

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,

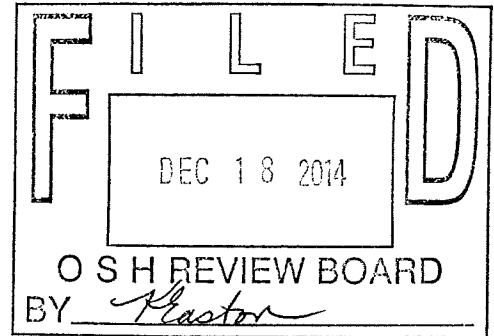
Docket No. RNO 14-1738

Complainant,

vs.

10 WEST COAST ARBORISTS, INC.,

Respondent.



11
12
13 DECISION

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 12th day of November
16 2014, in furtherance of notice duly provided according to law, SALLI
17 ORTIZ, ESQ., counsel appearing on behalf of the **Chief Administrative**
18 **Officer of the Occupational Safety and Administration, Division of**
19 **Industrial Relations** (OSHA), and Mr. Ernesto Macias, safety
20 representative appearing on behalf of respondent, **WEST COAST ARBORISTS,**
21 **INC.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as
22 follows:

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

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

28 Citation 1, Item 1 charges a violation of 29 CFR 1910.269(a)(3),

1 which provides in pertinent part:

2 Existing conditions related to the safety of the
3 work to be performed shall be determined before
4 work on or near electric lines or equipment is
5 started. Such conditions include, but are not
6 limited to, the nominal voltages of lines and
7 equipment, the maximum switching transient
8 voltages, the presence of hazardous induced
9 voltages, the presence and condition of protective
10 grounds and equipment grounding conductors, the
11 condition of poles, environmental conditions
12 relative to safety, and the locations of circuits
13 and equipment, including power and communication
14 lines and fire protective signaling circuits.

9 Complainant charged no determination of the nominal voltage of
10 power lines was determined before work near electrical lines while
11 performing tree trimming operations. An employee was working in an
12 aerial lift bucket positioned between and through the neutral and
13 primary distribution lines of a 25 kilovolt (kV), 12 amp max load
14 circuit. The distance between the neutral and Center-King phase
15 electric line was 7 feet 6 inches.

16 The violation was classified as "Serious". The proposed penalty
17 for the alleged violation is in the amount of \$1,975.00.

18 Counsel for the complainant and respondent stipulated to the
19 admission of evidence identifying complainant Exhibits 1 through 3, and
20 respondent Exhibits A and B.

21 Complainant presented testimony and documentary evidence to support
22 the cited violation. Compliance Safety and Health Officer (CSHO) Mr.
23 Bryson Frazier testified as to his inspection and the citation issued
24 to the employer.

25 CSHO Frazier accompanied by CSHO Brandi Gill inspected the
26 respondent worksite located in a residential area in Reno, Nevada on or
27 about February 21, 2014. CSHO Frazier referenced his inspection report
28 at Exhibit 1, page 8 through 9, and testified respondent West Coast

1 Arborists, Inc. employees were performing tree trimming operations in
2 a residential area in Reno, Nevada as subcontractors to Nevada Energy.
3 During the walkaround inspection CSHO Frazier observed Employee No. 1
4 (name redacted) operating an aerial lift to reach a tree for trimming
5 purposes while Employee No. 2 (name redacted) monitored his movements
6 from the ground. The lift truck aerial boom was positioned under three
7 primary distribution power lines and above the neutral line. Employee
8 No. 1 finished the trimming operations and moved the aerial lift bucket
9 back through the power lines to stow the boom and bucket. As he moved
10 through the power lines, the bottom of the aerial boom bucket contacted
11 the neutral power line. CSHO Frazier referenced employee interviews at
12 Exhibit 1, pages 11 and 12 which he obtained from the observed
13 individuals during the inspection. He testified Employee No. 1 informed
14 him he did not know the nominal voltage of the line near where he was
15 performing the tree trimming work.

