

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

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

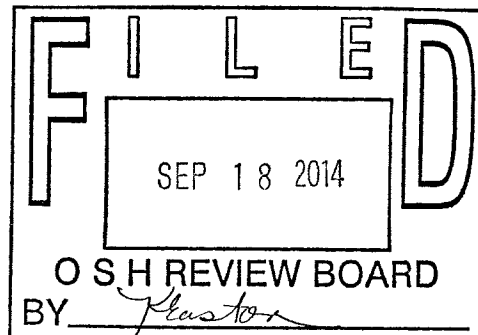
Docket No. LV 14-1715

Complainant,

vs.

CROSS CONSTRUCTION COMPANY, LLC,

Respondent.



12
13 **DECISION**

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of August
16 2014, in furtherance of notice duly provided according to law, MS. SALLI
17 ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**
18 **Administrative Officer of the Occupational Safety and Health**
19 **Administration, Division of Industrial Relations** (OSHA); and MR. ADAM
20 KNECHT, appearing on behalf of Respondent, **Cross Construction Company,**
21 **LLC.**

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

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

27 Citation 1, Item 1, charged a violation of 29 CFR 1926.451(a)(6),
28 which provides in pertinent part:

1 Scaffolds shall be designed by a qualified person
2 and shall be constructed and loaded in accordance
3 with that design. Non-mandatory Appendix A to this
4 subpart contains examples of criteria that will
5 enable an employer to comply with paragraph (a) of
6 this section.

7 The complainant alleged that at the Cross Construction Company, LLC
8 jobsite on West Charleston Boulevard, a fabricated frame scaffold system
9 was in use to apply stucco to the building. The scaffold was designed
10 by a Cross Construction employee who was not qualified to design
11 scaffolding. The scaffolding exhibited design flaws, such as the
12 absence of integral components which exposed employees to serious
13 injuries including broken bones and trauma in the event of a structural
14 failure of the scaffold. The violation was classified as Serious. The
15 proposed penalty for the alleged violation is in the amount of
16 \$1,200.00.

17 Citation 1, Item 2, charged a violation of 29 CFR 1926.451(b)(8),
18 which provides in pertinent part:

19 At all points of a scaffold where the platform
20 changes direction, such as turning a corner, any
21 platform that rests on a bearer at an angle other
22 than a right angle shall be laid first, and
23 platforms which rest at right angles over the same
24 bearer shall be laid second, on top of the first
25 platform.

26 The complainant alleged that at the Cross Construction Company, LLC
27 jobsite on West Charleston Boulevard, a fabricated frame scaffold system
28 was in use to apply stucco to the building. Planks laid at angles to
29 affect direction changes at the corner of the scaffold system were laid
30 on top of the planks which rested on the bearing members of the frames.
31 Planks laid at an angle to the corner of the scaffold were not supported
32 against tipping from the scaffold, which exposed employees to potential
33 injury from falls. The violation was classified as Serious. The

1 proposed penalty for the alleged violation is in the amount of
2 \$1,200.00.

3 Citation 1, Item 3, charged a violation of 29 CFR 1926.451(b)(10),
4 which provides in pertinent part:

5 Scaffold components manufactured by different
6 manufacturers shall not be intermixed unless the
7 components fit together with force and the
8 scaffold's structure integrity is maintained by the
9 user. Scaffold components manufactured by
different manufacturers shall not be modified in
order to intermix them unless a competent person
determines the resulting scaffold is structurally
sound.

10 The complainant alleged that at the Cross Construction Company, LLC
11 jobsite on West Charleston Boulevard, a fabricated frame scaffold system
12 was in use to apply stucco to the building. Component parts from
13 different manufacturers were intermixed in the scaffold system, many of
14 which did not fit together, or had been modified to fit. Employees
15 working from the scaffold were exposed to potentially serious injuries
16 in the event of a fall due to failure of the scaffold. The violation
17 was classified as Serious. The proposed penalty for the alleged
18 violation is in the amount of \$1,200.00.

19 Citation 1, Item 4, charged a violation of 29 CFR
20 1926.451(c)(2)(i), which provides in pertinent part:

21 Footings shall be level, sound, rigid, and capable
22 of supporting the loaded scaffold without settling
or displacement.

23 The complainant alleged that at the Cross Construction Company, LLC
24 jobsite on West Charleston Boulevard, a fabricated frame scaffold system
25 was installed with footings that were incapable of supporting the loaded
26 scaffolding without settling. The metal footings of the scaffolding
27 were placed directly on grade, and sunk below grade when rainfall and
28 water from a stucco process caused the soil to soften. No mud sills or

1 other supplemental support was installed. Employees working from the
2 scaffold were exposed to potential injuries in the event of a collapse
3 of the scaffold. The violation was classified as Serious. The proposed
4 penalty for the alleged violation is in the amount of \$1,600.00.

