 16/B4, 7 BNA OSHC
25 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No.
76-1948, 1979); *Harvey Workover, Inc.*, 79 OSAHRC
26 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
27 1254, 1261 (D.C. Cir. 2003). (emphasis added)

28 A respondent may rebut allegations by showing:

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

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

8 . . . a serious violation exists in a place of
9 employment if there is a **substantial probability**
10 **that death or serious physical harm could result**
11 from a condition which exists or from one or more
12 practices, means, methods, operations or processes
13 which have been adopted or **are in use at that place**
14 **of employment** unless the employer did not and could
15 not, with the exercise of **reasonable diligence**,
16 know the presence of the violation. (emphasis
17 added)

18 The testimony of CSHO Belcher was credible and supported by the
19 photographs and documentary evidence to establish the elements to prove
20 violations of the cited standards.

21 The evidence demonstrated **applicability** of the excavation
22 protection and training standards to the subject worksite as observed
23 and photographed. **Non-complying violative conditions** were established
24 by the photographs, documents, and witness statements in evidence and
25 the credible CSHO testimony. **Employee exposure** was demonstrated **directly**
26 through the evidence including witness statements, photographic exhibits
27 and testing; but also **constructively** from the unrefuted work site
28 conditions through **the rule of access**. **Constructive employer knowledge**
of the violations is imputed to the respondent employer through
supervisory personnel Messrs. Rumsey and Torres on the site.

 In addition to the un rebutted **non-compliant conditions** as
demonstrated through the evidence admitted including the photographs,

1 documentary exhibits, and credible CSHO testimony, the violative
2 conditions were subject to **plain view** by superintendent Rumsey and
3 foreman Torres. Accordingly, the employer is charged with lawful
4 knowledge; it knew or should have known of the violations through
5 reasonable diligence.

6 The employee statements, the observations of CSHO Belcher, the
7 photographic exhibits and the investigation report established proof of
8 direct and constructive employee exposure. The respondent provided no
9 evidence to rebut the statements of the three employees, and/or
10 testimony of CSHO Belcher with regard to Citation 1, Item 1 as to
11 training.

12 Three (3) employees admitted they had no respondent employer
13 training. The employer could not rebut the statements or produce any
14 competent credible evidence of the subject employees training. Yet it
15 produced "typical attendance" verification records for its other
16 employees.

17 At Citation 1, Item 2, the photographs and admissions established
18 spoils materials near the trench edge. At Citation 1, Items 2 and 3,
19 it was unrefuted the excavation clearly was not protected from cave-in
20 by shoring or other means. The respondent admitted that the loader was
21 moving materials from the edge or in process but that does not negate
22 the hazard exposure nor establish a defense to the violative conditions
23 in accordance with the specific terms of the cited standard. The
24 potential for injury to the employees was demonstrated by the
25 preponderant evidence of the conditions at the site and CSHO testimony.
26 Further, it can be inferred from the evidence that work was underway in
27 an unprotected area of the trench where an employee was operating a
28 compactor which supports the witness statements and foreman admissions

1 provided to the CSHO at the time of the investigation. The respondent
2 provided no credible or competent rebuttal evidence and in fact admitted
3 the violative conditions explaining only the required protective work
4 was "in process".

5 At Citation 1, Item 3, there was no shoring where an employee
6 admitted he was operating the Wacker compaction work results were shown
7 in the photographs. Respondent counsel ultimately admitted the
8 violation explaining it only occurred briefly. Three employees
9 admitted, and the photographs clearly showed, there was no cave-in
10 protection in place.

11 The Wacker had to be operated by an employee as indicated by Mr.
12 Rumsey. The work area around the Wacker showed compacting had been
13 done. Employee number 3 represented he operated the Wacker on the day
14 of inspection for approximately 15 minutes. The trench was over the
15 height of a 5'7" man subject of employee interviews and the pictorial
16 evidence. The Wacker was photographed near the center of the trench
17 with no reasonable explanation of how it was placed there without an
18 employee in the trench. The respondent admitted the employee was in the
19 unprotected area of the trench but **for only a brief time.**

20 The respondent employer knew, or with the exercise of reasonable
21 diligence, could have known of the violative conditions. All of the
22 violations occurred in **plain view**, and under the **supervision of company**
23 **superintendent Rumsey and foreman Torres.**

