NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

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

Complainant,

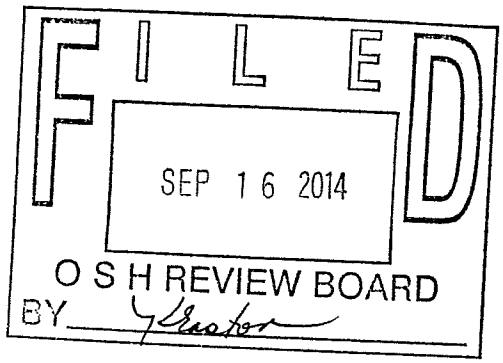
vs.

CREATIVE DIGITAL PRINTING,

Respondent.

_____/

Docket No. LV 14-1698



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of August 2014, in furtherance of notice duly provided according to law, MS. SALLI ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations** (OSHA); and MR. ERIC COSKEY, Owner, appearing on behalf of Respondent, **Creative Digital Printing.**

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

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

Citation 1, Item 1, charged a violation of NRS 618.375(1) commonly known as the General Duty Clause, which provides in pertinent part:

> Duties of employers. Every employer shall furnish employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his or her employees.

The complainant alleged that in the Large Format area of the Creative Digital Printing facility, located at 6415 Karms Park Court, Las Vegas LV 89118, the place of employment was not furnished to be free from recognized hazards. An employee who built banners and mounted posters loaded and unloaded material from steel storage racks not secured to prevent movement, which exposed the employee to struck by hazards that could result in contusions, broken bones, head or spinal injuries, and up to death. The violation was classified as Serious. The proposed penalty for the alleged violation is in the amount of $3,500.00.

Citation 1, Item 2, charged a violation of 29 CFR 1910.212(a)(1), which provides in pertinent part:

> Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are-barrier guards, two-hand tripping devices, electronic safety devices, etc.

The complainant alleged that in the wet printing area of the Creative Digital Printing facility, located at 6415 Karms Park Court, Las Vegas NV 89118, employees used duplicator machines to print various materials. The ink rollers on the duplicator machines contained ingoing nip points and rotating parts which were not guarded by one of the methods stated above. The ingoing nip points exposed employees to

caught-in hazards which could result in broken bones or finger amputation. The violation was classified as Serious. The proposed penalty for the alleged violation is in the amount of $4,900.00.

Citation 1, Item 3, charged a violation of 29 CFR 1910.213(d)(1), which provides in pertinent part:

> Hand-fed cross cut table saws. Each circular crosscut table saw must be guarded by a hood which meets all the requirements of paragraph (c)(1) of this section for hoods for circular ripsaws.

The complainant alleged that in the Letter Press area of the Creative Digital Printing facility, located at 6415 Karms Park Court, Las Vegas NV 89118, an employee used a circular saw (Hammond Trim O Saw Model G4B Serial #7447) to cut wood and foil paper. The saw that was being used was not properly guarded in such that the portion of the saw above the table was not completely enclosed, and not guarded to prevent the operator from flying splinters and broken saw teeth. The improperly guarded saw at the point of operation exposed the employee to caught-in and struck by hazards which could result in, lacerations, and finger or hand amputations. The violation was classified as Serious. The proposed penalty for the alleged violation is in the amount of $3,500.00.

Citation 1, Item 4, charged a violation of 29 CFR 1910.219(d)(1), which provides in pertinent part:

> Guarding. Pulleys, any parts of which are seven (7) feet or less from the floor or working platform shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section. Pulleys serving as balance wheels (e.g., punch presses) on which the point of contact between belt and pulley is more than six feet six inches (6 ft. 6 in.) From the floor or platform may be guarded with a disk covering the spokes.

The complainant alleged that in the Letter Press area of the

Creative Digital Printing facility, located at 6415 Karms Park Court, Las Vegas NV 89118, an employee used a circular saw (Hammond Trim O Saw Model G4B Serial #7447) to cut wood and foil paper. The pulley, which was part of the power transmission device of the saw was not guarded, which exposed the employee to caught in hazards at in running nip points, which could result in lacerations or finger amputation. The violation was classified as Serious. The proposed penalty for the alleged violation is in the amount of $3,500.00.

