

Fatality

no mis. proof met

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NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

- isolated no misc.

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

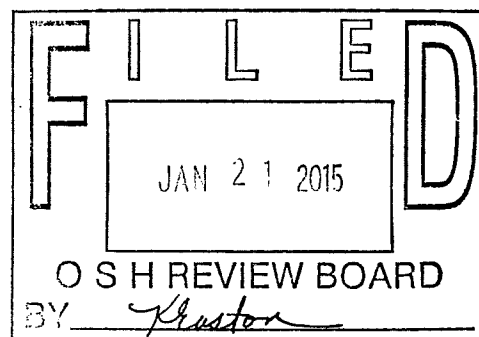
Docket No. RNO 14-1723

Complainant,

vs.

RENO FORKLIFT, INC.;

Respondent.



D E C I S I O N

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 12th day of November 2014, in furtherance of notice duly provided according to law, SALLI ORTIZ, ESQ., counsel appearing on behalf of the **Chief Administrative Officer of the Occupational Safety and Administration, Division of Industrial Relations (OSHA)**, and BRUCE MUNDY, ESQ., appearing on behalf of respondent, **RENO FORKLIFT, 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.

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

Citation 1, Item 1a, charges a violation of 29 CFR 1910.178(1)(2)(ii), which provides in pertinent part:

1 Training shall consist of formal instruction (e.g.
2 lecture, discussion, interactive computer learning,
3 video tape, written material), practical training
4 (demonstrations performed by the trainer and
practical exercises performed by the trainee), and
evaluation of the operator's performance in the
workplace.

5 The complainant alleged training for an employee performing
6 delivery and pick up of powered industrial trucks utilizing a Loadoll
7 retractable bed truck, did not consist of a combination of formal
8 instruction and practical training with demonstrations of the operation
9 of powered industrial trucks on the deployed bed of the delivery vehicle
10 and practical exercises performed by the employee and an evaluation of
11 the operator's performance. An employee was attempting to load a Drexel
12 Model SLT 30 powered industrial truck (forklift), serial number
13 46601D30377 on a Loadoll retractable bed truck. When the bed was fully
14 retracted, the Drexel SLT 30 rolled off the right side. The employee
15 attempted to stop it and was crushed when it fell.

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

18 Citation 1, Item 1b, charges a violation of 29 CFR
19 1910.178(1)(3)(ii)(A), which provides in pertinent part:

20 Powered industrial truck operators shall receive
21 initial training in the following topics, except in
22 topics which the employer can demonstrate are not
23 applicable to safe operation of the truck in the
employer's workplace. Workplace related topics:
Surface conditions where the vehicle will be
operated.

24 The complainant alleged an employee who operated industrial trucks
25 for delivery and pick up utilizing the bed of a Loadoll retractable bed
26 truck, had not received initial practical training in such operations
27 that considered the surface conditions of the bed when deployed and
28 retracted and had (sic) been demonstrated by a trainer, practiced by the

1 employee and evaluated by the employer. An employee was attempting to
2 load a Drexel Model SLT 30 powered industrial truck (forklift), serial
3 number 46601D30377 on a Loadoll retractable bed truck. When the bed was
4 fully retracted, the Drexel SLT 30 rolled off the right side. The
5 employee had attempted to stop it and was crushed when it fell.

6 The violation was classified as Serious. The proposed penalty for
7 the alleged violation is grouped with Item 1a.

8 Citation 1, Item 1c, charges a violation of 29 CFR
9 1910.178(1)(3)(ii)(G), which provides in pertinent part:

10 Powered industrial truck operators shall receive
11 initial training in the following topics, except in
12 topics which the employer can demonstrate are not
13 applicable to safe operation of the truck in the
employer's workplace. Ramps and other sloped
surfaces that could affect the vehicle's stability.

14 The complainant alleged an employee who operated industrial trucks
15 (forklift) for delivery and pick up utilizing the bed of a Loadoll
16 retractable bed truck, had not received initial practical training in
17 such operations that considered the surface conditions of the bed when
18 deployed and retracted and had (sic) been demonstrated by a trainer,
19 practiced by the employee and evaluated by the employer. An employee
20 was attempting to load a Drexel Model SLT 30 powered industrial truck
21 (forklift), serial number 46601D30377 on a Loadoll retractable bed
22 truck. When the bed was fully retracted, the Drexel SLT 30 rolled off
23 the right side. The employee had attempted to stop it and was crushed
24 when it fell.