5 Citation 1, Item 5, charged a violation of 29 CFR 1926.451(c)(3),
6 which provides in pertinent part:

7 Supported scaffold poles, legs, posts, frames, and
8 uprights shall be plumb and braced to prevent
9 swaying and displacement.

10 The complainant alleged that at the Cross Construction Company, LLC
11 jobsite on West Charleston Boulevard, a fabricated frame scaffold system
12 was installed with frame components which were bent and inadequately
13 braced to maintain the frame components in a plumb and secure position.
14 Employees working from the scaffold were exposed to potential serious
15 injuries in the event of a collapse of the scaffold. The violation was
16 classified as Serious. The proposed penalty for the alleged violation
17 is in the amount of \$1,600.00.

18 Citation 1, Item 6, charged a violation of 29 CFR 1926.451(f)(3),
19 which provides in pertinent part:

20 Scaffolds and scaffold components shall be
21 inspected for visible defects by a competent person
22 before each work shift, and after any occurrence
23 which could affect a scaffold's structural
24 integrity.

25 The complainant alleged that at the Cross Construction Company, LLC
26 jobsite on West Charleston Boulevard, a fabricated frame scaffold system
27 was in use by employees and based on employee statements was not
28 inspected before use. The scaffold had structural deficiencies which
29 were present in plain view while employees were working from the
30 scaffold. Employees were exposed to potential injuries in the event of
31 a failure of the scaffold system. The violation was classified as

1 Serious. The proposed penalty for the alleged violation is in the amount
2 of \$1,200.00.

3 Citation 1, Item 7, charged a violation of 29 CFR 1926.451(f)(7),
4 which provides in pertinent part:

5 Scaffolds shall be erected, moved, dismantled, or
6 altered only under the supervision and direction of
7 a competent person qualified in scaffold erection,
8 moving, dismantling or alteration. Such activities
shall be performed only by experienced and trained
employees selected for such work by the competent
person.

9 The complainant alleged that at the Cross Construction Company, LLC
10 jobsite on West Charleston Boulevard, a fabricated frame scaffold system
11 was erected and altered by employees inexperienced in working with
12 scaffolding. The employees were not trained to erect or alter
13 scaffolds, and were supervised by an individual who was not a competent
14 person. Employees performing the work of erecting or altering the
15 scaffold were exposed to potential injuries from falls or other injuries
16 in the event of a collapse of the scaffold during the process of
17 erecting or altering the scaffold. The violation was classified as
18 Serious. The proposed penalty for the alleged violation is in the amount
19 of \$1,600.00.

20 Citation 1, Item 8, charged a violation of 29 CFR 1926.454(a),
21 which provides in pertinent part:

22 The employer shall have each employee who performs
23 work while on a scaffold trained by a person
24 qualified in the subject matter to recognize the
25 hazards associated with the type of scaffold being
26 used and to understand the procedures to control or
27 minimize those hazards. The training shall include
28 the following areas, as applicable: The nature of
any electrical hazards, fall hazards and falling
object hazards in the work area; the correct
procedures for dealing with electrical hazards and
for erecting, maintaining, and disassembling the
fall protection systems being used; the proper use
of the scaffold, and the proper handling of
materials on the scaffold; the maximum intended

1 load and the load-carrying capacities of the
2 scaffolds used; and any other pertinent
requirements of this subpart.

3 The complainant alleged that at the Cross Construction Company LLC
4 jobsite on West Charleston Boulevard, a fabricated frame scaffold system
5 was in use by employees who were not trained to recognize the hazards
6 associated with working from the scaffold, or in procedures to control
7 or minimize those hazards. Employees working from the scaffold were
8 exposed to potentially serious injuries due to design and equipment
9 deficiencies observed during the inspection. The violation was
10 classified as Serious. The proposed penalty for the alleged violation
11 is in the amount of \$1,600.00.

12 The parties stipulated to the admission of evidence identified as
13 complainant's Exhibit 1.

14 Complainant presented testimonial and documentary evidence with
15 regard to the alleged violations. Mr. Tristan Dressler, a Compliance
16 Safety and Health Officer (CSHO) testified as to his inspection, and the
17 citations issued to the respondent employer. He referenced his
18 narrative report and testified from the investigative materials at
19 Exhibit 1.

20 On September 18, 2013, Compliance Safety and Health Officers
21 Dressler and Lizarraga initiated a programmed inspection of the
22 construction project located at the Nevada Comprehensive Pain Center,
23 2809 West Charleston Boulevard, Las Vegas, NV. Upon entry to the
24 medical office at the site, CSHOs were advised by office staff that an
25 opening conference should be conducted with the General Contractor,
26 Cross Construction Company, LLC.

