

File

NEVADA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW BOARD

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

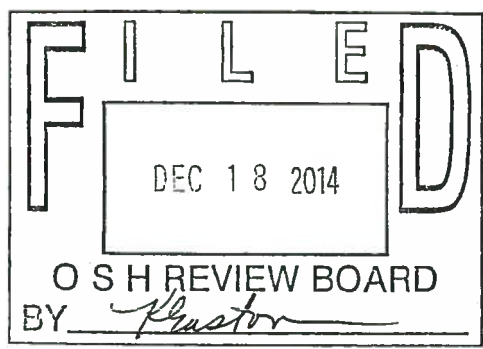
Docket No. LV 15-1759

Complainant,

vs.

CRYSTAL COURT APARTMENTS, INC.,

Respondent.



**DECISION**

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 5<sup>th</sup> day of November, 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. GEORGE REICHERT, safety representative, appearing on behalf of Respondent, **Crystal Court Apartments, Inc.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

Jurisdiction in this matter has been conferred in accordance with Nevada Revised Statute 618.315.

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

4 Citation 1, Item 1, charges a violation of 29 CFR 1910.303(g)(1),  
5 which provides in pertinent part:

6 *Space about electric equipment.* Sufficient access  
7 and working space shall be provided and maintained  
8 about all electric equipment to permit ready and  
safe operation and maintenance of such equipment.

9 Complainant charged that inside the electrical room located on the  
10 fourth floor at the Crystal Court Apartments, multiple electrical panels  
11 were blocked by materials such as stove-ovens, tables and refrigerators,  
12 restricting access to the panels for safe, ready operations and  
13 maintenance. Employees who worked in the electrical room areas were  
14 exposed to possible electrical shock, contact injuries and/or fire  
15 hazards.

16 The violation was classified as "Serious". The proposed penalty  
17 for the violation is in the amount of \$2,800.00.

18 The parties stipulated to the admission of evidence identifying  
19 complainant Exhibits 1 through 3.

20 Counsel for the complainant, through Certified Safety and Health  
21 Officer (CSHO) Daren Turner presented testimony and evidence of the  
22 violation, classification and appropriateness of the proposed penalty.  
23 Mr. Turner conducted an inspection at respondent's apartment complex in  
24 Las Vegas, Nevada based upon an anonymous complaint to NIOSH. The  
25 opening conference was conducted with respondent manager George Reichert  
26 and maintenance director Rod Chesterton. Mr. Turner identified  
27 complainant's Exhibits 1 through 3 stipulated in evidence. He testified  
28 as to his observations during the course of the inspection. During the

1 "walk around" inspection CSHO Turner observed electrical panels in the  
2 fourth floor "electrical room" blocked by various items. Inside the  
3 electrical room he noted panels and electrical meters obstructed by  
4 stored appliances and furniture. He was informed the stored items were  
5 taken out of service or abandoned by former tenants. The stored items  
6 restricted the space preventing safe access to the electrical panels  
7 under normal employee working conditions and notably in case of an  
8 emergency. The space about the electrical equipment was obstructed by  
9 at least 36 inches in multiple instances.

10 CSHO Turner conducted employee interviews and referenced Exhibit  
11 1 at page 23. Employee #1 identified as a maintenance tech reported he  
12 was required to work in the electrical room on the fourth floor to reset  
13 a breaker for a tenant in the previous month and found a refrigerator  
14 and stove obstructing his access to the panel. Employee #2 reported he  
15 was in the fourth floor electrical room just 30 minutes previous to the  
16 inspection and accesses the room every day during the course of his  
17 employment. He reported the maintenance personnel stored appliances in  
18 those rooms on a regular basis. Mr. Turner testified the interview  
19 information and his observations confirmed the employees were exposed  
20 to the hazardous working conditions when required to service or reset  
21 the breaker panel, review the meters, or perform regularly assigned work  
22 tasks.