25 The violation was classified as Serious. The proposed penalty for
26 the alleged violation is grouped with Item 1a.

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

1 Establishment of safety program: Duties of certain
2 employers; requirements of program; training for
3 temporary employees; regulations; exemption.

4 1. Except as otherwise provided in
5 subsections 8 and 9, an employer shall establish a
6 written safety program and carry out the
7 requirements of the program within 90 days after it
8 is established.

9 The complainant alleged the employer did not carry out the
10 requirements of its Written Safety Program in that the hazards
11 associated with ground to truck loading and unloading of powered
12 industrial trucks (forklifts) were not identified, evaluated and
13 controlled in documented procedures provided to employees in the form
14 of training to recognize and control such hazards. An employee did not
15 set the brake of the Drexel model SLT 30 powered industrial truck
16 (forklift) after positioning it on the deployed bed of a Loadoll
17 retractable bed truck with the winch to the center of the bed. When the
18 bed was fully retracted, the Drexel powered industrial truck (forklift)
19 rolled off the right side of the bed crushing the employee beneath.

20 The violation was classified as Regulatory. The proposed penalty
21 for the alleged violation was \$1,000.00.

22 Counsel for complainant and respondent stipulated to the admission
23 of evidence identifying complainant Exhibits 1 through 3, and respondent
24 Exhibits 1 through 9.

25 Complainant presented an opening statement. Counsel asserted that
26 notwithstanding the case involving a tragic fatal accident, the
27 contested matters before the Board are based upon a lack of training,
28 and comprise the core issues for the cited violations. The deceased
employee was not trained to operate specific equipment and, as a result
of that lack of training, killed during the unloading process of a
forklift from a transportation truck.

1 Respondent presented an opening statement. Counsel asserted the
2 case involved a tragic mistake which resulted in the unfortunate death
3 of employee Mr. Anthony Lee. Counsel represented the evidence will show
4 Mr. Lee received all appropriate required training, and utilized
5 equipment which itself carried labeled warning notices. Counsel argued
6 the case involves employee Lee not following the training he was given
7 by the employer. OSHA has no facts, evidence or law for finding
8 violations based upon lack of training.

9 Counsel for the Chief Administrative Officer presented testimony
10 and evidence with regard to the alleged violations. Certified Safety
11 and Health Officer (CSHO) Mr. Chris Carling identified Exhibits 1
12 through 3 stipulated in evidence and referenced the documents in his
13 testimony. On November 5, 2013 CSHOs Carling and Riley, were directed
14 to conduct an inspection involving a fatal accident at the Amazon
15 warehouse facility in Fernley, Nevada. The accident resulted in the
16 death of Mr. Anthony Lee, a truck driver employee of the respondent,
17 Reno Forklift. The event had been reported by Mr. Pat Pimpl, president
18 of Reno Forklift to the Reno OSHA office. The CSHOs conducted a
19 "walkaround" inspection which included employer representatives Mr.
20 George Pimpl, vice president, and Mr. Ed Achter, service manager for
21 Reno Forklift. The site safety manager and regional safety manager for
22 Amazon were also present because the accident occurred on the Amazon
23 facility site. The CSHOs observed and photographed the forklift which
24 had been righted after the accident to remove the body of deceased
25 employee Lee, and reviewed information furnished by the employer.

26 Respondent service manager Achter provided CSHO Carling a
27 preliminary description of the accident events. Reno Forklift employee
28 Lee was directed to pick up the subject forklift that had been used by

1 another respondent employee at the Amazon facility. Mr. Lee was
2 assigned a T69 freightliner transport truck with a Loadoll retractable
3 bed. The forklift has been "staged for pick up" south of the Amazon
4 loading dock. Mr. Lee backed the transport truck into position,
5 deployed the rear outrigging/bumper, moved the bed to the ground and
6 drove the forklift onto the ramp. CSHO Carling testified a truck driver
7 witness nearby reported employee Lee appeared to have some difficulty
8 getting the forklift steering tire straight at the base of the ramp.
9 Employee Lee moved the forklift onto the extended bed, connected the
10 winch cable to the forklift, released the brake, and winched the
11 forklift up the bed. He then operated the controls on the left side of
12 the transport truck to retract the bed. When the bed reached the "stop"
13 at the cab, inertia caused the forklift to roll slowly forward and off
14 the right side of the truck bed. Mr. Lee ran around to the right side
15 as soon as the forklift started to roll and was crushed when it fell
16 from the Loadoll truck bed to the ground. The truck driver who
17 witnessed the accident called 911.