16 CSHO Frazier testified Employee No. 2 did not know the voltage for
17 the primary distribution lines and referenced the Employee No. 2 witness
18 statement at Exhibit 1, page 12 to confirm his testimony. CSHO Frazier
19 also inquired of Mr. Michael Wessner, the respondent crew leader and
20 reported Mr. Wessner informed him that ". . . he did not know the
21 voltage but guessed it was 15 volts".

22 CSHO Frazier contacted Mr. Mark Young an administrator at Nevada
23 Energy and confirmed the primary distribution lines at the location
24 where the employees were working contained "nominal voltage of 25
25 kilovolts".

26 Mr. Frazier testified there was no evidence provided from the
27 witnesses, crew leader Wessner or Mr. Nick Dirk supervisor, that any
28 determination of the nominal voltage of the line was conducted prior to

1 the performance of the tree trimming operations. He informed the
2 respondent representatives of the violative conditions, referenced the
3 standard, and advised he was recommending a serious citation for the
4 violation.

5 At Exhibit 1, page 13, CSHO Frazier identified his OSHES 1B
6 worksheet, the penalty calculations and adjustment factors, as well as
7 the exposure and classification of the violation as "Serious".

8 Respondent representative Mr. Macias conducted cross-examination.
9 CSHO Frazier testified the two employees who "guessed" at the voltage
10 after stating they did not actually know same were within the "nominal
11 range of the primary voltage". In continued responses CSHO Frazier
12 testified the ground man employee knew how close he needed to be in his
13 job capacity, and that the employees were able to identify the "primary"
14 power line. He further testified the employee guesses were within the
15 range but responded the safety issue with guessing voltage at a lower
16 range could lead an employee to get closer than a safe distance and be
17 subjected to potential shock hazard.

18 Respondent offered no witness testimony.

19 At the conclusion of evidence and testimony, complainant presented
20 closing argument. Counsel asserted the terms of the standard
21 specifically require threshold conditions related to safety must be
22 performed and determined before any work can commence on or near
23 electrical lines. The employee interview statements standing alone were
24 proof of the cited violation. The unrefuted admissions unequivocally
25 established they simply did not know the voltage. The statements
26 corroborate the testimony of CSHO Frazier. The violative condition
27 under standard was established and the burden of proof satisfied.

28 Counsel asserted even the respondent lead supervisor was way off

1 in his "guess" of the voltage. The purpose of the standard is to ensure
2 the employees and the employer first check and determine the dangers of
3 electrical line power before any work is commenced. The working
4 employees and supervisor were simply proceeding on "blind faith"; there
5 was no evidence whatsoever offered to demonstrate compliance with the
6 standard.

7 The respondent presented closing argument. Mr. Macias asserted the
8 standard terms required a determination of "nominal" voltage for the
9 lines and therefore the guesses being within the range demonstrated they
10 knew the approach distance minimums. No employee ever violated the
11 approach distances and therefore none exposed to hazards from any work
12 within a dangerous electrical condition. He concluded that without any
13 facts to show a proximity to the potential for injury, there can be no
14 violation.

15 In reviewing the testimony, exhibits, and arguments of counsel, the
16 Board is required to measure the evidence against the required elements
17 to establish violations under Occupational Safety & Health Law based
18 upon the statutory burden of proof and competent evidence.

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

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

23 To prove a violation of a standard, the Secretary
24 must establish (1) the **applicability** of the
25 standard, (2) the existence of **noncomplying**
26 **conditions**, (3) **employee exposure** or access, and
27 (4) that the **employer knew or with the exercise of**
28 **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

1 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
2 (No. 76-1408, 1979); *American Wrecking Corp. v.*
3 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
4 2003).

5 A respondent may rebut allegations by showing:

- 6 1. The standard was inapplicable to the situation
7 at issue;
- 8 2. The situation was in compliance; or lack of
9 access to a hazard. See *Anning-Johnson Co.*,
10 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).
- 11 3. Proof by a preponderance of substantial
12 evidence of a recognized defense.

13 The admitted evidence and testimony established the specific terms
14 of the standard were not subject of compliance. The complainant witness
15 testimony was credible and corroborated by the documentary witness
16 testimony Exhibit 1, pages 11 and 12. Regardless of the actual voltage,
17 approach distances or various factors raised in cross-examination, there
18 was no rebuttal of the complainant preponderant evidence subject of
19 testimony and documentary Exhibits 1 through 3.

