

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
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5 CHIEF ADMINISTRATIVE OFFICER  
6 OF THE OCCUPATIONAL SAFETY AND  
7 HEALTH ADMINISTRATION, DIVISION  
8 OF INDUSTRIAL RELATIONS OF THE  
9 DEPARTMENT OF BUSINESS AND  
10 INDUSTRY,

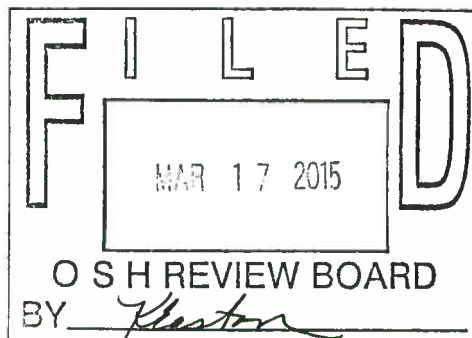
Docket No. LV 15-1756

Complainant,

vs.

11 CDC DEVELOPMENT, LLC,  
12 dba C & D FRAMING,

Respondent.



13  
14 **DECISION**

15 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**  
16 **HEALTH REVIEW BOARD** at a hearing commenced on the 11<sup>th</sup> day of February,  
17 2015, in furtherance of notice duly provided according to law, SALLI  
18 ORTIZ, ESQ., counsel appearing on behalf of the **Chief Administrative**  
19 **Officer of the Occupational Safety and Administration, Division of**  
20 **Industrial Relations** (OSHA), and MR. ISMAEL CURIEL, Owner, appearing on  
21 behalf of respondent, **CDC Development, LLC**; the **NEVADA OCCUPATIONAL**  
22 **SAFETY AND HEALTH REVIEW BOARD** finds as 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 1926.501(b)(13),

1 which provides in pertinent part:

2 "Residential construction." Each employee engaged  
3 in residential construction activities 6 feet (1.8  
4 m) or more above lower levels shall be protected by  
5 guardrail systems, safety net system, or personal  
6 fall arrest system unless another provision in  
7 paragraph (b) of this section provides for an  
8 alternative fall protection measure. Exception:  
9 When the employer can demonstrate that it is  
10 infeasible or creates a greater hazard to use these  
11 systems, the employer shall develop and implement  
12 a fall protection plan which meets the requirements  
13 of paragraph (k) of 1926.502.

14 Note: There is a presumption that it is feasible  
15 and will not create a greater hazard to implement  
16 at least one of the above-listed fall protection  
17 systems. Accordingly, the employer has the burden  
18 of establishing that it is appropriate to implement  
19 a fall protection plan which complies with  
20 1926.502(k) for a particular workplace situation,  
21 in lieu of implementing any of those systems.

22 Complainant alleged that the Senior Homes/Mixed Income construction  
23 project in Las Vegas, Nevada, employees were performing framing  
24 activities at heights greater than six feet above the ground without  
25 having any guardrails or other means of fall protection in place, on  
26 three separate instances:

27 1. On April 2, 2014, two employees were landing truss bundles  
28 lifted by a crane while walking the top plate of the third story.  
The height at the top plate was approximately 31 feet.

1 2. On April 17, 2014, at the northeast corner of the jobsite, an  
employee was installing sheeting at a height of approximately 18  
feet.

2 3. On April 17, 2014, at the southwest corner of the jobsite, two  
employees were installing a wood frame column at a height of  
approximately 18 feet.

3 The complainant further alleged that the identified respondent  
4 employees were exposed to possible serious injuries such as fractures,  
5 paralysis, and death in the event of a fall to the dirt and rock surface  
6 below their work area.

7 The complainant further alleged:

1 CDC DEVELOPMENT WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS  
2 OCCUPATIONAL SAFETY AND HEALTH STANDARD, OR ITS EQUIVALENT  
3 STANDARD WHICH WAS CONTAINED IN NVOSHA INSPECTION NUMBER  
314886409, CITATION 01, ITEM 001 AND WAS AFFIRMED AS A FINAL ORDER  
ON JUNE 16, 2011.

4 CDC DEVELOPMENT WAS PREVIOUSLY CITED FOR A REPEATED VIOLATION OF  
5 THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD, OR ITS EQUIVALENT  
6 STANDARD WHICH WAS CONTAINED IN NVOSHA INSPECTION NUMBER  
314892845, CITATION 01, ITEM 001 AND WAS AFFIRMED AS A FINAL ORDER  
ON OCTOBER 3, 2011.

7 CDC DEVELOPMENT WAS PREVIOUSLY CITED FOR A REPEATED VIOLATION OF  
8 THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD, OR ITS EQUIVALENT  
9 STANDARD WHICH WAS CONTAINED IN NVOSHA INSPECTION NUMBER  
314886409, CITATION 01, ITEM 001 AND WAS AFFIRMED AS A FINAL ORDER  
ON FEBRUARY 24, 2012.