23 He testified the space about the electrical equipment was less than  
24 36 inches in multiple areas and confirmed the minimum distance  
25 requirement to be a determining factor for violation under the OSHA  
26 standards. CSHO Turner referenced 29 CFR 1910.303(g) of the standard  
27 subpart Table S-1, which established the controlling distance minimums.  
28 Management informed him they would have the room cleaned and allow three

1 foot clearance for all electrical equipment throughout the rooms. He  
2 testified that inside the electrical rooms on the fourth floor the  
3 electrical panels were blocked and could not be readily reached. The  
4 obstructing conditions within 36 inches creates general work hazards.  
5 CSHO Turner testified the hazards are compounded in the event of a fire  
6 or other need to quickly reach the breakers particularly in an  
7 emergency.

8 CSHO Turner identified photographs taken during the inspection and  
9 explained the depictions in support of his testimony at Exhibits 1,  
10 pages 50-55. He noted particularly the measuring tape shown at page 51  
11 to establish the lack of minimum 36 inch distances.

12 CSHO Turner testified on the standard, the requirements, his  
13 proposed recommendation for citing the violation and discussions with  
14 the respondent representatives during the closing conference. He  
15 explained the serious classification referencing employee **access** to the  
16 potential hazards of electrical shock, injurious contact or fire danger  
17 if working on the panels in the electrical room during normal work and  
18 particularly if an emergency occurred. He testified as to the Exhibit  
19 1, page 25 worksheet in support of the calculations for severity,  
20 probability and gravity.

21 On cross-examination CSHO Turner testified he observed no damaged  
22 electrical panels nor any of the appliances stored in an area to be  
23 plugged into a wall outlet. He observed nothing flammable and was able  
24 to "move around" in the electrical room through most of the area. Mr.  
25 Turner responded to questions on the date the cited standard was adopted  
26 or any changes made, and answered he was unaware of the original date.  
27 He testified the cited standard is currently published and the  
28 responsibility of all employers to assure compliance.

1 At the completion of complainant evidence and testimony, the  
2 respondent offered no witnesses or documentary evidence and reserved  
3 right to closing argument.

4 Complainant presented closing argument asserting the facts in  
5 evidence clearly established a violation by the preponderance of  
6 evidence. The pictorial evidence corroborated the testimony of the CSHO  
7 and interviewed witnesses. The measurement tape photo confirmed the  
8 CSHO testimony of obstructions within the 36 inch prohibited distances  
9 under the standard. Counsel asserted the violations were in **plain view**  
10 and the photograph clearly demonstrated obstructions to the panels.  
11 Counsel further noted the initial referral identified other areas  
12 subject of complaint but CSHO Turner found no validity to those and  
13 recommended the issuance of only one serious violation based upon the  
14 evidence.

15 Respondent representative offered closing argument and asserted the  
16 fire department minimum distance for obstructions to be only 12 inches  
17 and the employer was unaware of the OSHA 36 inch requirement. He  
18 asserted the identified obstructions permitted movement around the area  
19 and did not warrant citation for a serious violation. He argued that  
20 there was simply an error on the part of the respondent as to the  
21 minimum obstruction distance based upon the 12 inch fire department  
22 regulation and the OSHA standard. He further argued the obstructions  
23 were immediately removed and the conditions abated.

24 The Board in reviewing the facts, documentation, testimony and  
25 other evidence must measure same against the established applicable law  
26 developed under the Occupational Safety & Health Act.

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

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

4 To prove a violation of a standard, the Secretary  
5 must establish (1) the applicability of the  
6 standard, (2) the existence of noncomplying  
7 conditions, (3) employee exposure or access, and  
8 (4) that the employer knew or with the exercise of  
9 reasonable diligence could have known of the  
10 violative condition. See *Belger Cartage Service,*  
*Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
11 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);  
12 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC  
13 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
14 (No. 76-1408, 1979); *American Wrecking Corp. v.*  
15 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.  
16 2003).