27 Entry was granted following an opening conference with Cross
28 Superintendent Burt Craig. Mr. Craig accompanied the CSHOs on the

1 walkaround, and was subsequently joined by Dustin Belinski, President
2 of Cross Construction Company, LLC.

3 CSHO Dressler testified that during the walkaround inspection he
4 found the project involved renovation of approximately 5,000 square feet
5 of the building. A fabricated frame scaffold was installed around the
6 outside of the building. The scaffold was in place to allow Cross
7 Construction Company employees access to the exterior of the structure
8 to apply stucco. Mr. Burt Craig, Superintendent for Cross Construction,
9 reported the scaffold was designed and installed by Mr. Santos Agilar,
10 an employee of respondent. Mr. Dustin Belinski, President of
11 respondent, informed CSHO Dressler that Mr. Agilar was an individual
12 Cross had worked with in past years as a subcontractor and currently
13 hired as an employee by Cross to install the scaffold and oversee the
14 stucco work. CSHO Dressler reported Mr. Belinski informed him that Mr.
15 Agilar was not trained by respondent to either erect or inspect
16 scaffolding. Mr. Belinski further advised that he was ". . . under the
17 impression that Santos (Agilar) was competent to rig scaffolding based
18 upon his (previous) working relationship with him . . .". Mr. Agilar
19 selected the Cross employee personnel to work as the stucco crew and
20 they assisted him (Agilar) in erecting the scaffolding. CSHO Dressler
21 testified that Mr. Belenski admitted the respondent employer did not
22 provide Mr. Agilar or the crew with any training in the design,
23 erection, inspection or safe conduct of work on or from scaffolding.

24 CSHO Dressler testified that during the inspection of the
25 scaffolding, he and CSHO Lizarraga observed the vertical support members
26 of the scaffold frames resting in what appeared to be loose, wet soil.
27 The vertical members did not appear to be affixed with baseplates, and
28 instead appeared to be simply tubular steel poles resting directly on

1 dirt. Closer examination revealed that metal baseplates were affixed
2 to the frames, however most of the metal baseplates on the south, west
3 and north sides of the building had sunk below grade level in the moist
4 dirt, and had become covered by the dirt, creating the impression that
5 no baseplates were present.

6 Mr. Dressler further testified there were no mudsills installed to
7 prevent settling. He observed a number of scaffold components to be
8 damaged, including vertical frame members on the south west corner,
9 which had bent legs, and vertical frame members and cross bars on the
10 north end of the building, which Mr. Belinski stated were struck and
11 displaced by a backhoe during excavation work. CSHO Dressler testified
12 that during employee interviews he was informed that Santos Agilar
13 directed employees to move the sections of the scaffold which had been
14 struck back into position and to continue work on the scaffold until
15 replacement parts could be obtained. The employees stated that to their
16 knowledge no replacement parts were ever sourced. CSHO Dressler further
17 testified many pieces of the wood planking which were cracked, dry
18 rotted and in use depicted obvious physical damage.

19 On the west side of the building, a working platform was installed
20 under an overhang roof using the scaffold frame and planks. The
21 platform was not fully planked, and two single boards were placed at
22 each end, spanning from the working platform to the lower level of the
23 main scaffold. Near the south east corner, a single plank was placed
24 between the upper working level of the scaffold and the parapet wall of
25 the building. No guardrails were in place. On the west side of the
26 building, guardrails were missing on the second level of the scaffold.

27 CSHO Dressler identified and testified as to the photographic
28 exhibits admitted in evidence at Exhibit 1. He described the violative

1 conditions depicted in each of the photographs and related those to each
2 citation and item alleged under the cited standards.

3 At Citation 1, Item 1, the standard required the scaffolding be
4 designed by a qualified person and constructed in accordance with that
5 design. However, he confirmed from interviews with Mr. Agilar that he
6 had no training to satisfy basic qualification criteria under the
7 guidelines in the appendix of the citation. He referenced the
8 photographs to demonstrate many patent defective conditions as observed
9 in the erection of the scaffolding, **all in plain view** and showing a lack
10 of connecting pins and/or other obvious defects in the design and
11 erection of the scaffolding and components. Mr. Dressler testified
12 **employer knowledge** of the violative conditions was demonstrated based
13 upon Mr. Belinski's statements during the interview where he "assumed"
14 employee Agilar was qualified but did not verify any training or
15 qualifications. CSHO Dressler testified that based upon the statements
16 and assumptions, the employer knew or **should have known** that a qualified
17 person was required and without any verification of Mr. Agilar's
18 background the necessary element of violation was demonstrated.