18 CSHO Carling confirmed through respondent employee interviews that
19 the subject forklift was operating properly while being used at the
20 Amazon facility prior to the accident. After the incident, a large tow
21 truck operated by Cal Nevada towing hoisted the forklift onto a
22 transport truck. It was temporarily stored for two days at the towing
23 company's facility in Fernley, Nevada, then delivered to the respondent
24 yard in Sparks, Nevada. The forklift was driven off the transport truck
25 after being function tested at a loading dock. The park brake,
26 operating brakes and steering functioned normally before the forklift
27 was removed from the transport truck. Operations were observed by CSHOs
28 Carling and Riley.

1 The respondent provided documentation to support Mr. Lee's training
2 by another "pick up and delivery driver" (identified as Employee #2),
3 reflecting 30 hours of instructional time. The training documentation
4 was in the form of an invoice. Employee #2 reported he personally
5 provided training which included operation of transport truck #69,
6 inspection of the equipment, and operation of various types of forklifts
7 in the context of maneuvering for the purpose of loading and unloading
8 from loading docks onto a transport truck. The respondent did not
9 produce a copy of the operations manual for the Heavy Duty Loadoll
10 retractable bed.

11 CSHO Carling testified he was informed additional training had been
12 provided to Mr. Lee by service manager Ed Achter. He referenced his
13 investigative report including a list of training details subject of Mr.
14 Achter's statements at the time of the initial inspection. Mr. Carling
15 testified the respondent was not able to provide a copy of the company
16 employee training plan for review. He noted an absence of specific
17 information and documents to confirm procedures for loading or unloading
18 forklifts from retractable bed transport trucks, either at loading docks
19 or from the ground.

20 Mr. Carling identified employee number 2 as the individual who
21 provided much of the training for Mr. Lee, but noted his report did not
22 include recall for performing ground truck loading or loading during the
23 training. Mr. Carling determined the employer did not prepare written
24 step by step delivery procedures taking into account the hazards of
25 loading and unloading power industrial trucks (forklifts), but rather
26 relied on training provided by an experienced more senior employee.

27 CSHO Carling identified the photographic exhibits stipulated in
28 evidence and testified with regard to same at Exhibit 1, pages 72

1 through 78. He explained each depiction of the equipment involved in
2 the accident. Mr. Carling also testified as to the OSHES 1B "worksheet"
3 at Exhibit 1, pages 37 to 47 and explained the entries, penalty
4 calculations and basis for the serious classification. He determined the
5 hazard exposure from the investigative facts, including interviews with
6 the truck driver witness who observed Mr. Lee performing the operation
7 on the day of the accident. He testified that he concluded from the
8 evidence there was a lack of satisfactory training, particularly for
9 loading or unloading as required by the specific terms of the applicable
10 standards.

11 CSHO Carling testified with regard to each citation, the violative
12 conditions, exposure and classifications.

13 At Citation 1, Item 1a referencing 29 CFR 1910.178(1)(2)(iii) Mr.
14 Carling noted the specific allegations at Exhibit 1, pages 56 through
15 59. He charged employee Lee was not trained in the proper loading of
16 an industrial truck, classified the violation as Serious and proposed
17 a group penalty in the amount of \$3,500.00. He believed Mr. Lee
18 received training but it was not for performing the specific tasks
19 required nor did it involve the meaningful and necessary instructions
20 associated with the job task.

21 At Citation 1, Item 1b referencing 29 CFR 1910.178(1)(3)(ii)(A),
22 Mr. Carling determined employee Lee did not receive initial practical
23 training in retractable bed truck operations. He concluded the employer
24 was required to evaluate aspects of the training needed and assure it
25 was completed. He received no evidence at the time from the respondent
26 to support compliance.