Citation 1, Item 5, charged a violation of 29 CFR 1910.303(b)(2), which provides in pertinent part:

> Installation and use. Listed of labeled equipment shall be installed and used in accordance with any instructions included in the listing or labeling.

The complainant alleged that at the Creative Digital Printing facility, located at 6415 Karms Park Court, Las Vegas NV 89118, employees used electrical equipment to fold, cut, bind, and print paper. Relocatable power taps were being used, which did not comply with the Underwriter's Laboratory's (UL) labeling or listing, which exposed employees to contact with electrical current and fire hazards. The following are seven instances where relocatable power taps were not used according to the instructions included in the labeling or listing:

1. Relocatable power tap being daisy chained (located in the wet print area)

2. Relocatable power tap being used to power printing equipment (bindery area)

3. Relocatable power tap used to power printing equipment (bindery area)

4. Relocatable power tap used to power paper drill, saddle stitch, and shrinkwrap (bindery area)

5. Relocatable power tap used to power printing equipment (located along the east wall in the bindery area)

6. Relocatable power tap used to power vending (soda) machines (located along the Southeast wall near the break area of the facility)

7. Relocatable power tap mounted with a zip tie (located in the letter press area of the facility)

The violation was classified as Serious. The proposed penalty for the alleged violation is in the amount of $3,500.00.

Citation 1, Item 6, charged a violation of 29 CFR 1910.305(b)(1)(ii), which provides in pertinent part:

> Unused openings in cabinets, boxes, and fittings shall be effectively closed.

The complainant alleged that in the break area, at the Southwest corner of the Creative Digital Printing facility, located at 6415 Karms Park Court, Las Vegas NV 89118, an employee accessed circuit breaker panels to reset breakers that tripped. The circuit breaker panels contained unused openings that were not effectively closed, which exposed the employee to contact with electric current hazards, which could result in electric shock or electrocution. The following are two instances where breaker panels had unused openings that were not closed:

1. Breaker Panel "B" (located at the Southwest corner of the facility)

2. Breaker Panel "C" (located at the Southwest corner of the facility)

The violation was classified as Serious. The proposed penalty for the alleged violation is in the amount of $3,500.00.

Citation 1, Item 7, charged a violation of 29 CFR 1910.305(g)(2)(iii), which provides in pertinent part:

> Flexible cords and cables shall be connected to devices and fittings so that strain relief is provided that will prevent pull from being directly transmitted to joints or terminal screws.

The complainant alleged that at the Bindery area of the Creative Digital Printing facility, located at 6415 Karms Park Court, Las Vegas NV 89118, two employees used equipment to fold and shrink wrap material that was printed. The power cords of the equipment were missing their strain relief, which exposed the employees to contact with electrical current hazards that could result in electric shock or electrocution. The following four instances were identified:

1. Heidelberg Quickfolder machine
2. Morgana DigiFold 5000P machine
3. Baumfolder Serial #1090001 machine
4. Chicago Electric Power Tools heat gun

The violation was classified as Serious. The proposed penalty for the alleged violation is in the amount of $4,900.00.

Citation 1, Item 8, charged a violation of 29 CFR 1910.1200(e)(1), which provides in pertinent part:

> Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraph (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training would be met, and which also includes the following; a list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and, the methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

The complainant alleged that in the wet print area of the Creative Digital Printing facility, located at 6415 Karms Park Court, Las Vegas NV 89118, employees worked on printing machines, which required the use of chemicals such as Varn Pronto Blanket Product Code: 650-B010009, Nexeo Isopropanol 99% Product Code: 20290, AW 46 R&O Hydraulic Oil to clean and maintain printing equipment. A written hazard communication program that covered all the required items listed above was not developed and implemented, which exposed employees to contact with toxic and flammable liquid hazards, which could result in skin irritation and burns. The violation was classified as Serious. The proposed penalty for the alleged violation is in the amount of $3,500.00.

Citation 2, Item 1, charged a violation of NRS 618.383(1), which provides in pertinent part:

> Establishment of safety program: Duties of certain employers; requirements of program; training for temporary employees; regulations; exemption. Except as otherwise provided in subsections 8 and 9, an employer shall establish a written safety program and carry out the requirements of the program within 90 days after it was established.