10 Complainant classified the alleged violations at Citation 1, Item  
11 1, as "Willful", and proposed a penalty of \$30,800.00 after giving due  
12 consideration of the probability, severity and extent of the violation,  
13 the employer's history of previous violations, and the employer's size  
14 and good faith.

15 Counsel for the complainant and respondent stipulated to the  
16 admission of evidence identifying complainant Exhibits 1 through 3, and  
17 respondent Exhibits A through H, with the exception of Exhibit G which  
18 was subject to objection on the basis of lack of foundation and  
19 irrelevance. Exhibit G was identified as a video of another worksite  
20 and denied admission in evidence during the course of the hearing.

21 During opening statement, counsel for complainant asserted that  
22 violative conditions will be demonstrated and proven by a preponderance  
23 of evidence based upon the testimony, documentary exhibits, and  
24 photographs obtained during the inspection of the respondent job site.  
25 Counsel noted the violation was classified as willful based upon the  
26 respondents previous repeated citations for violation of the same  
27 standard and evidence of blatant disregard for safety, despite full  
28 knowledge of the compliance requirements. Counsel for the complainant

1 asserted the respondent owner, Mr. Ismael Curiel, simply takes the  
2 position that compliance was **infeasible** but offers no alternative means  
3 of protection nor the proof required to establish that defense.

4 Respondent provided no opening statement.

5 FACTS

6 Three instances of violation were documented during inspections of  
7 the residential construction project located at 65 East Windmill Lane  
8 in Las Vegas, Nevada. Violative conditions were observed and documented  
9 by CSHOs at Exhibit 1 stipulated in evidence.

10 On April 2, Training Supervisor Compliance Safety and Health  
11 Officer (CSHO) Mr. Tristan Dressler contacted the enforcement office to  
12 report his observation of two employees working on the top plate of the  
13 three story construction project located at 65 East Windmill Lane, Las  
14 Vegas, Nevada. Based upon CSHO Dressler's reported observations of  
15 imminent danger, CSHO Mr. Gregory Drew arrived at the project location,  
16 met with Mr. Dressler, and observed the job site from a public road.  
17 Mr. Drew obtained photographs of the hazardous working conditions.  
18 CSHOs Dressler and Drew entered the job site and made contact with Mr.  
19 Frank Hawkins, superintendent of National Construction Providers, the  
20 general contractor and Mr. Ferando Juarez, the foreman of CDC  
21 Development. After explaining the observations to Mr. Juarez, he called  
22 the identified employees down from the work area where Messrs. Hawkins,  
23 Dressler and Drew conducted an abbreviated opening conference.

24 Photos depicting the hazards were reviewed with Mr. Juarez. Mr.  
25 Juarez responded, it is very difficult to tie off at the top floor  
26 because there is no area for the employees to attach an anchor. Mr.  
27 Juarez identified the employees in the photographs as employees number  
28 1 and 2, and employed by the respondent CDC Development.

1 On April 17, 2014 a formal complaint was received by the OSHA  
2 district office reporting employees were performing framing activities  
3 at heights up to 20 feet without any fall protection in place at the  
4 same Senior Home/Mixed Income residential construction project. CSHOs  
5 observed two employees performing framing activities at the **northeast**  
6 corner of the job site installing sheeting on a second level with no  
7 form of fall protection in place. Photos were taken of the employees  
8 from the sidewalk. They identified themselves as Messrs. Juan Llamas  
9 and Saul Quiles, employees of respondent C&D Framing.

10 As the CSHOs returned to the contractor's trailer, they observed  
11 two employees, Messrs. Aturo Lazaro and Saul Lazaro, at the **southeast**  
12 corner of the job site on a second level performing framing activities  
13 without any form of fall protection in place. Additionally an  
14 individual identified as employee number 4 was observed operating a  
15 forklift. The three employees stated they all worked for C&D Framing.  
16 Employee number 4 reported to the CSHOs that it was an error not being  
17 tied off while working on an unprotected ledge.

18 During the **walkaround inspection**, respondent owner Mr. Ismael  
19 Curiel informed the CSHOs the employee working on the northeast corner  
20 was pinning plywood at approximately 18 feet from the ground level.  
21 When asked why the observed employees were not tied off he reportedly  
22 replied "because its infeasible".

23 As part of the inspection CSHOs requested 300/300A logs and other  
24 documents for years 2011, 2012 and 2013. The CSHOs granted an extended  
25 time period of four days to supply the documents. When they were not  
26 received from the employer after the extension, CSHO Dressler returned  
27 to the job site on April 22 to retrieve the documentation. On April 24  
28 CSHO Dressler advised he would have to subpoena the documents unless

1 delivery was subject of compliance.