27 At Citation 1, Item 1c referencing 29 CFR 1910.178(1)(3)(ii)(G),
28 CSHO Carling testified employee Lee did not receive the proper training

1 for operating a retractable bed truck even though he may have been
2 trained in the operation of forklifts for delivery and pick up. He
3 explained the testimony as based upon the lack of documentation to
4 establish that specific training for the work task assigned. CSHO
5 Carling concluded the accident occurred because employee Lee was
6 performing tasks for which he was not specifically trained.

7 At Citation 2, Item 1 referencing NRS 618.383(1), CSHO Carling
8 referenced the cited standard and charging allegations at Exhibit 1,
9 page 44. He testified the purpose of the standard is to assure specific
10 training and requires the employer carry out its written safety program.
11 He classified the violation as regulatory because no evidence was
12 provided as to specific procedures nor identified what is needed to
13 protect the employee.

14 CSHO Carling testified as to complainant's Exhibit 2, page 81, the
15 information provided by Mr. Achter at the time of the inspection. CSHO
16 Carling testified the topics and documents did not show or provide how
17 to load or unload a forklift. The documents did demonstrate some
18 training, although not what CSHO Carling determined to be required under
19 the terms of the specific standard. At Exhibit 2, page 84, the
20 checklist provided by the employer, Mr. Carling concluded the
21 information referenced only "moving equipment" and was "merely general
22 . . . but not . . . specific enough to be meaningful to show employee
23 Lee was trained to load and unload the forklift equipment . . . although
24 he was trained to operate the forklift."

25 Respondent conducted cross-examination of CSHO Carling. He
26 testified there was no doubt Mr. Lee did not set the parking brake
27 before the accident. He admitted that training does not have to be in
28 writing but can be verbal and that training "varies" by topic and for

1 different equipment. In response to counsel's question: ". . . had the
2 parking brake been set the accident could have been avoided?", Mr.
3 Carling replied ". . . yes . . . but he also should have chained it
4 . . .". On questioning regarding the operational manual, Mr. Carling
5 testified the operational manual shows "how to carry . . . the equipment
6 . . . and agreed that it is necessary to set . . . the equipment . . .
7 brake."

8 At the conclusion of complainant's case respondent presented
9 witness testimony and documentary evidence at respondent's Exhibit 1
10 through 9.

11 Mr. George Pimpl, vice president of respondent, testified as to
12 respondent's exhibits specifically identifying photograph Exhibit 2
13 depicting a warning decal on the forklift near the hand brake. He also
14 testified to a similar photo at Exhibit 3, and read the decal
15 informational signage notifying an operator the forklift is not equipped
16 with an automatic seat brake and that "you must engage the hand
17 operating parking brake lever before leaving the truck (forklift)." He
18 identified Exhibit 6, as a photograph showing the handbrake was not set
19 (engaged) at the time of the accident. He testified that safety
20 meetings and training occur every Friday and include video and
21 documentary training directly by the employer or through other
22 employees. Mr. Pimpl testified employee training is verified by
23 employee "sign offs" on the written documents maintained by the HR
24 department.

25 Respondent presented witness testimony from Mr. Ed Achter, the
26 employer service manager. Mr. Achter testified he hired Mr. Lee after
27 reviewing 35 applications, and determined he was qualified with a
28 history of driving "chain haulers". Mr. Achter described the

1 requirement for "chaining down" rolling stock type equipment explaining
2 it must be stabilized as opposed to simply hauling freight. He
3 testified Mr. Lee clearly understood English. Mr. Achter trained Mr.
4 Lee on how to operate loading mechanisms and practiced loading a
5 forklift onto a transport truck. He specifically showed Mr. Lee how to
6 set the park brake and operate the winch. Mr. Achter particularly
7 demonstrated when to release the park brake after connecting and
8 "winching it up". He explained the instructions he gave Mr. Lee on the
9 process of setting and releasing the park brake and practiced "how to
10 do it". He pointed out the warning decals on the vehicle for braking,
11 and identified the "pinch points" for where not to place ones hands.
12 He testified that he always asked for questions and practiced various
13 phases of loading and unloading during the instructions and training.
14 After the second round of practice, Mr. Lee performed a full load and
15 unload on his own without any problems. He testified Mr. Lee informed
16 him that he had previously transported forklifts at his other jobs.