The complainant alleged that at the Creative Digital Printing facility, located at 6415 Karms Park Court, Las Vegas NV 89118, a workplace written safety program was not established and implemented within 90 days of establishment. The violation was classified as Regulatory. The proposed penalty for the alleged violation is in the amount of $700.00.

The parties stipulated to the admission of evidence identified as complainant's Exhibits 1 through 3 and respondent Exhibit A.

Counsel for the Chief Administrative Officer presented testimony and documentary evidence with regard to the alleged violations. Certified Safety and Health Officer (CSHO) Michael Rodriguez testified

he was assigned to conduct a "comprehensive inspection" of the respondent's facility at Creative Digital Printing, 6415 Karms Park Court, Las Vegas NV 89118. On or about October 4, 2007 CSHO Rodriguez conducted an opening conference with Mr. Jeff Casey, the co-owner of respondent. A "walkaround" inspection covered the entire facility and included the printing floor and office areas. During the inspection CSHO Rodriguez observed a variety of conditions within the enforcement jurisdiction of Nevada OSHA. The inspections were concluded on or about November 4, 2013 and a closing conference conducted with Mr. Eric Coskey, co-owner of respondent Creative Digital Printing. Several violations were noted at the time of the inspection. Eight serious citations and one regulatory citation were proposed in accordance with the Nevada Operations Manual. The employers rights and responsibilities following the OSHA inspection were explained by Mr. Rodriguez. The closing conference was concluded on November 5, 2013.

Mr. Rodriguez referenced his narrative report at pages 15 through 20 and employee interviews at pages 22 through 29. He identified the photographic exhibits depicting violative conditions at pages 87 through 118 and explained the facts of the violation, applicability of the cited standard, the worksheet rating data including the OSHA-1B at pages 30-35 and the basis for the penalty calculations, adjustment factors.

At Citation 1, Item 1, CSHO Rodriguez cited the respondent for a violation of NRS 618.375(1) commonly known as the General Duty Clause. He observed steel storage racks in the large format area of the facility which were not bolted or otherwise secured to the floor. During the walkaround inspection he also observed some of the storage steel racks were loaded with heavy materials placed on palettes. Mr. Casey informed CSHO Rodriguez that he "borrows" employees from the neighboring employer

to come in with a forklift when they needed palettes with materials loaded or unloaded from the racks. He testified both Messrs. Casey and Coskey informed him they were unaware the racks should have been bolted or secured to the floor. They confirmed the shelves are at times loaded by a forklift creating the potential to tip or dislocate a storage rack if accidentally bumped or otherwise disturbed. The CSHO further testified Mr. Casey informed him the storage racks had been in the facility as of October 2013 and had never been bolted to the floor area. The fork lift was required approximately once each month; and the loading and unloading comprised approximately 10 minutes of time. CSHO Rodriguez further testified he did not observe employee exposure during the course of the inspection but constructive exposure to the hazardous conditions was developed through his observations, investigation, the statements of Messrs. Casey, Coskey and the interviewed employees. Interviewed employee number 2 reported that he loads and unloads materials from the storage racks approximately 10 times per day and was not aware the racks were not bolted or secured to the floor.

CSHO Rodriguez identified the recognized hazards associated with loaded shelving without attachment to the floor area and a potential fall to seriously injure or cause the death of an employee. He testified that he informed Messrs. Casey and Coskey the holes on the bottom of the shelving were manufactured as part of the equipment so it could be secured to the floor and prevent tipping and therefore potential serious injury to employees.

CSHO Rodriguez testified the hazard was obvious and recognized but without a specific standard applicable he referenced the Nevada General Duty Clause and recommended the citation and penalty accordingly.