2 A closing conference was conducted on July 17, 2014 with Mr.  
3 Curiel, the owner of C&D Framing. Results of the referral inspections  
4 were explained, the observed hazards reviewed, standard violations  
5 explained, and confirmation that all subject items abated or completed.  
6 CSHO Pupp explained that a Willful violation citation would be proposed  
7 in accordance with the Nevada Operations Manual (NOM).

8 DISCUSSION

9 Counsel for the Chief Administrative Officer presented witness  
10 testimony and documentary evidence with regard to the alleged  
11 violations. Mr. Ismael Curiel was called as an adverse witness. He  
12 identified himself as the company owner and responsible for project  
13 oversight. He testified that he reviewed the cited standard and  
14 understands the provisions but asserted there were "gray areas which  
15 made compliance in many instances infeasible". He identified Exhibit  
16 1, page 78 as a letter sent to OSHA by CDC denying the violative conduct  
17 and asserting defensive positions. Mr. Curiel explained the terms of  
18 the correspondence and read portions of same into the record from the  
19 exhibit in evidence.

20 In response to questions with regard to a lack of feasibility of  
21 compliance for wearing fall protection when loading trusses, Mr. Curiel  
22 testified that ". . . large loads can swing and knock into an employee  
23 and break a leg . . .". He further testified that ". . . when loading  
24 trusses employees need to be flexible and cannot safely be tied off  
25 . . . at that particular time . . .". He testified that his employees  
26 comply with tie off and fall hazard protection except during the time  
27 for truss loading because it is too unsafe and therefore he cannot  
28 direct his employees to comply with the standard.

1 Counsel inquired as to whether there were any "alternate means" of  
2 protection elected in accordance with the terms of the standard. Mr.  
3 Curiel responded there is ". . . no way to tie off three stories up .  
4 . . .".

5 During continued examination as to direct or alternate compliance,  
6 Mr. Curiel testified the "gray areas in the standard made compliance  
7 infeasible but OSHA says it will come up with an alternate means of  
8 protection . . .". Counsel inquired as to whether Mr. Curiel understood  
9 the provisions of the standard notes section which included a  
10 presumption that providing compliance is feasible and will not create  
11 a greater hazard, but if it would (create a greater hazard) the employer  
12 has the burden of establishing it is appropriate to implement a fall  
13 protection plan compliant with the standard for a particular workplace  
14 situation in lieu of implementing the systems. Mr. Curiel responded he  
15 does not believe there is a feasible means and cannot provide an  
16 alternate means of protection. He again repeated compliance is  
17 "infeasible".

18 Mr. Curiel testified in response to continued questioning that in  
19 ". . . 20 years he has never reviewed the details of the standard for  
20 providing alternate means of protection . . . but believes it's  
21 infeasible and with no alternative method suggested by OSHA or any  
22 others, . . . it is not possible to comply . . .".

23 Counsel for complainant presented witness testimony and documentary  
24 evidence through Compliance Safety and Health Officer (CSHO) Mr. Steven  
25 Pupp. CSHO Pupp referenced his inspection narrative report and the  
26 stipulated evidence in Exhibits 1 through 4. He explained the  
27 inspection process, the notification initiated by Mr. Dressler, the  
28 anonymous referral, and the three distinct instances of violations

1 observed by the CSHOs subject of the photographic exhibits in evidence.  
2 Mr. Pupp further explained the lack of response to the documentary  
3 requests which required the issuance of a subpoena to obtain the company  
4 safety plan. He testified foreman Juarez and Mr. Curiel informed him  
5 ". . . it's hard to tie off when loading (trusses) . . .". He informed  
6 both that use of internal ladders, scaffolding or other alternate means  
7 could be implemented; but Messrs. Curiel and Juarez repeatedly told him  
8 those alternatives "would not work".

9 Mr. Pupp referenced Exhibit 1 and testified he interviewed the  
10 identified respondent employees in conjunction with CSHO Lizarraga who  
11 speaks Spanish and translated the responses.

12 Mr. Pupp identified photographic Exhibit 1, page 91, and explained  
13 it depicted two CDC employees walking on top plates without fall  
14 protection. He also confirmed the photographs depicting violations at  
15 page 92, 93a, 95a, 96a and 97a. Mr. Pupp further identified photograph  
16 101a and testified it depicted a CDC employee without tie off protection  
17 while not engaged in truss loading.

18 Mr. Pupp testified the purpose of the standard is to protect  
19 employees from fall hazards. He described the hazards and potential  
20 injuries of a serious nature that could result from falls at working  
21 heights above 16 feet and particularly for the respondent employees  
22 photographed. He confirmed that he observed the identified exposed  
23 respondent employees on both April 2<sup>nd</sup> and April 17<sup>th</sup>. No explanation  
24 by anyone at CDC was provided as to why or how protection, direct or  
25 alternate options, were infeasible or impossible. He testified that Mr.  
26 Curiel and the employees only repeatedly stated that protection was  
27 infeasible.