17 On cross-examination counsel challenged the credibility of Mr.
18 Achter. She questioned why Mr. Achter did not inform CSHO Carling about
19 the personal training at the time of the initial inspection and
20 investigation. Mr. Achter responded that he answered all the questions
21 asked by Mr. Carling. He testified that it didn't occur to him to
22 detail all the testimony given today in the written statement or verbal
23 responses at the time of the investigation. When again challenged, Mr.
24 Achter testified that respondent's Exhibit 8 and 9, which correspond to
25 complainant's Exhibit 2, pages 82 and 84, actually include the training
26 information. He testified Exhibit 8 referenced the loading and
27 unloading process and was written by Mr. Carling based upon Mr. Achter's
28 recollections on January 11, 2014 when asked to describe Mr. Lee's

1 training. Mr. Achter testified his report was his best recollection at
2 the time, and that he was forthright with CSHO Carling. He testified
3 Exhibit 9 to be the acknowledgment signed by Mr. Lee to confirm his
4 training.

5 Mr. Robert Manning testified he was the respondent safety director
6 at the time of the accident. He identified respondent's Exhibit 9
7 signed by he as trainer and Mr. Lee as trainee employee. He testified
8 the section on "moving machinery . . . provides no employee should be
9 working around any equipment unless it is . . . blocked from movement
10 . . .". He described Exhibit 9 to confirm Mr. Lee was instructed to set
11 the park brake which is an equivalent term for "blocking."

12 On cross-examination Mr. Manning testified he did not personally
13 practice loading and unloading with Mr. Lee, nor bring with him a list
14 of employees trained on particular machinery.

15 Complainant and respondent submitted closing argument.

16 Complainant argued the focus of the CSHOs at the time of inspection
17 was on the specific type of training required under the standards for
18 retractable truck loading and unloading of a forklift. She asserted
19 there was no evidence furnished at the "time of the inspection" to
20 establish that specific training ever occurred. In fact there was no
21 documentary evidence of what equipment Mr. Lee was trained on although
22 the respondent witnesses claim they kept it for other employees.

23 Counsel argued that Mr. Achter never offered any of the statements
24 subject of his current testimony at the time of the inspection. She
25 asserted Mr. Achter said nothing to the CSHO at the time but ". . . all
26 of a sudden today he went step-by-step through training . . .". There
27 was nothing in writing given to the CSHOs by Mr. Achter at the time of
28 the inspection. When challenged today Mr. Achter testified he must have

1 overlooked all the detail when interviewed by CSHO Carling. That
2 "stretches credibility".

3 Counsel argued the Board will find no evidence of the specific
4 training in any documents or interviews by anyone; except for today when
5 for the first time Mr. Achter became very thorough. She argued there
6 was no evidence, again except for today, that the transport truck Mr.
7 Lee used on the day of the accident was the same truck "he always drove"
8 with the retractable bed; nor was there any evidence at the time of the
9 inspection that Mr. Achter trained Mr. Lee specifically regarding that
10 vehicle.

11 Counsel admitted the park brake should have been set by Mr. Lee,
12 but "except for today meaningful training evidence was never provided
13 . . .".

14 Counsel asserted that each cited standard represents a separate
15 safety requirement violation and all should be confirmed accordingly.

16 Respondent presented closing argument. Counsel asserted ". . . the
17 accident did not occur because employee Lee was not trained but because
18 he . . . forgot his training and simply did not set the brake." He
19 referenced Citation 1, Item 1a and argued there was substantial evidence
20 Mr. Lee was provided training. Mr. Achter testified honestly and
21 explained the exact training provided to rebut the allegations of
22 violations. Mr. Achter put Mr. Lee through all appropriate training
23 procedures and practiced with him until Mr. Lee could properly perform
24 the work tasks on his own. Both witnesses Achter and Pimpl testified
25 Mr. Lee was trained, and knew he was supposed to set the park brake.
26 He was an experienced employee. Equipment labeling, documented training
27 and responses provided both at the time of the inspection and at the
28 hearing today clearly prove the cited violations are not supported by

1 any evidence. OSHA counsel claims it is strange Mr. Achter just now
2 comes up with training detail; but Mr. Achter's response at respondent's
3 Exhibit 8 number 6 to CSHO Carling established Mr. Lee was given
4 demonstration and practice training on winching up the equipment onto
5 the truck bed. This ". . . corroborates the sworn testimony today by
6 Mr. Achter . . .". He argued Exhibit 8 at number 6 given at the time
7 of inspection is proof of ground load and winch on and off training.