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

20 . . . a serious violation exists in a place of  
21 employment if there is a substantial probability  
22 that death or serious physical harm could result  
23 from a condition which exists or from one or more  
24 practices, means, methods, operations or processes  
25 which have been adopted or are in use at that place  
26 of employment **unless the employer did not and could**  
27 **not, with the exercise of reasonable diligence,**  
28 **know the presence of the violation.** (emphasis  
added)

29 The Board finds the testimonial evidence provided by CSHO Turner  
30 was credible, un rebutted and met the recognized burden of proof of the  
31 violation charged at Citation 1, Item 1, referencing 29 CFR  
32 1910.303(g)(1). The testimony was corroborated by the photographs at  
33 Exhibit 1, pages 50-55. The Board further finds the witness interview  
34 statements supported the proof requirement of direct **employee exposure**  
35 **and through access** to the hazardous conditions. Both employees reported  
36 they had access to the room and were required to reach the electrical  
37 panel breakers to effectuate a reset. Employee #2 had regular occasion  
38

1 to perform work in the electrical rooms.

2 The Board concludes the employer failed to satisfy the requirements  
3 of the standard to protect employees exposed to the potential of  
4 electrical shock or work place hazards due to obstruction of electrical  
5 panels. The violative conditions were in **plain view**. The employer knew  
6 or should have known with the **exercise of reasonable diligence** of the  
7 unsafe working conditions.

8 Actual knowledge is not required for a finding of  
9 a serious violation. Foreseeability and  
10 preventability render a violation serious provided  
11 that a reasonably prudent employer, i.e., one who  
12 is safety conscious and possesses the technical  
13 expertise normally expected in the industry  
14 concerned, would know of the danger. *Candler-*  
15 *Rusche, Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723  
16 (1976), appeal filed, No. 76-1645 (D.C. Cir. July  
17 16, 1976); *Rockwell International*, 2 OSHC 1710,  
18 1973-1974 OSHD ¶ 16,960 (1973), *aff'd*, 540 F.2d  
19 1283 (6<sup>th</sup> Cir. 1976); *Mountain States Telephone &*  
20 *Telegraph Co.*, 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365  
21 (1973).

22 Employee exposure is established under occupational safety and  
23 health law if there is "access to hazardous conditions".

24 Under well established Occupational Safety and  
25 Health Law, **there need be no showing of actual**  
26 **exposure in favor of a rule of access based upon**  
27 **reasonable predictability** - (1) the zone of danger  
28 is 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 (9<sup>th</sup> Cir. 1975); *General*  
*Electric Company v. OSAHRC and Usery*, 540 F.2d 67,  
69 (2d Cir. 1976).

29 The preponderance of documentary evidence and un rebutted testimony

1 clearly established **direct and obvious potential hazards** to employees.  
2 The hazards were reasonably **foreseeable** and required protection to keep  
3 the employee work place free of **recognized** unsafe working conditions.  
4 Further, it is reasonable to infer from the evidence that any impediment  
5 to an electrical breaker panel during the event of a power outage or  
6 emergency would exacerbate the identified hazards.

7           The courts have long recognized that an **obvious or**  
8 **glaring nature of a hazard** may itself suffice to  
9 provide the basis for a finding of . . . a  
10 "recognized hazard" . . . See, *Kelly Springfield*  
*Tire Co. V. Donovan*, 729 F.2d 317, 321, 11 OSH  
Cases 1889 (5<sup>th</sup> Cir. 1984).

11           Based upon facts, evidence and testimony, it is the decision of the  
12 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that respondent  
13 violated Nevada Revised Statute as charged in Citation 1, Item 1, 29 CFR  
14 1910.303(g)(1). The violation met the requirements of the **serious**  
15 classification due to the potential for serious injury or death from an  
16 electrical shock, fire or emergency caused by obstruction of the storage  
17 materials impeding movement in the work room. The proposed penalty in  
18 the amount of TWO THOUSAND EIGHT HUNDRED DOLLARS (\$2,800.00) is  
19 reasonable and approved.

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



1 by the Chairman of the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW  
2 BOARD shall constitute the Final Order of the BOARD.

3 DATED: This 18th day of December, 2014.

4 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
5 REVIEW BOARD

6 By                   /s/                    
7 JOE ADAMS, Chairman

- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28