28 Mr. Pupp explained the willful classification and, referring to his



1 inspection report, identified the elements required for the willful  
2 classification. He testified the elements include plain indifference  
3 ~~or~~ an intentional disregard for safety. He cited the subject violations  
4 under the intentional disregard element because the company had  
5 previously repeatedly been cited for the same violation, and Mr. Curiel  
6 admitted he understood the requirements of the standard, but just didn't  
7 believe protection for his employees during loading operations is  
8 feasible.

9 Mr. Pupp continued testimony and explained the initial involvement  
10 of CSHO Dressler together with other CSHOs and himself. He referenced  
11 facts in his narrative report at Exhibit 1, pages 41-47. He testified  
12 a willful classification was cited as opposed to repeat/serious because  
13 the employer already had two previous repeat violations making it  
14 inappropriate to cite anything other than willful. CSHO Pupp testified  
15 the penalty was reduced from \$70,000 to \$30,800 based upon the  
16 operations manual due to the small size of the company. He further  
17 testified that given Mr. Curiel's awareness of the standard, his long  
18 experience in the industry, and continuous violative conduct based upon  
19 an erroneous belief that there is no feasibility of protection, he  
20 concluded Mr. Curiel simply did not take the standard seriously and  
21 intentionally disregarded employee safety by refusing to comply with the  
22 required fall hazard protection. Because of his previous history  
23 including two repeat and one serious violation, this would be the  
24 fourth, so there was no alternative but to classify the matter as a  
25 willful violation.

26 CSHO Pupp explained the severity and gravity ratings of the  
27 violations and penalty calculations. He testified that notwithstanding  
28 assertions made by Mr. Curiel in his letter at Exhibit 1, page 78,

1 neither he nor any other CSHOs used defamatory language or exhibited  
2 unprofessional conduct. He also testified there were recognized  
3 alternate means of protection feasible, including use of exterior  
4 scaffolding, ladders, and a variety of protective guarding  
5 configurations which could achieve employee protection. Mr. Pupp also  
6 denied unprofessional conduct by discussing the proposed violations at  
7 the closing conference with Mr. Curiel in the presence of the general  
8 contractor. He explained that on multi-employer worksites the closing  
9 conference is conducted with all contractors; there was no punitive  
10 intent nor bias in his conduct.

11 Mr. Curiel conducted cross-examination of CSHO Pupp. He raised  
12 questions directed toward the impropriety of the inspection and  
13 challenged various observations subject of direct testimony. At Exhibit  
14 1, photograph 94a, Mr. Pupp confirmed there were two employees without  
15 tie off loading trusses. Mr. Curiel questioned ". . . if it was so  
16 dangerous why did you let it go for 45 minutes." Mr. Pupp explained the  
17 time requirements to locate and contact the appropriate individuals in  
18 authority, meet with general and subcontractor safety representatives,  
19 and cause the employees to cease work. Mr. Pupp identified photograph  
20 115a as depicting an employee in a man basket with a lanyard. At  
21 Exhibit 1, photograph 101a, when questioned if he observed a harness Mr.  
22 Pupp responded that he "could not tell"; but the subject photograph was  
23 taken by one of the other CSHOs. At photograph 112a, Mr. Pupp explained  
24 the picture demonstrates two employees working behind a wall. Mr.  
25 Curiel questioned whether that was "protection"; Mr. Pupp responded it  
26 would be protection "if secured." At photographic Exhibit D, Mr. Pupp  
27 responded a safety row was depicted. At Exhibit F he confirmed the  
28 existence of a ladder. At Exhibit E he testified it shows guardrails on

1 a second and third floor and an employee on the top. Mr. Pupp further  
2 identified the "thumb drive" picture entered as Exhibit A as depicting  
3 an employee wearing a harness and a "yo yo".

4 During continued cross examination Mr. Curiel questioned whether  
5 it was typical to discuss violations in front of a general contractor  
6 to which Mr. Pupp responded that it was appropriate and common practice.  
7 Mr. Curiel questioned why that conduct was not defaming the respondent  
8 by letting the general contractor hear about previous citations and  
9 violations. Mr. Pupp responded he could not answer that. Mr. Pupp  
10 confirmed he was asked to "be patient" on document delivery because the  
11 respondent employee responsible was in medical treatment. When asked  
12 if the exhibits also showed the company uses fall protection, Mr. Pupp  
13 responded affirmatively, but stated ". . . not in the instances subject  
14 of the citations . . .".

15 Counsel for complainant presented direct witness testimony from  
16 CSHO Mr. Tristin Dressler. He explained his initial contact with the  
17 job site during off work hours as observing violative conditions while  
18 driving by the site on the roadway. He testified to his initial  
19 observations referencing statements in the written narrative portion of  
20 Exhibit 1. Mr. Dressler testified he did not engage in any  
21 unprofessional conduct or make any threatening comments. He denied his  
22 inspection had any punitive basis or malicious motive. CSHO Dressler  
23 testified he was surprised at the frankness of Mr. Juarez who informed  
24 him that he knew employees were not using tie offs but believed it was  
25 defensible. Mr. Dressler explained he was not hostile toward Mr. Curiel  
26 when delivering the subpoena, but merely did what he had to do in order  
27 to continue the investigative process and complete the inspection.