20 The elements to establish violations under the recognized burden
21 of proof were met. It was undisputed the standard was **applicable** to the
22 admitted facts in evidence. The existence of **non-complying conditions**
23 was confirmed through the un rebutted employee witness statements
24 corroborating the sworn credible testimony of CSHO Frazier. The
25 respondent employees were **directly exposed** and/or had **access** to the
26 violative conditions and potential serious injuries or death that could
27 result from the voltage established as existent in the lines. Even the
28 employee "guesses" were within a range to cause serious injuries or
death from the voltage undisputedly existent in the power lines.
Finally, the employer **knowledge** was established because the supervisory
employees of respondent were onsite and provided no testimony, evidence

1 or reporting they had ". . . determined before work on or near
2 electrical lines or equipment . . . the nominal voltages of (the) lines
3 . . .".

4 **Employer knowledge** of the violative conditions is imputed to the
5 employer when a supervisor knew or with reasonable diligence could have
6 known of the violative conditions. Clearly the CSHO testimony of the
7 reportings by the supervisory employee, which was unrefuted, established
8 they had not made a determination to know the nominal voltage before
9 work commenced. See *Division of Occupational Safety and Health v. Pabco*
10 *Gypsum*, 105 Nev. 371, 775 P.2d 701 (1989).

11 Respondent offered no witness testimony to rebut the allegations,
12 CSHO testimony, or documentary evidence or mitigate the evidence of
13 violation.

14 Based upon the facts and applicable law, the violation must be
15 confirmed.

16 The classification of the violation as "serious" is confirmed. NRS
17 618.625 provides in pertinent part:

18 ". . . a serious violation exists in a place of
19 employment if there is a **substantial probability**
20 **that death or serious physical harm could result**
21 **from a condition** which exists, or from one or more
22 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."

23 Congress, through enactment of the Code of Federal Regulations
24 (CFR), develops specific standards to protect employees in the workplace
25 after extensive study and determination that particular hazards are
26 known and/or **recognized** in certain industries. A hazard is deemed
27 "recognized" when the potential danger of the condition or practice is
28 either actually known to the particular employer or generally known in

1 the industry. *Continental Oil Co. v. OSHRC*, 630 F.2d 446, 448 (9th Cir.
2 1980).

3 The testimonial and documentary evidence was unrefuted and
4 confirmed the dangers associated with exposure to electrical power lines
5 in support of the serious classification and employee exposure to
6 serious injury or death. The issue before the Board as to the violation
7 classification is not that any serious injury **occurred** but whether the
8 **potential** for same existed. Employees on the worksite had **access** to
9 hazardous electrical conditions recognized to result in serious injury
10 or death. The **probability** for serious injury or death from exposure to
11 the hazardous conditions is governing criteria included in the penalty
12 calculation at Exhibit 1, pages 13 through 15. There is a preponderance
13 of evidence in the record to support the classification of the violation
14 as serious and the reasonableness of the proposed penalty.

15 The Board finds, as a matter of fact and law, that a violation did
16 occur as to Citation 1, Item 1, 29 CFR 1910.269(a)(3), the
17 classification of the violation as "Serious" appropriate, and the
18 proposed penalty in the amount of TWO THOUSAND NINE HUNDRED SEVENTY-FIVE
19 (\$2,975.00) reasonable.

20 Based upon facts, evidence and testimony, it is the decision of the
21 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of
22 Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR
23 1910.269(a)(3), the Serious classification confirmed, and the proposed
24 penalty in the amount of \$2,975.00 approved.

25 The Board directs counsel for the **complainant** to submit proposed
26 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**
27 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel
28 within twenty (20) days from date of decision. After five (5) days time

1 for filing any objection, the final Findings of Fact and Conclusions of
2 Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
3 **REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and
4 Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL**
5 **SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the
6 **BOARD.**

7 DATED: This 18th day of December 2014.

8 NEVADA OCCUPATIONAL SAFETY AND HEALTH
9 REVIEW BOARD

10 By /s/
11 JOE ADAMS, CHAIRMAN