8 At Citation 1, Item 1b, counsel argued the retractable bed
9 practical training was established through the unimpeached testimony of
10 Mr. Achter and corroborated at Exhibit 9 where Mr. Lee acknowledged he
11 received the appropriate training. Respondent Exhibit 9 on "blocking",
12 which is the function of a parking brake, proved there was no violation
13 of the cited standard.

14 Counsel argued as to the Citation 1 violations, the labeling on the
15 vehicle established the requirement of an employee to set the parking
16 brake. CSHO Carling testified that had the brake been set, this
17 accident would not have happened. Clearly Mr. Lee violated his
18 training, the warning notices, and the labeling on the vehicle all of
19 which caused his unfortunate accident and death. He was an experienced
20 driver. He used the same transport truck all the time so was accustomed
21 to the vehicle and its retractable bed operation. He had previously
22 moved "chain down" equipment, and operated a retractable bed.

23 At Citation 2, counsel argued that Exhibit 9, the "sign off" by Mr.
24 Lee, demonstrated he was instructed to "stop and block" before moving
25 any equipment. Accordingly there was no proof of a violation to
26 establish the employer did not carry out its safety plan requirements.

27 Counsel concluded that the accident was not due to a lack of
28 training but rather Mr. Lee's non-compliance with the established

1 company work rules and his own safety training, which under OSHA law
2 constitutes employee misconduct.

3 In reviewing the testimony, evidence, exhibits and arguments of
4 counsel, the board is required to measure same against the elements to
5 establish violations under Occupational Safety & Health Law based upon
6 the statutory burden of proof and competent evidence.

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

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

12 A "serious" violation is established in accordance with NRS
13 618.625(2) which provides in pertinent part:

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

19 To establish a prima facie case, the Secretary
20 (Chief Administrative Officer) must prove the
21 existence of a violation, the exposure of
22 employees, the reasonableness of the abatement
period, and the appropriateness of the penalty.
Bechtel Corporation, 2 OSHC 1336, 1974-1975 OSHD
¶18,906 (1974); *Crescent Wharf & Warehouse Co.*, 1
OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).

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
1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
(No. 76-1408, 1979); *American Wrecking Corp. v.*

1 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
2 2003).

3 A respondent may rebut allegations by showing:

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

7 The Board finds the complainant evidence does not prove the
8 violations alleged at Citations 1 and 2. The essential evidentiary
9 element to prove non-complying conditions by preponderant evidence was
10 not met.

11 Further, even had a prima facia case of violation been established,
12 the respondent evidence met the burden of proof to avoid findings of
13 violations through the recognized defense of **unpreventable employee**
14 **misconduct**.

15 The burden of proof rests with OSHA under Nevada law (NAC 618.788);
16 but after establishing same, the burden shifts to the respondent to
17 prove any recognized defenses. See *Jensen Construction Co.*, 7 OSHC
18 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10 OSHC 2128,
19 1980 OSHC 1045 ¶24,174 (1980).

20 The elements required for the defense of unpreventable employee
21 misconduct are:

- 22 (1) The employer must establish **work rules**
23 designated to prevent the violation
- 24 (2) The employer must **adequately communicate** these
 rules to its employees
- 25 (3) The employer must take **steps to discover violations**
- 26 (4) The employer must **effectively enforce the rules**
27 when violations have been discovered.

28 The substantial evidence demonstrates the employer **established work**

1 **rules designed to prevent the alleged training violations.** Complainant
2 allegations and arguments there was a lack of specificity or
3 particularity in the training constituting a lack of meaningful
4 instruction were not established or supported by the evidence. The
5 testimony of Mr. Achter was credible, clear and convincing. While
6 challenged during cross-examination, the testimony was not impeached.
7 Mr. Achter's testimony was corroborated by the statement he gave CSHO
8 Carling at the time of the inspection (complainant's Exhibit 1, page 26)
9 and confirmed through respondent's Exhibit 9, where Mr. Lee acknowledged
10 specific training. The sworn testimony of Mr. Achter must be given
11 reasonable weight having been found credible.