At Citation 1, Item 2, CSHO Rodriguez testified he observed exposed

"nip points and rotating parts" not guarded by one or more approved methods for employee protection. He explained the photographs of the cited unguarded machine at Exhibit 1, pages 93 through 94A; and identified feasible manufactured guarding as referenced at pages 126 and 127 in Exhibit 4. Mr. Casey informed CSHO Rodriguez the machine never had a guard and he did not believe it was a safety hazard. Mr. Casey further stated no guard is manufactured by the company or available for purchase. CSHO Rodriguez testified he researched the issue and was able to obtain pictures from the internet of an ABDick 9810 duplicator machine which clearly depicted a guard over the ink rollers. He referenced exhibits in evidence to demonstrate the **availability** of the guard and **feasibility** of protecting employees from the potential identified obvious hazard. He explained the injuries that could occur from employee hand or finger contact with the nip points of the duplicator machine subject of citation.

At Citation 1, Item 3, Mr. Rodriguez cited respondent for a circular saw utilized by a respondent employee without proper guarding. Mr. Rodriguez explained to Mr. Coskey the guard currently on the saw did not meet the requirements of the referenced standard as it applied to a different type saw. During interviews employee 3 informed CSHO Rodriguez that he used the subject saw on October 9, 2013 and sometime during the prior week. The employee explained he uses the saw to cut wood and roles of foil paper. While employee exposure was not observed during the course of inspection, exposure to the hazard was developed through employee interviews and employee **access** to the hazardous conditions and supported by the employee interview statement.

At Citation 1, Item 4, the pulley area on the circular saw in the letter press area of the facility was not guarded in accordance with the

requirements of the standard. The pulley which was part of the power transmission device to the saw had the potential for exposure of the operating employee to make contact with the running nip points which could result in lacerations or loss of a finger.

At Citation 1, Item 5, CSHO Rodriguez observed relocatable power taps being utilized, which did not comply with the Underwriter's Laboratory (UL) labeling or listing, and exposed employees to contact with electrical current and fire hazards. CSHO Rodriguez found seven instances where relocatable power taps were not utilized in accordance with the UL instructions, including the labeling or listing. He testified as to each of those instances and identified the photographic exhibits in evidence supporting his observation of the violative conditions. He explained the exposure and rating factors under the worksheet and OSHA-1B.

At Citation 1, Item 6, CSHO Rodriguez found an electrical violation in the break area at the southwest corner of the Creative Digital Printing facility. An employee accessed circuit breaker panels to reset breakers that had tripped. The circuit breaker panels contained unused openings which were not effectively closed. He identified the photographic exhibits in support of the observed violative conditions. He found two instances of unclosed openings in the breaker panels and recommended a citation for the violative conditions accordingly.

At Citation 1, Item 7, CSHO Rodriguez observed four instances of power cords on equipment missing "strain relief" which exposed employees to contact with electric current hazards which could result in electric shock or electrocution. He explained each of the four instances of violation and the support for same identified in the photographic exhibits in evidence.

At Citation 1, Item 8, CSHO Rodriguez testified employees were working on printing machines which required the use of toxic chemicals but found no written hazard communication program that covered all the required items listed and which was not developed nor implemented in accordance with the referenced standard. The potential exposure to employees from contact with toxic and flammable liquid hazards could result in skin irritations and burns. The violation was classified as serious. Mr. Rodriguez explained the potential injuries that could occur as supported by the photographic exhibits with labels describing the content of the chemical products being utilized.

At Citation 2, Item 1, CSHO Rodriguez found a regulatory violation under NRS 618.383(1). He concluded there was a violation based on his finding no written workplace safety program established or implemented within the 90 day time requirement. He testified that while the respondent provided two binders of documents on training and informational materials to satisfy the company written safety program, they were more in the nature of "how to" books as opposed to the required written safety program. CSHO Rodriguez explained the basis of his findings and the violative condition. He referenced pages 19 and 20 of the narrative report and OSHA-1B exhibits in evidence.

CSHO Rodriguez concluded his testimony by further explaining the penalty calculation process, determinations as to the serious nature of the potential injuries that could result as applicable in the violative conditions and the employer knowledge of the hazardous conditions.

Respondent representative conducted cross-examination of CSHO Rodriguez. On questioning with regard to a lack of explanation of the purpose of the investigation as enforcement rather than simply compliant, CSHO Rodriguez responded that he presented his credentials

and explained the purposes and extent of the comprehensive inspection. On questions relative to abatement or correction, Mr. Rodriguez testified the respondent was cooperative in resolving the issues but neither asserted nor provided any facts or information that might be utilized to either mitigate or negate the finding of hazardous conditions in violation of the referenced standards.