28 Complainant presented witness evidence and testimony from Mr. Aldo

1 Lizarraga. He identified himself as the CSHO translator of witness  
2 statements from Spanish speaking employees at the time of the  
3 inspection. Mr. Curiel was the first management person contacted. Mr.  
4 Lizarraga testified that Mr. Curiel told him ". . . compliance with the  
5 standard for full protection during (truss) loading was infeasible and  
6 that he was aware of the requirements of the standard." He personally  
7 observed employees working without tie off during truss loading work.

8 Mr. Lizarraga identified Exhibit 1, page 49 as the Employee number  
9 1 interview. He testified the employee told him he was not wearing fall  
10 protection while unloading trusses and said he didn't have time to set  
11 up any anchor points.

12 CSHO Lizarraga identified page 51 as the witness statement from  
13 employee number 2. He testified the employee was not wearing tie off  
14 and stated ". . . I can't tie off at the top while unloading and still  
15 reach the trusses during the unloading and loading process . . .".

16 Mr. Lizarraga identified page 53 as the witness statement of  
17 employee number 3. He testified the employee informed him he could not  
18 set an anchor while doing truss unloading work so unable to the off.  
19 Employee number 3 further reported he uses fall arrest systems when  
20 ". . . he thinks he has time to use it . . .".

21 Mr. Lizarraga testified the northeast and southeast work areas had  
22 guardrails installed on all four sides ". . . except for the **northwest**  
23 **and southwest areas** which did not have guardrails in place . . .".

24 Mr. Lizarraga identified Exhibit 1, page 78 as the contest letter  
25 submitted by the respondent and testified the assertions that employees  
26 in the photographs were not those of CDC is incorrect because he  
27 personally interviewed them and all reported they work for CDC. Mr.  
28 Lizarraga testified that CDC is capable of using tie off protection

1 which is feasible directly or through the alternate means which he and  
2 the associate CSHO's recommended to Mr. Curiel. He further explained  
3 at Exhibit 1, page 19 that in addition to Mr. Dressler observing  
4 problems at the site, someone anonymously also called in a complaint.  
5 The basis for the inspection was not only because of Mr. Dressler's  
6 initial observations.

7 On cross examination, Mr. Lizarraga denied he was intimidating to  
8 any of the employees subject of the translation for witness statements  
9 or during other inquiries at the inspection. He explained the employee  
10 interview off site was not done as an intimidation but rather to  
11 accommodate the employees schedule. He testified that Mr. Curiel gave  
12 him the employee's cell phone number to arrange the off site interview.

13 During continued cross examination Mr. Lizarraga testified at  
14 photograph 111a that the wall in front of the employee "could constitute  
15 fall protection . . .". He further testified at Exhibit 1, page 114a  
16 that he did not interview the employee depicted in the photo. Mr.  
17 Lizarraga testified that he did not "press" or intimidate any of the  
18 employees, but admitted that sometimes he interjects his opinion during  
19 interview discussions. In concluding cross examination CSHO Lizarraga  
20 testified that when an anonymous call comes in it "could have" come from  
21 a CSHO.

22 Counsel presented witness and documentary evidence through CSHO  
23 James Andrews. He participated in the inspection and was involved in  
24 taking photographs. Mr. Andrews identified Exhibit 1, photograph 101a  
25 as a picture he took depicting a CDC employee without fall protection  
26 performing sheeting work over 18 feet from the ground level. He further  
27 identified photographic exhibits 102a, 103a, 104a as measurement photos  
28 to depict the height of the work from ground level. He testified photo

1 107a as depicting rails were not at the platform where he observed  
2 respondent employees working. He described photographs 108a and 109a  
3 as demonstrating no fall protection on the identified respondent  
4 employee. He testified 111a depicts identified respondent employees on  
5 a platform without fall protection.

6 CSHO Andrews testified he was only on the site one day because his  
7 supervisor determined the CSHOs should combine the inspections so CSHO  
8 Pupp took over. He testified as to Exhibit 1, page 78, the contest  
9 letter, and responded there was never any harassment or discriminatory  
10 conduct advanced against Mr. Curiel, his company or any respondent  
11 employees. He testified everyone was very professional and the  
12 inspection process normal.

13 On cross examination by Mr. Curiel, CSHO Andrews testified he took  
14 pictures from the public street before he entered the worksite.  
15 Photograph 112a was taken by him but not on the job site property. He  
16 took pictures before he presented his credentials but only on public  
17 areas from where the violative conduct could be observed. He testified  
18 photograph 114 depicts a harness, and 113 shows an anchor point. When  
19 asked what could be done to protect employees from a fall, Mr. Andrews  
20 described the use of scaffolding. He further explained that a railing  
21 does not constitute a "rail guard" under the OSHA standards if there is  
22 a distance of 18 inches between.