12 Mr. Achter testified with regard to the existing safety program,
13 work rules and training he personally provided. It was not impeached.
14 He described practice training and noted Mr. Lee's capabilities after
15 the second full loading and unloading effort. He hired Mr. Lee after
16 reviewing 35 applications based on his previous work experience and
17 demonstrated capabilities. The evidence of training, together with the
18 exhibits confirming vehicle labeling and the testimony of Mr. Pimpl, all
19 corroborated the testimony and documentation offered by Mr. Achter.
20 This evidence satisfied a critical requirement to support the defense
21 of employee misconduct.

22 Nevada OSHA did not establish preponderant evidence that respondent
23 **failed to provide the type or amount of sufficient training that a**
24 **reasonable employer in similar circumstances would have provided to its**
25 **employees.** See, *El Paso Crane and Rigging CO.*, 16 BNA OSHC 1419, 1424
26 (No. 90-1106, 1993). *Pacific Coast Steel v. State of Nevada,*
27 *Occupational Safety and Health Administration, Division of Industrial*
28 *Relations, Department of Business and Industry, Case A-11-634068-J,*

1 Clark County District Court, unpublished.

2 The employer **adequately communicated** the required safety rules
3 through training of employee Lee as demonstrated by the documentary
4 evidence (see Exhibit 9) and unrebutted credible testimony of Messrs.
5 Pimpl, Achter and Manning. There was no evidence offered or submitted
6 by complainant that Mr. Lee was untrained, not given safety
7 instructions, nor meaningfully instructed in the workplace safety
8 requirements under the company plan. To the contrary, the evidence
9 demonstrated the plan and rules had been reviewed by the employees,
10 particularly employee Lee when he executed the acknowledgment at Exhibit
11 9.

12 It is further found from the evidence submitted at complainant's
13 Exhibit 1, page 10, that the witness truck driver who actually observed
14 the accident reported that Mr. Lee, while having some difficulty
15 aligning the forklift, "looked like he had done it a thousand times".
16 That independent testimony corroborates the respondent witness testimony
17 and supports the finding that not only was Mr. Lee trained on the
18 subject work but appeared experienced to know what he was doing. The
19 preponderant evidence supported the respondent defense to the alleged
20 violations, as well as a defense of unpreventable employee misconduct.

21 The testimony and evidence also supports the respondent position
22 that the employer **"took steps to discover violations"**, an additional
23 proof element for the defense of employee misconduct. There was no
24 evidence that Mr. Lee previously violated company or safety rules.
25 Further, the CSHOs found no facts to warrant charging inadequacy of the
26 respondent safety program and plan. They proposed no citations relating
27 to same. No employer can absolutely assure or police every moment of
28 an employees work day to guarantee compliance nor is there any OSHA

1 requirement to do so. The case law has long recognized the elements of
2 violation measured through **reasonable prevention and foreseeability**.
3 There was no evidence the employer did not take steps to discover
4 violations. Inference from the preponderant evidence and credible
5 testimony demonstrates respondent met that element to support the
6 defense of employee misconduct.

7 The testimony of respondent witnesses, the Exhibit 9 Hazard
8 Training Checklist, and no evidence to the contrary by the inspecting
9 CSHOs, supports reasonable inference the employer effectively enforced
10 the work rules. The documents in evidence established a compliant
11 existent company safety plan.

12 Evidence that the employer effectively communicated
13 enforced safety policies to protect against the
14 hazard permits an inference that the employer
15 justifiably relied on its employees to comply with
16 the applicable safety rules and that violations of
17 these safety policies were **not foreseeable or**
18 **preventable.** *Austin Bldg. Co. v. Occupational*
19 *Safety & Health Review Comm.*, 647 F.2d 1063, 1068
20 (10th Cir. 1981). When an employer proves that it
21 has effectively communicated and enforced its
22 safety policies, serious citations are dismissed.
23 See *Secretary of Labor v. Consolidated Edison Co.*,
24 13 O.S.H. Cas. (BNA) 2107 (OSHRC Jan. 11, 1989);
25 *Secretary of Labor v. General Crane Inc.*, 13 O.S.H.
26 Cas. (BNA) 1608 (OSHRC Jan. 19, 1988); *Secretary of*
27 *Labor v. Greer Architectural Prods. Inc.*, 14 O.S.H.
28 Cas. (BNA) 1200 (OSHRC July 3, 1989). (emphasis
added)