On redirect examination, CSHO Rodriguez testified all of the violations and in fact all the violative conditions referenced were in **"plain view"** and the hazards **obvious or recognizable** by any reasonably prudent employer. He further testified he found only one employee who reported he had been trained by 3M on chemical use. The other two employees in the shop area were neither trained nor was there an MSDS at the site to educate employees how to avoid hazards or protect themselves in the event of contact.

At the conclusion of the presentation of evidence and testimony both parties provided closing argument.

Complainant argued the burden of proof had been met for what the facts and evidence established were clearly "long standing violative conditions showing a casual approach to safety . . .". All the violations were in **plain view, obvious and easily recognized.** The lack of secured shelving was an egregious issue considering a fork lift was admittedly brought into an employee work area of the facility once a month, which could easily bump or dislodge the racks loaded with materials and seriously injure an employee. The reasonable prudent employer standard of compliance makes the violations obvious and must be enforced. While the employer demonstrated cooperation and good faith, it simply failed and/or refused to take notice of the OSHA standards and regulations which a reasonable, prudent and safety

conscious employer is presumed to realize necessary in the operation of any business in the state of Nevada.

Respondent presented closing argument and asserted as owners of a very small printing company they were not aware of the "OSHA problems". All issues brought to the owners attention were fixed showing they do care and intended to cooperate with OSHA. The respondent representative asserted the owners recently moved the shop and never got to the safety details as they were focused on the work areas and difficulties of the shrinking economy. Mr. Coskey asserted there was no evidence that nip points on the inking portion of the press at Citation 1, Item 2 could cause any injury. He asserted the CSHO observed a demonstration by an employee exposing his hand to the nip points without injury. He further noted there was no part made for the machine for guarding and the experienced employee operating same had never observed one. It was impossible for respondent to comply with the guarding standard and still operate the machine. In addition, there was no guard available in the marketplace for purchase. The machine is no longer made and the CSHO referenced the wrong model when he testified and the exhibit demonstrated an available guarding component suitable for the machine.

Respondent representative Coskey asserted the citations were excessive and far beyond what their small company could afford and unfair given the owners lack of understanding that the inspection an enforcement action with the potential of finding serious violations and assessing substantial monetary penalties.

In considering the testimony, exhibits, and arguments of counsel, the Board is required to review the evidence and established legal elements to prove violations under Occupational Safety & Health Law.

In all proceedings commenced by the filing of a

notice of contest, the burden of proof rests with the Administrator. (See NAC 618.788(1).

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

To prove a violation of a **specific** 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).

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

". . . Every employer shall:

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

A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;

2. The situation was in compliance; or lack of access to a hazard. See, *Anning-Johnson Co.*, 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

NRS 618.625 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 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."

The respondent employer was cited for nine (9) violations including violations at Citation 1, Item 1 of NRS 618.375(1) the General Duty Clause, and Citation 2, Item 1, the Nevada statutory regulation at NRS 618.383(1). The remaining violations at Citation 1, Items 2 through 8, referenced codified specific enforcement standards from Chapter 29 of the United States Code of Federal Regulations (CFR) adopted into the Nevada Revised Statutes (NRS). The burden of proof to establish a violation under occupational safety and health law requires different elements of proof to establish a general duty clause violation from a specific standard. The violation at Citation 1, Item 1, referenced a serious violation of NRS 618.375(1), the General Duty Clause. Complainant met the burden of proof and satisfied the elements to establish and confirm a violation by a preponderance of evidence.