23 At the conclusion of evidence and testimony counsel presented  
24 closing arguments.

25 Complainant asserted there had been lots of "red herrings" raised  
26 at the hearing, but the photographs in evidence clearly depict confirmed  
27 respondent employees not tied off in any way whatsoever while working  
28 over six feet above ground level and exposed to fall hazards. Mr.

1 Curiel, repeatedly admitted he does not protect his employees under the  
2 fall hazard standard while they are engaged in loading trusses because  
3 it is simply "infeasible". He asserts that word as a defense even  
4 though he did nothing to attempt alternate compliance nor explain or  
5 prove there was an actual infeasible condition. He merely accuses OSHA  
6 of creating a "gray area" to trap him and other employers.

7 Counsel argued the law gives employers great leeway under the cited  
8 standard by permitting them to devise safety plans that satisfy  
9 alternate compliance if there is in fact an impossibility, greater  
10 danger or infeasibility of compliance. Mr. Curiel refused to offer any  
11 alternatives or options and elected to leave the employees completely  
12 unprotected. Counsel asserted it was unrealistic to do nothing and  
13 simply claim infeasibility as if that were a final defense in and of  
14 itself. Without any alternate fall hazard protection options elected  
15 or even proposed, previous history of the same violative conduct, and  
16 admitting full knowledge employees were unprotected is proof of an  
17 intentional disregard for safety and a willful violation under the cited  
18 specific standard.

19 Counsel asserted that while all of the CSHOs were accused of  
20 bullying, unprofessional conduct, and/or demeaning discriminatory  
21 activity there was absolutely no evidence of any kind to support those  
22 allegations. Counsel argued that even if the conduct described were  
23 true, it is not a defense in and of itself because the law requires  
24 specific elements of evidence to claim and prove the defense of  
25 **unreasonable inspection.**

26 Counsel concluded by arguing the employer, Mr. Curiel, has full  
27 knowledge of the cited standard and long experience in the industry, but  
28 simply disagrees with any compliance requirements for his employees

1 while engaged in truss loading work. He has a history of the same  
2 violations and fully informed of the consequences of continued disregard  
3 for the plain meaning of the standard. He endangered his employees.

4 Counsel concluded by asserting that OSHA was extremely fair with  
5 Mr. Curiel despite all of his unfounded assertions of mistreatment.  
6 Each one of the violative conditions that occurred on three separate  
7 instances all could legitimately have been the basis of separate willful  
8 citations, but the respondent was only charged with one and even given  
9 substantial monetary credit on the penalty assessment.

10 Respondent presented closing argument. Mr. Curiel asserted Nevada  
11 OSHA never enforced the cited standard over past years for residential  
12 construction in Las Vegas. He had been in the business for many years  
13 but only now recently seen, from his previous cited violations, they are  
14 imposing lots of fines but offering no assistance for compliance. He  
15 argued the CSHOs gained unauthorized access to the job site; and didn't  
16 interview other contractor employees who might have been engaged in  
17 violative conduct. He argued that loading truss work is the only time  
18 when fall protection is infeasible because it won't work and everybody  
19 in the industry knows that and does it the same way as he does. He  
20 asserted that other contractors on the site were not cited for the same  
21 conduct. He concluded by arguing that his company follows all fall  
22 protection safety as demonstrated by the pictorial evidence and the lack  
23 of any other cited violations at the worksite, except in this one area  
24 of truss loading which is infeasible or creates a greater danger to his  
25 employees.

26 Findings of violation for the cited OSHA standard requires proof  
27 by a preponderance of evidence under applicable law promulgated and  
28 developed through the Occupational Safety & Health Act.



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

3 All facts forming the basis of a complaint must be  
4 proved by a preponderance of the evidence. *Armor  
Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958  
5 (1973).

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

13 A "**willful**" violation is established upon a preponderance of  
14 evidence based upon NRS 618.635 which provides in pertinent part:

15 Any employer who **willfully** or repeatedly violates  
16 any requirements of this chapter, any standard,  
17 rule, regulation or order promulgated or prescribed  
18 pursuant to this chapter, may be assessed an  
administrative fine of not more than \$70,000 for  
each violation, but not less than \$5,000 for each  
willful violation. (emphasis added)

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

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

The **burden of proof** to confirm a violation rests with OSHA under

1 Nevada law (NAC 618.788(1)); but after establishing same, **the burden**  
2 **shifts to the respondent to prove any recognized defenses.** See *Jensen*  
3 *Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶ 23,664 (1979). Accord,  
4 *Marson Corp.*, 10 OSHC 2128, 1980 OSHC 1045 ¶ 24,174 (1980).