19 At Citation 1, Item 2, CSHO Dressler referenced Exhibit 1, pages
20 96 through 99A and described the hazards to employee safety due to
21 planks laid at angles to effect directional changes on the **top** of the
22 planks which rested on bearing members of the frames. He described the
23 hazardous conditions and the potential for employee injuries based upon
24 a lack of support due to the laying pattern and any resultant tipping
25 of the scaffolding resulting in an employee fall from a two-tiered
26 structure to the ground level. Mr. Dressler again further testified
27 that the employer knowledge element was demonstrated because
28 Superintendent Craig admitted he was present on the site and as a

1 supervisory employee his knowledge is imputed to the employer under
2 enforcement standards and guidelines.

3 At Citation 1, Item 3, CSHO Dressler referenced photographic
4 Exhibit 1, pages 100 through 102A and explained the depicted mixed
5 components which did not result in an effective or safe "fit" so the
6 materials would be held together and support the scaffolding. He
7 referenced his employee interviews and information that Mr. Agilar was
8 made aware of the mixed components but took no action to correct same.
9 He testified company president Belinski confirmed he relied upon Mr.
10 Agilar as the responsible and qualified employee to erect the
11 scaffolding and accordingly charged with **knowledge** of the defective
12 conditions by imputation.

13 At Citation 1, Item 4, CSHO Dressler testified that pictorial
14 Exhibit 1, pages 103 through 106A, depicted the metal foot of the
15 scaffolding into earthen material without any planking support. He
16 explained the hazards that could result to be potential for shifting or
17 sinking and thereby collapsing of a portion of the scaffolding. He
18 testified Superintendent Craig told him he thought it would be okay
19 because Mr. Agilar erected the scaffolding and the person upon whom the
20 company relied upon to do it properly.

21 At Citation 1, Item 5, CSHO Dressler testified that pictorial
22 Exhibit 1, pages 91, 91A, 95 and 95A showed the scaffolding was out of
23 plumb and the uprights were not braced to prevent displacement in
24 violation of the specific terms of the standard. He further testified
25 the effective components in a bent position were clearly defective from
26 a simple observation by anyone, even without extended scaffolding
27 experience.

28 CSHO Dressler testified as to Citation 1, Item 6, and explained the

1 standard which required inspection of the scaffolding before employee
2 use. He testified a **competent person** who is **qualified** as defined by the
3 OSHA standards must inspect the scaffolding. He found there was no
4 identified competent person on site, no credentials provided by the
5 employer, and an admission by president Belenski that he was not
6 qualified and only "assumed" that Mr. Agilar based on his years of
7 experience met the criteria. CSHO Dressler could find no competent
8 person on the site for respondent or anyone even qualified to inspect
9 the scaffolding.

10 At Citation 1, Item 7, CSHO Dressler referenced scaffolding erected
11 and altered by employees inexperienced in working with scaffolding. He
12 testified that his interviews reflected that employees not only were
13 incapable based upon a lack of training for erecting or altering the
14 scaffolding, but they were simply inexperienced in the subject field of
15 work. Respondent provided no evidence of employee training,
16 qualifications or experience in the field.

17 At Citation 1, Item 8, CSHO Dressler testified the scaffolding was
18 in use by employees who were not trained to recognize the hazards
19 associated with working from the scaffolds or in measures to control or
20 minimize the hazards. The employees interviewed could not adequately
21 describe or demonstrate any training for the subject work nor could the
22 respondent provide any evidence or documentation to support
23 qualification. Further, President Belinski and Superintendent Craig
24 both admitted the company had never trained the employees in accordance
25 with the standard.

26 CSHO Dressler continued his testimony and described his ratings as
27 to each of the violations from the exhibits in evidence, including his
28 work sheets and methods for arriving at classification for each of the

1 violations as **serious**. He testified that approximately 42 employees on
2 the site were exposed to the hazards from the defective or improperly
3 designed and erected scaffolding because of the multi-employer worksite
4 conditions. He testified no employees were observed actually working
5 at the time of the inspection. He relied upon the observed worksite
6 conditions, admissions made by the respondent employees, the employer,
7 as well as other employees and other employers on the worksite. All
8 provided substantial evidence of employee exposure to the conditions and
9 the potential hazards associated with same. He testified the penalties
10 were calculated pursuant to the enforcement manual and under the OSHA
11 computer system for credits and allowances in accordance with OSHA
12 policies.