> In citing an employer under the **General Duty Clause**, it is specifically necessary to demonstrate the existence of a **recognized hazard** as mandated by the statute; whereas citing an employer under a **specific standard** relies upon a recognition element based upon codification by Congress and adoption of certain recognition hazards for particular industries. To establish a violation of the General Duty Clause, the **complainant must do more than show the mere presence of a hazard.** The General Duty Clause, ". . . **obligates employers to rid their workplaces of recognized hazards . . .**" *Whitney Aircraft v. Secretary of Labor*, 649 F.2d 96, 100 (2nd Cir. 1981). (emphasis added)
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> "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 listed three elements that OSHA must prove to establish a general duty violation; the Review Commission extrapolated a fourth element from the court's reasoning: (1) a **condition or activity in the workplace presents a hazard** to an employee; (2) the condition or activity is **recognized as a hazard;** (3) the hazard is causing or is **likely to cause death or serious physical harm;** and (4) a

> **feasible means exists to eliminate or materially reduce** the hazard. The four-part test continues to be followed by the courts and the Review Commission. E.g., *Wiley Organics Inc. v. OSHRC*, 124 F.3d 201, 17 OSH Cases 2125 (6th Cir. 1997); *Beverly Enters., Inc.*, 19 OSH Cases 1161, 1168 (Rev. Comm'n 2000); *Kokosing Constr. Co.*, 17 OSH Cases 1869, 1872 (Rev. Comm'n 1996). The *National Realty*, decision itself continues to be routinely cited as a landmark decision. *See, e.g., Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321, 11 OSH Cases 1889 (5th Cir. 1984); *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 11 OSH Cases 1657 (D.C. Cir. 1983); *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 845 n.8, 9 OSH Cases 1946 (8th Cir. 1981); *Pratt & Whitney Aircraft Div. v. Secretary of Labor*, 649 F.2d 96, 9 OSH Cases 1554 (2d Cir. 1981); *R.L. Sanders Roofing Co. v. OSHRC*, 620 F.2d 97, 8 OSH Cases 1559 (5th Cir. 1980); *Magma Copper Co. v. Marshall*, 608 F.2d 373, 7 OSH Cases 1893 (9th Cir. 1979); *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871, 7 OSH Cases 1802 (3d Cir. 1979). Rabinowitz Occupational Safety and Health Law, 2008, 2nd Ed., page 91. (emphasis added)
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> When the Secretary has introduced evidence showing the existence of a hazard in the workplace, the **employer may, of course, defend by showing that it has taken all necessary precautions to prevent the occurrence of the violation.** *Western Mass. Elec. Co.*, 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981). (emphasis added)

The testimony of CSHO Rodriguez as well as the arguments and evidence presented by counsel together with the photographic exhibits demonstrate a patent **recognized** hazardous condition at Citation 1, Item 1. Loaded steel shelving in the employee work area comes monthly in potential contact with forklift loading activity inside the facility. The evidence was unrebutted the shelving was not secured to the floor. The recognition of such an obvious hazard was so obvious that no added proof elements need be considered to establish a violative condition that should be **recognized** by a reasonably prudent employer.

The legal duty of respondent is not to protect against unknown, unforseen or extreme events, but rather **recognized hazards** as defined

by or developed under applicable occupational safety and health law.

To satisfy the burden of proof for an alleged general duty clause violation under established Occupational Safety and Health Law, the division must show **by a preponderance of evidence** that there existed a **"recognized hazard"** of which the **employer had knowledge** (actual or constructive) in order to **foresee** and, thus, **prevent** injury or harm to its employees by utilizing **feasible** measures that would reduce the likelihood of injury.

The evidence demonstrates by a preponderance of evidence that the unrebutted testimony of the employer operation prevented a **clear and obvious potential hazard** to employees which is reasonably forseeable and requires protection to keep the work place safe from such a hazard. Further, it is reasonable to infer from the evidence that an unsecured steel shelf coming in potential contact with a forklift constitutes an **obvious** hazard.

> The courts have long recognized that an **obvious or glaring nature of a hazard** may itself suffice to provide the basis for a finding of **recognition** in the context of a "recognized hazard", a required proof element under the general duty clause. See, *Kelly Springfield Tire Co. V. Donovan*, 729 F.2d 317, 321, 11 OSH Cases 1889 (5th Cir. 1984).

The testimonial evidence, exhibits, photographs and lack of any rebuttal evidence by respondent requires a finding of violations at Citation 1, Items 2 through 8.