National Realty and Construction Co., Inc. v.
OSHRC, 489 F.2d 1257 (D.C. Cir. 1973), is the
fountainhead case repeatedly cited to relieve
employers responsibility for the allegedly
disobedient and negligent act of employees which
violate specific standards promulgated under the
Act, and sets forth the principal which has been
confirmed in an extensive line of OSHC cases and
reconfirmed in *Secretary of Labor v. A. Hansen*
Masonry, 19 O.S.H.C. 1041, 1042 (2000).

An employer cannot in all circumstances be held to
the strict standard of being an absolute guarantor
or insurer that his employees will observe all the
Secretary's standards at all times. An isolated

1 brief violation of a standard by an employee which
2 is unknown to the employer and is contrary to both
3 the employer's instructions and a company work rule
4 which the employer has uniformly enforced does not
necessarily constitute a violation of [the specific
duty clause] by the employer. *Id.*, 1 O.S.H.C. at
1046.

5 It is further noted that "employers are not liable
6 under the Act for an individual single act of an
7 employee which an employer cannot prevent." *Id.*,
8 3 O.S.H.C. at 1982. The OSHRC has repeatedly held
9 that "employers, however, have an affirmative duty
to protect against preventable hazards and
preventable hazardous conduct by employees. *Id.*
See also, *Brock v. L.E. Meyers Co.*, 818 F.2d 1270
(6th Cir.), cert. denied 484 U.S. 989 (1987).

10 The controlling cases make clear the existence of
11 an employer's defense for the unforeseeable
12 disobedience of an employee who violates the
13 specific duty clause. However, the disobedience
14 defense will fail if the employer does not
15 effectively communicate and conscientiously enforce
16 the safety program at all times. Even when a
17 safety program is thorough and properly conceived,
18 lax administration renders it ineffective. *P.*
19 *Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 110-
20 111 (1st Cir. 1997). Although the mere occurrence
21 of a safety violation does not establish
22 ineffective enforcement, *Secretary of Labor v.*
23 *Raytheon Constructors Inc.*, 19 O.S.H.C. 1311, 1314
24 (2000) the employer must show that it took adequate
25 steps to discover violations of its work rules and
26 an effective system to detect unsafe conditions
27 control. *Secretary of Labor v. Fishel Co.*, 18
O.S.H.C. 1530, 1531 (1998). Failure to follow
through and to require employees to abide by safety
standards should be evidence that disciplinary
action against disobedient employees progressed to
levels of punishment designed to provide
deterrence. *Id.* See also, *Secretary of Labor v.*
28 *A&W Construction Services, Inc.*, 19 O.S.H.C. 1659,
1664 (2001); *Secretary of Labor v. Raytheon*
Constructors Inc., 19 O.S.H.C. 1311, 1314 (2000).
A disciplinary program consisting solely of verbal
warnings is insufficient. *Secretary of Labor v.*
Reynolds Inc., 19 O.S.H.C. 1653, 1657 (2001);
Secretary of Labor v. Dayton Hudson Corp., 19
O.S.H.C. 1045, 1046 (2000). Similarly, disciplinary
action that occurs long after the violation was
committed may be found ineffective.

Based upon the preponderant substantial evidence, it is the

1 decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that
2 no violation of Nevada Revised Statutes did occur as to Citation 1, Item
3 1a, 29 CFR 1910.178(1)(2)(ii), Citation 1, Item 1b, 29 CFR
4 1910.178(1)(3)(ii)(A), Citation 1, Item 1c, 29 CFR
5 1910.178(1)(3)(ii)(G), the Serious violations and proposed penalties are
6 denied. It is the further decision of the **NEVADA OCCUPATIONAL SAFETY**
7 **AND HEALTH REVIEW BOARD** that no violation of Nevada Revised Statutes did
8 occur as to Citation 2, Item 1, NRS 618.383(1) and the proposed penalty
9 denied.

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

20 DATED: This 21st day of January 2015.

21 NEVADA OCCUPATIONAL SAFETY AND HEALTH
22 REVIEW BOARD

23 /s/

24 JOE ADAMS, CHAIRMAN