13 On cross-examination by respondent counsel, CSHO Dressler testified
14 he wrote the employee statements during the interviews, asked the
15 employees to read them to assure they were correct, then sign. The
16 employees did not actually write the descriptive materials, but fully
17 understood and confirmed them to him during the investigation. He
18 further testified that his associate trainee CSHO on the site Mr.
19 Lizarraga acted as a Spanish interpreter for any individuals who did not
20 have a working facility in the English language. He further testified
21 that only a few words required explanation because the employees
22 generally spoke good English. He confirmed that all of his interviews
23 were conducted in English and there was little difficulty but in the
24 instance that same occurred, CSHO Lizarraga assisted accordingly.

25 CSHO Dressler testified that when he was first on the site he saw
26 no exposed employees so he focused his inspection on the potential for
27 employee exposure and confirmed those conditions through interviews of
28 the employees and the employer representatives.

1 Respondent counsel continued cross-examination of various aspects
2 of testimony, including inquiry as to whether there were any concrete
3 footings below the leg braces to support the scaffolding. Mr. Dressler
4 testified that he was unaware of any such condition and received no
5 information relative to same from either Mr. Craig or Mr. Belinski. All
6 conditions were abated in an acceptable time period and effectuated by
7 removal of the scaffolding on the same day. CSHO Dressler responded to
8 continued questioning and testified the ratings for penalty calculations
9 do require subjective judgment but are based on observations and
10 findings at the time of the inspection.

11 At the conclusion of the complainant's case, counsel for respondent
12 presented testimonial evidence from Mr. Dustin Belinski, the president
13 of Cross Construction Company, LLC. He testified the company is very
14 small having suffered during the recessive economic condition as
15 reflected by there currently being a total of five employees and only
16 two in the field. He principally hires subcontractors to perform the
17 actual construction work, but due to low volume, lack of available
18 subcontractors in the area and high insurance he was required to
19 effectuate the subject work through an employed group of workers. The
20 employees were selected by Mr. Agilar. He admitted he is only
21 "familiar" with scaffolding and neither experienced nor qualified to
22 erect or inspect scaffolding. He did not inspect the scaffolding but
23 he "looked at it". He did not notice any problems, for example the
24 scaffolding being out of plumb or missing any components. He testified
25 "I didn't have knowledge for that." He knew Mr. Agilar from previous co-
26 working conditions and "understood" he had 20 years of experience in
27 stucco application. He knew he was an experienced employee based upon
28 his relationship so he hired him to perform the work. He testified that

1 he relied on Mr. Agilar "absolutely" based upon his own lack of
2 knowledge, experience, and expertise in scaffolding.

3 Mr. Belinski testified that he misunderstood the CSHOs requested
4 purpose for being on the site and thought it merely involved observation
5 and comment on the safety of his operations. On the second visit of the
6 same day, he believed CSHO Dressler became more focused, taking pictures
7 and there was a more serious atmosphere. He testified explaining at
8 photograph 106A there was merely "overspray of stucco on top of the soil
9 . . . closer to the building . . ." and not evidence of any wet or non-
10 supportive conditions. There was no company safety officer at the time,
11 however his father now is acting as a safety officer for the company.
12 He further testified that he corrected each defect that he could, either
13 immediately or promptly, and did not believe there was any basis for
14 finding any serious violations as there had been no accident or problems
15 at the worksite.

16 On cross-examination Mr. Belinski testified he did not inspect the
17 scaffolding but only "looked at it". He had no experience in
18 scaffolding erection or inspection, and fully relied on Mr. Agilar in
19 whom he vested great confidence and "still does". He observed there was
20 no guardrail in place in the area described by counsel, but thought it
21 was for bringing up material and did not believe it was a safety
22 violation. He testified that he is aware OSHA has two arms and one is
23 enforcement. He further testified on inquiry that he had observed the
24 cracks in the planking depicted at photographic exhibit 94; and observed
25 the scaffolding at photograph 104A as not properly attached. He
26 testified Mr. Agilar was not present at the hearing to testify based
27 upon his fear stating he was "scared". He further responded that his
28 company had been threatened by unions, his employees "beat up", and Mr.

1 Agilar had been threatened so would not appear to testify.

2 Mr. Belinski continued his testimony and asserted without
3 reservation that he ". . . still believes Mr. Agilar is competent . .
4 . because he has lots of experience . . . and built scaffolds all over
5 Nevada . . . and believe he was trained . . .". Counsel inquired
6 whether it is reasonable to conclude that when an employer sees missing
7 parts the fair assumption would be the competent man was not trained or
8 capable. Mr. Belinski testified affirmatively. Counsel asked Mr.
9 Belinski that when observing holes in boards would that not indicate the
10 same? Mr. Belinski testified affirmatively.