5 The credible testimony of CSHOs Dressler, Pupp, Andrews, Lizarraga,  
6 the stipulated documentary evidence, and admitted sworn testimony of  
7 respondent owner Mr. Curiel corroborated by the employee interview  
8 statements established the elements of violation at Citation 1, Item 1,  
9 by a preponderance of substantial evidence.

10 The cited standard was undisputably **applicable** to the construction  
11 work conducted by the respondent employer at the worksite. There was  
12 no challenge to any of the facts of violation under the terms of the  
13 standard. The non-compliant **violative conditions** were undisputed. Mr.  
14 Curiel **admitted** the violative conduct, but asserted he complies with  
15 other fall protection except for the "gray area" during truss loading  
16 because he believed protection to be infeasible and not subject to any  
17 alternate means of compliance. The testimony of the CSHOs was credible  
18 and the photographic evidence unrefuted. **Employee exposure** was clearly  
19 established based upon the corroborated CSHO observations, photographic  
20 exhibits in evidence depicting the employees without fall protection in  
21 violation, the witness statements admitting the violative conduct, and  
22 most importantly the admissions of Mr. Curiel who did not deny exposure  
23 of the employees to fall hazards but claimed there was no feasible means  
24 to protect them. **Employer knowledge** was undisputed based upon the  
25 observations, photographs, testimony of the CSHOs and admissions of  
26 respondent and owner Mr. Curiel.

27 The credible evidence on the record was clear, convincing,  
28 substantial, preponderant, and confirmed the cited violation.

1 Mr. Curiel's defensive positions of infeasibility or greater hazard  
2 were not supported by any evidence. He offered no evidence that he ever  
3 even attempted to locate, implement or utilize some alternate means of  
4 compliance which is permitted under the standard. The employer has the  
5 burden of establishing when it is appropriate to implement a fall  
6 protection plan which complies with the cited standard for a particular  
7 work place situation in lieu of implementing any recognized full safety  
8 systems. Mr. Curiel simply relied upon his own determination of  
9 infeasibility and unsupported claims that other employers were violating  
10 the same standard and asserted no further responsibility for  
11 implementation of fall protection during the truss loading process on  
12 his construction site.

13 To confirm a **willful violation** under recognized Occupational Safety  
14 and Health Law, a preponderance of evidence must support the finding  
15 that violations were committed with **intentional knowing, or voluntary**  
16 **disregard** for the requirements of the act, **or with plain indifference**  
17 **to employee safety.**

18 *E.g., National Eng'g & Contracting Co. v. Herman,*  
19 *181 F.3d 715, 18 OSH Cases 2114 (6<sup>th</sup> Cir. 1999);*  
20 *Caterpillar Inv. v. Herman, 122 F.3d 437, 17 OSH*  
21 *Cases 2121 (7<sup>th</sup> Cir. 1997); Valdak Corp. v. OSHRC,*  
22 *73 F.3d 1466, 17 OSH Cases 1492 (8<sup>th</sup> Cir. 1996);*  
23 *Conie Const v. Reich, 73 F.3d 382, 17 OSH Cases*  
24 *1409 (D.C. Cir. 1995); Reich v. Trinity Indus., 16*  
25 *F.3d 1149, 16 OSH Cases 1670 (11<sup>th</sup> Cir. 1994);*  
26 *Universal Auto Radiator Mfg. Co. v. Marshall, 631*  
27 *F.2d 20, 8 OSH Cases 2026 (3d Cir. 1980);*  
28 *Pepperidge Farm, Inc., 17 OSH Cases 1993, 1998-2000*  
*(Rev. Comm'n 1997). Occupational Safety and Health*  
*Law, 3<sup>rd</sup> Ed., Bloomberg BNA, page 264*

25 A focal point of the willful classification is evidence of the  
26 employer's state of mind.

27 A willful violation is distinguished from a  
28 nonwillful violation by "an **employer's heightened**  
**awareness** of the illegality of the **conduct or**  
**conditions** and **by a state of mind, i.e. conscious**

1           **disregard or plain indifference for the safety and**  
2           **health of employees."** *General Motors Corp.*, 14 OSH  
3           Cases 2064 (Rev. Comm'n 1991). A showing of evil  
4           or malicious intent is not necessary to establish  
5           willfulness. *McKie Ford, Inc. v. Secretary of*  
6           *Labor*, 191 F.3d 853, 18 OSH Cases 1905 (8<sup>th</sup> Cir.  
7           1999). Occupational Safety and Health Law, 3<sup>rd</sup> Ed.,  
8           Bloomberg BNA, page 264 (emphasis added)

9           An employer's knowledge of an applicable legal  
10          requirement also can be demonstrated through an  
11          **employer's communications with OSHA personnel, or**  
12          **a supervisor's admission of familiarity with the**  
13          **standards.** *Interstate Erectors Inc.*, 74 F.3d 223,  
14          229, 17 OSH Cases 1522 (10<sup>th</sup> Cir. 1996; *Pentecost*  
15          *Contracting Corp.*, 17 OSH Cases 1953, 1955 (Rev.  
16          Comm'n 1997). *Conie Constr. Inc.*, 73 F.2d 382, 384  
17          17 OSH Cases 1409 (D.C. Cir. 1995).