24 In general, the actual or constructive **knowledge of**
25 **a supervisory employee will be imputed to the**
26 **employer**, and thus constitute a prima facie showing
27 of employer knowledge. Where supervisory knowledge
28 can be imputed, OSHA need not also show that there
were deficiencies in the employer's safety program.
Halmar Corp., 18 OSH Cases 1014, 1016-17 (Rev.
Comm'n 1997), *aff'd on other grounds*, 18 OSH Cases
1359 (2d Cir. 1998). *But see L.R. Willson & Sons*

1 *Inc. v. OSHRC*, 134 F.3d 1235, 1240-41, 18 OSH Cases
2 1129 (4th Cir. 1998), and cases cited therein at
3 footnote 31. Occupational Safety and Health Law, 2nd
4 Ed., Rabinowitz at page 87. (emphasis added)

5 ". . . (A) **supervisor's knowledge** of deviations
6 from standards . . . is properly **imputed to the**
7 **respondent employer.** . . ." *Division of Occupational*
8 *Safety and Health vs. Pabco Gypsum*, 105 Nev. 371,
9 775 P.2d 701 (1989). (emphasis added)

10 The testimony of Mr. Rumsey was equivocal and not competent
11 credible evidence. The testimony did not rebut the preponderant
12 evidence of violations with regard to a lack of training for three
13 exposed employees, the areas of employee work in the unprotected
14 excavation deeper than five feet or when operating the Wacker, and that
15 spoils materials depicted in the photographs with no equipment operating
16 were simply in the process of being removed so not considered a
17 violation.

18 Notably with regard to the training issue, there was no competent
19 or credible evidence presented that Spanish speaking employees were
20 provided meaningful training to rebut the three subject Spanish employee
21 witness statements or investigative findings by CSHO Belcher.

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

29 When an employer proves that it has **effectively**
30 **communicated and enforced its safety policies**,
31 serious citations are dismissed. See *Secretary of*
32 *Labor v. Consolidated Edison Co.*, 13 O.S.H. Cas.
33 (BNA) 2107 (OSHRC Jan. 11, 1989); *Secretary of*
34 *Labor v. General Crane Inc.*, 13 O.S.H. Cas. (BNA)
35 1608 (OSHRC Jan. 19, 1988); *Secretary of Labor v.*
36 *Greer Architectural Prods. Inc.*, 14 O.S.H. Cas.
37 (BNA) 1200 (OSHRC July 3, 1989). (emphasis added)

1 Respondent superintendent Rumsey was in **control** of the job site and
2 the excavation operations. Under well established Occupational Safety
3 and Health Law, "... liability is imposed ... on a contractor who
4 **creates a hazard or who has control** over the condition on a multi-
5 employer worksite ...". See, *Brennan v. OSHRC (Underhill Construction*
6 *Corp.)*, 513 F.2d 1032 (2nd Cir. 1975). The commission and courts have
7 recognized that protection from hazard exposure to employees is the
8 responsibility of the employer and confirmed that "... policy is best
9 effectuated by placing responsibility for hazards on those who create
10 them." Responsibility remains with the respondent who **created and/or**
11 **controlled** the conditions at the worksite.

12 The preponderance of evidence establishes the cited violations, of
13 the standards, the serious classifications, and the reasonableness of
14 the proposed penalties.

15 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
16 **REVIEW BOARD** that violations of Nevada Revised Statute did occur as to
17 Citation 1, Item 1, 29 CFR 1926.21(b)(2); Item 2, 29 CFR 1926.651(j)(2);
18 Item 3, 29 CFR 1926.652(a)(1). The violation classifications of Serious
19 are confirmed and the proposed penalties in the total sum of TEN
20 THOUSAND EIGHTY DOLLARS (\$10,080.00) approved.

21 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**
22 **HEALTH REVIEW BOARD** that a violation of Nevada Revised Statute did occur
23 as to Citation 2, Item 1, 29 CFR 1904.32(a)(1), the violation
24 classification of Other with no proposed penalty.

25 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
26 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION**
27 **OF INDUSTRIAL RELATIONS**, to submit proposed Findings of Fact and
28 Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**

1 **BOARD** and serve copies on opposing counsel within twenty (20) days from
2 date of decision. After five (5) days time for filing any objection,
3 the final Findings of Fact and Conclusions of Law shall be submitted to
4 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing
5 counsel. Service of the Findings of Fact and Conclusions of Law signed
6 by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
7 **BOARD** shall constitute the Final Order of the **BOARD**.

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

9 NEVADA OCCUPATIONAL SAFETY AND HEALTH
10 REVIEW BOARD

11 By /s/
12 JOE ADAMS, Chairman
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