11 At the conclusion of evidence and testimony, counsel presented
12 closing argument.

13 Complainant asserted there were clear, unequivocal legally
14 established violations charged in each of the citations based upon the
15 evidence and testimony in the record. Counsel argued the violations were
16 noteworthy because most were in "**plain view**" which any reasonable
17 employer should have noted as unsafe violative conditions. The
18 employees were simply "untrained". There was ". . . no verification of
19 training by the respondent and no competent or qualified person on the
20 site . . .". The evidence was unrebutted and unequivocal. Counsel
21 further noted that even some employee statements show there was not only
22 no training, but also a concern for employee safety. One employee
23 informed CSHO Dressler that the scaffolding was hit by a backhoe and the
24 frame bent, but remained uncorrected nor replaced. Mr. Belinski
25 acknowledged he knew of the damaged scaffolding material but did nothing
26 about it and simply "washed his hands" of responsibility, assuming Mr.
27 Agilar had matters under control.

28 Counsel asserted the evidence demonstrated a complete lack of

1 safety consciousness on the part of the respondent, pointedly based on
2 Mr. Belinski's testimony that despite all of the violations, the
3 pictures and the evidence, he still believes the obvious defects were
4 okay and still has great faith in the competence of Mr. Agilar.

5 Counsel further argued the problems were not "fixed immediately"
6 as testified; but rather because inspection occurred on September 18th
7 it was only on November 1st the corrective conditions could be verified.
8 Counsel concluded by arguing that the employer didn't even know what the
9 problems were nor what they were doing, and even today demonstrate that
10 continued position and attitude. The complainant documents and
11 testimony all met the burden of proof. There was no witness testimony
12 or other evidence that rebutted the proof of violations.

13 Respondent presented closing argument. Counsel identified the
14 recognized proof elements required to find violations under occupational
15 safety and health law. He argued there was simply no **employer knowledge**
16 to meet the necessary element to find a violation. The respondent
17 employer testified he relied upon employee Agilar to be qualified based
18 on his experience and reputation and asserted that was not "**employer**
19 **knowledge**" as defined under occupational safety and health law.

20 Counsel argued the CSHOs did not identify themselves as
21 "enforcement" personnel and on the site seeking to find violations for
22 the purpose of citation and assessment of penalties. CSHO Dressler
23 stated to Mr. Belinski's that he was "not here to issue citations . .
24 .". This mislead the respondent, "he was blind sided, and . . . not
25 fairly placed on notice . . . that the inspection could lead to serious
26 violations and substantial monetary penalties . . .".

27 Counsel argued the scaffolding was "attached to the wall", and
28 therefore not in a dangerous condition for potential collapse or

1 tipping. He further asserted that nothing was done in bad faith; the
2 employer was cooperative, but did not have a working knowledge or
3 understanding of OSHA. OSHA took advantage of a cooperative,
4 unsuspecting employer and now asserts the element of "employer
5 knowledge" was met under the burden of proof to find violations and
6 penalties of \$11,000.00 against a very small family company all grounded
7 on very "subjective" determinations. Counsel concluding the citations
8 and penalties were ". . . excessive and not fair of this small family
9 owned company and in the economy . . .".

10 In considering the testimony, exhibits, and arguments of counsel,
11 the Board is required to review the evidence and established legal
12 elements to prove violations under recognized occupational safety and
13 health law.

14 In all proceedings commenced by the filing of a
15 notice of contest, the burden of proof rests with
the Administrator. (See NAC 618.788(1)).

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

19 To prove a violation of a standard, the Secretary
must establish (1) the applicability of the
20 standard, (2) the existence of noncomplying
conditions, (3) employee exposure or access, and
21 (4) that the employer knew or with the exercise of
reasonable diligence could have known of the
22 violative condition. See *Belger Cartage Service,*
Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
23 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
24 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
(No. 76-1408, 1979); *American Wrecking Corp. v.*
25 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
2003).

26 A respondent may rebut allegations by showing:

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

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

3 NRS 618.625 provides in pertinent part:

4 ". . . a serious violation exists in a place of
5 employment if there is a **substantial probability**
6 **that death or serious physical harm could result**
7 **from a condition** which exists, or from one or more
8 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."

9 The elements of proof to establish violations of the cited standard
10 were met by preponderant evidence. The standard was **applicable** to the
11 facts in evidence. There was no claim or rebuttal to the contrary.
12 **Non-complying conditions** were established by complainant witnesses, the
13 photographic exhibits, and admitted by respondent witness. The employer
14 failed to implement the safety requirements specifically alleged in the
15 enforcement standards. **Employer knowledge** was proven through the
16 witness testimony of Mr. Belinski and under imputed principles
17 recognized under occupational safety and health law. **Employee exposure**
18 through **access** to hazardous conditions was demonstrated by the
19 investigative information of the comprehensive jobsite inspection and
20 admissions that the scaffolding was utilized by untrained employees in
21 the erection and work to apply stucco to the structure.