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

> A citation may be vacated if the employer proves that: (1) **the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances** in that either (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or

> economically infeasible after its implementation; **and** (2) either (a) an **alternative method of protection was used** or (b) there was no feasible alternative means of protection. *Beaver Plant Operations Inc.*, 18 OSHC 1972, 1977 (Rev. Comm'n 1999), rev'd on another ground, 223 F.3d 25, 19 OSHC 1053 (1st Cir. 2000); *Gregory & Cook, Inc.*, 17 OSHC 1189, 1190 (Rev. Comm'n 1995); *Siebel Modern Mfg. & Welding Corp.*, 15 OSHC 1218, 1228 (1991); *Mosser Constr. Co.*, 15 OSHC 1408, 1416 (Rev. Comm'n 1991); *Dun-Par Engineered Form Co.*, 12 OSHC 1949 (1986), rev'd on another ground, 843 F.2d 1135, 13 OSHC 1652 (8th Cir. 1988). (emphasis added)

The Board finds the standards referenced to be **applicable** to the facts in evidence. **Non-complying conditions** were proven, admitted or unrebutted by the respondent. No respondent witnesses were offered. The employee statements to the CSHO in evidence supporting the violative conditions were neither explained nor rebutted. **Employee exposure** was proven both **directly** under the conditions observed, photographed and unrebutted or by preponderant evidence which demonstrated **imputed legal access** to the hazardous conditions in the workplace. **Employer knowledge** of the violative conditions was established from the CSHO testimony and reported findings of the investigation which were neither explained nor rebutted by respondent. There was no defense or mitigation presented under recognized occupational safety and health law. Employer knowledge must be **imputed** by the governing law when a supervisor, and here company owners, knew or **with reasonable diligence could have known** of the violative conditions. See *Division of Occupational Safety and Health v. Pabco Gypsum*, 105 Nev. 371, 775 P.2d 701 (1989).

Complainant met the statutory burden of proof and established the serious violations found by a preponderance of evidence at Citation 1.

The violations were appropriately classified as **serious**.

NRS 618.625 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 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."

The testimony, including extended explanations by CSHO Rodriguez, demonstrated the serious nature of each of the violations as classified and supported by the admitted evidence.

The Board found no violation at Citation 2, Item 1, classified as "Regulatory". NRS 618.383(1) provides a workplace written safety program be implemented within 90 days of establishment. However there was no witness testimony or documentary evidence to support the violation based upon the 90 day benchmark and number of employees required under the terms of the standard. There was no preponderance of evidence or proof of the number of employees beyond the 90 days and therefore no evidence upon which to base a finding of violation at Citation 2, Item 1.

The Board finds, as a matter of fact and law, that violations did occur as to Citation 1, Items 1, 2, 3, 4, 5, 6, 7 and 8. The violations were proven by a preponderance of evidence in satisfaction of the recognized elements of violation under occupational safety and health law. The violations were appropriately classified and proven as "Serious". The proposed penalties were appropriate and lawfully calculated in the total amount of THIRTY THOUSAND EIGHT HUNDRED DOLLARS ($30,800.00). The Board found no violation at Citation 2, Item 1, NRS 618.383(1). The cited violation and proposed penalty are dismissed and denied.

It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**

REVIEW BOARD that violations of Nevada Revised Statutes are confirmed at Citation 1, Item 1, NRS 618,375(1), Citation 1, Item 2, 29 CFR 1910.212(a)(1), Citation 1, Item 3, 29 CFR 1910.213(d)(1), Citation 1, Item 4, 29 CFR 1910.219(d)(1), Citation 1, Item 5, 29 CFR 1910.303(b)(2), Citation 1, Item 6, 29 CFR 1910.305(b)(1)(ii), Citation 1, Item 7, 29 CFR 1910.305(g)(2)(iii) and Citation 1, Item 8, 29 CFR 1910.1200(e)(1). The classification of the violations is confirmed as "Serious". The total penalties are in the sum of THIRTY THOUSAND EIGHT HUNDRED DOLLARS ($30,800.00).

It is further the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation did occur as to Citation 2, Item 1, NRS 618.383(1) and the proposed penalty is denied.

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

DATED: This 16th day of September 2014.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JOE ADAMS, CHAIRMAN