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

(1973). (emphasis added)

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

The principle defensive element asserted by Mr. Belinski on behalf of the respondent is based upon a lack of **employer knowledge** of the violative conditions. However, the respondent **lack of understanding** of the construction field involving its employees designing and erecting or using scaffolding materials, is not a defense to employer knowledge but rather corroborates the evidence of violation. Further, the supervisory construction superintendent, Mr. Burt Craig, admitted he was neither a competent person nor qualified in the erection for employee use of scaffolding. There was no one on the construction site with the essential required capability and training in furtherance of the standard requirements. Further, Mr. Agilar was designated by respondent as the qualified individual and employee responsible for the other employees and possessed some supervisory role based upon the reliance and control placed in him, however he admitted to CSHO Dressler he had no training nor the required qualifications recognized under occupational safety and health law.

The respondent employer knew, or **with the exercise of reasonable**

1 **diligence**, could have known of the violative conditions. All of the
2 violations occurred in **plain view**, and under the **supervision of company**
3 **superintendent Craig** and, in many instances, **company president Belinski**.

4 In general, the actual or constructive **knowledge of**
5 **a supervisory employee will be imputed to the**
6 **employer**, and thus constitute a prima facie showing
7 of employer knowledge. Where supervisory knowledge
8 can be imputed, OSHA need not also show that there
9 were deficiencies in the employer's safety program.
10 *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*
Inc. v. OSHRC, 134 F.3d 1235, 1240-41, 18 OSH Cases
1129 (4th Cir. 1998), and cases cited therein at
footnote 31. Occupational Safety and Health Law, 2nd
Ed., Rabinowitz at page 87. (emphasis added)

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

14 It is a long established rule that, absent ambiguity, a statute's
15 **plain meaning** controls, and no further analysis is permitted. *State*
16 *Farm Mut. Auto. Ins. Co. v. Commissioner of Ins.*, 114 Nev. 535, 540, 958
17 P.2d 733, 736 (1998). Only where a statute's language is ambiguous,
18 must a court look to legislative history and rules of statutory
19 interpretation to determine its meaning. *Leven v. Frey*, 123 Nev. 399,
20 404, 168 P.3d 712, 716 (2007). A statute's language is ambiguous when
21 it is capable of more than one reasonable interpretation. *Id.* Internal
22 conflict can also render a statute ambiguous.

23 Based upon the facts and applicable law the violations must be
24 confirmed.

25 The classification of the violation as serious must also be
26 confirmed. NRS 618.625 provides in pertinent part:

27 ". . . a serious violation exists in a place of
28 employment if there is a **substantial probability**
that death or serious physical harm could result

1 **from a condition** which exists, or from one or more
2 practices, means, methods, operations or processes
3 which have been adopted or are in use in that place
4 of employment unless the employer did not and could
5 not, with the exercise of reasonable diligence,
6 know of the presence of the violation."

7 Congress, through enactment of the Code of Federal Regulations
8 (CFR), develops specific standards to protect employees in the workplace
9 after extensive study and determination that particular hazards are
10 known and/or **recognized** in certain industries. A hazard is deemed
11 "recognized" when the potential danger of the condition or practice is
12 either actually known to the particular employer or generally known in
13 the industry. *Continental Oil Co. v. OSHRC*, 630 R.2d 446, 448 (9th Cir.
14 1980). The testimonial evidence of the CSHO confirmed the dangers
15 associated with falls from a two-tiered scaffolding structure. The
16 issue before the board as to the violation classification is not that
17 any serious injury occurred but whether the **potential** for same existed.
18 Employees on the worksite had **access** to hazardous conditions. The
19 **probability** for serious injury or death from exposure to hazardous
20 conditions is the governing criteria. There was a preponderance of
21 evidence in the record to support the classification of the violations
22 as serious.

23 In reviewing the proposed penalties assessed, the Board finds that
24 subsets of certain violations were very closely interrelated making the
25 penalty aspects duplicitous. The resultant total penalties proposed
26 represent an excessive punitive burden. The goal of the Occupational
27 Safety and Health Act is to assure workplace safety. The amount of a
28 monetary fine does not necessarily correlate to correction or resolution
29 of unsafe employee working conditions. Given the evidence and facts of
30 violation presented, it is appropriate the penalties be **reduced and**

1 **grouped** in Citation 1 as to items 1, 2 and 5; and similarly as to
2 Citation 1, Items 4 and 7. By finding the respondent in serious
3 violation of each of the cited standards referenced but reducing the
4 penalties through grouping, the employer respondent is better able to
5 direct available funds to resolution of the violative conditions subject
6 of citation. However, the respondent is placed notice that upon any
7 subsequent inspection, findings of **repeat** violations of **any** violations
8 confirmed herein may justifiably result in the imposition of
9 extraordinary penalties in accordance with the OSHA enforcement program.
10 The penalty reduction and grouping here should not be misinterpreted as
11 excusing or condoning the violative conduct found. However the facts
12 in evidence warrant a fair and reasonable penalty assessment for
13 effective enforcement of the violative conditions under the statutory
14 guidelines to safeguard the employer's worksite.

15 The Federal courts recognize the exclusive authority of the
16 Commission (Board) to assess, raise, lower or adjust penalties.

17 If an employer contests the Secretary's proposed
18 penalty, the Review Commission (Board) has
19 exclusive authority to assess the penalty; the
20 Secretary's penalty is considered merely a
21 proposal. Relying on the language of Section
22 17(j), the Commission and courts of appeal have
23 consistently held that it is for the **Commission**
24 **(Board) to determine, de novo, the appropriateness**
25 **of the penalty to be imposed for violation** of the
26 Act or an OSHA standard. (Emphasis added) The
27 Review Commission therefore is not bound by OSHA's
28 penalty calculation guidelines. The Commission
evaluates all circumstances of a violation . . . in
determining what penalty, if any, should be
assessed. The Review Commission has held that the
criteria to be considered cannot always be given
equal weight and that no single factor is
controlling in assessing penalties. . . ."
Occupational Safety and Health Law, 2013,
Bloomberg/BNAL 3rd Ed., pages 295-297, citing cases,
U.S. Ladish Malting Co., 135 F.3d 484, 18 OSH Cases
1133 (7th Cir. 1998); *Reich v. Arcadian Corp.*, 110
F.3d 1192, 17 OSH Cases 1929 (5th Cir. 1997) (citing

29 U.S.C. §§666(j), 659(a), 659(c)); *Bush & Burchett Inc. V. Reich*, 117 F.3d 932, 939, 17 OSH Cases 1897, 1903 (6th Cir.), cert. denied, 118 S. Ct. (1997). *Quality Stamping Prods. Co.*, 16 OSH Cases 1927 (Rev. Comm'n 1994); *Valdak Cor.*, 17 OSH Cases 1135, 1137-38 & n.5 (Rev. Comm'n 1995), *aff'd*, 73 F.3d 1466, 17 OSH Cases 1492 (8th Cir. 1996) (. . .the Commission noted that **"the Act places no restrictions on the Commission's authority to raise or lower penalties within those limits"**). (emphasis added)

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 Board modifies the penalties and groups the violations at Citation 1, Items 1, 2 and 5, and confirms the serious classification and a total penalty of \$1,200.00. Similarly, the Board modifies the penalties and groups the violations at Citation 1, Items 4 and 7, and confirms the serious classification and a total penalty of \$1,600.00. The Board further finds a violation at Citation 1, Item 3, and confirms the serious classification and proposed penalty of \$1,200.00. The Board further finds a violation at Citation 1, Item 8, and confirms the serious classification and proposed penalty in the amount of \$1,600.00.

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, 29 CFR 1926.451(a)(6), Item 2, 29 CFR 1926.451(b)(8), and Item 5, 29 CFR 1926.451(c)(3). The Serious classifications are confirmed, and the grouped penalties approved in the amount of \$1,200.00.

Violations of Nevada Revised Statutes are confirmed at Citation 1, Item 4, 29 CFR 1926.451(c)(2)(i) and Item 7, 29 CFR 1926.451(f)(7). The citations are grouped, the Serious classifications confirmed, and the total grouped penalties approved in the amount of \$1,600.00.

A violation of Nevada Revised Statutes is confirmed at Citation 1,

1 Item 3, 29 CFR 1926.451(b)(8), the Serious classification confirmed and
2 the proposed penalty approved in the amount of \$1,200.00.

3 A violation of Nevada Revised Statutes is confirmed at Citation 1,
4 Item 6, 29 CFR 1926.451(f)(3), the Serious classification confirmed and
5 the total proposed penalty approved in the amount of \$1,200.00.

6 A violation of Nevada Revised Statutes is confirmed at Citation 1,
7 Item 8, 29 CFR 1926.454(a), the Serious classification confirmed and the
8 proposed penalty approved in the amount of \$1,600.00.

9 The grand total penalties for all violations, based upon reduction,
10 grouping and individual penalties found is in the amount of SIX THOUSAND
11 EIGHT HUNDRED DOLLARS (\$6,800.00).

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

23 DATED: This 18th day of September 2014.

24 NEVADA OCCUPATIONAL SAFETY AND HEALTH
25 REVIEW BOARD

26 By /s/
27 JOE ADAMS, CHAIRMAN
28