18          No where in the testimony or arguments of respondent was there ever  
19          any recognition for the need to protect employees from fall hazards by  
20          some means during the truss loading and unloading process. There was  
21          a plain disregard for the safety requirements promulgated under the  
22          occupational safety and health act and imposed upon all employers.

23          **Intentional noncompliance with a standard will**  
24          **usually be characterized as willful even if that**  
25          **noncompliance is based on the employer's belief**  
26          **that compliance was unnecessary for employee safety**  
27          **or that the methods implemented by the employer**  
28          **were superior to those called for by OSHA's**  
29          **standard.** *Conie*, 73 F.3d 382; *Donovan v. Capital*  
30          *City Excavating Co.*, 712 F.2d 1008, 1010, 11 OSH  
31          Cases 1581 (6<sup>th</sup> Cir. 1983) (foreman's belief that  
32          trench was safe); *F.X. Messina Constr. Corp. v.*  
33          *OSHRC*, 505 F.2d 701, 2 OSH Cases 1325 (1<sup>st</sup> Cir 1974)  
34          (same). *Fluor Daniel v. OSHRC*, 295 F.3d 1232,  
35          1241, 19 OSH Cases 1945, 1951 (11<sup>th</sup> Cir. 2002).  
36          Occupational Safety and Health Law, 3<sup>rd</sup> Ed.,  
37          Bloomberg BNA, page 266 (emphasis added)

38          **Intentional disregard** for the requirements of a  
39          standard and **plain indifference to employee safety**  
40          are **independent elements of willfulness.** Thus,  
41          even if an employer did not actually know of the  
42          specific requirements of a standard or the Act,  
43          willfulness can be found if the **employer's conduct**  
44          **or attitude exhibits plain indifference to employee**  
45          **safety.** In *A. E. Staley v. Secretary of Labor*, the  
46          District of Columbia Circuit clarified the  
47          difference between the two independent elements of

1 willfulness: intentional disregard of the  
2 requirements of the regulation and plain  
3 indifference to employee safety. While **intentional**  
4 **disregard requires employer knowledge** of the  
5 specific violative condition, **plain indifference**  
6 **does not require direct evidence that the employer**  
7 **knew of each individual violation.** Instead, plain  
8 indifference **substitutes for knowledge** of the  
9 specific condition as a means of inferring the  
10 employer's willful intent. *Beta Constr Co.*, 16 OSH  
11 Cases 1435, n.7 (Rev. Comm'n 1993). *Valdak Corp.*  
12 *v. OSHRC*, 73 F.3d 1466, 17 OSH Cases 1492 (8<sup>th</sup> Cir.  
13 1996); *National Eng'g & Contracting Co.*, 18 OSH  
14 Cases 1075, 1080-81 (Rev. Comm'n 1997), *aff'd*, 181  
15 F.3d 715, 721-22 (6<sup>th</sup> Cir. 1999). 295 F.3d 1341, 19  
16 OSH Cases 1937 (D.C. Cir. 2002). Occupational  
17 Safety and Health Law, 3<sup>rd</sup> Ed., Bloomberg BNA, page  
18 267 (emphasis added)

19  
20 The burden of proof to establish willfulness need not show that an  
21 employer was aware of the illegality of its acts or omissions and  
22 consciously disregarded the requirements of the act but rather only  
23 plainly indifferent to employee safety and health. (*A. E. Staley*, supra  
24 at page 14.)

25 The Courts and Commission continue to hold an  
26 employer's belief that compliance is **infeasible** or  
27 that the standard does not apply must be  
28 **objectively reasonable** to sustain a defense to  
willfulness. *A. J. McNulty & Co. v. Secretary of*  
*Labor*, 283 F.3d 328, 338, 19 OSH Cases 1769, 1776  
(D.C. Cir. 2002) (emphasis added)

29 The evidence and testimony by a preponderance established the  
30 employer maintained certain fall arrest safety systems but failed to  
31 identify or address the specific violative conduct during the loading  
32 and unloading process of trusses based upon an intentional disregard of  
33 the standard by simply asserting it was infeasible and without any facts  
34 or evidence whatsoever to demonstrate alternative efforts to find a  
35 means of some compliance to protect its employees during very dangerous  
36 fall hazard conditions. Further, respondent employer knew, based on his  
37 own testimony of the violative condition. All the cited conditions

1 occurred in **plain view** and with the direct supervision of the company  
2 supervisors and that of the owner himself, Mr. Curiel.

3 The penalty calculation procedures for willful violations have been  
4 subject of review by the Federal courts and establish legal case  
5 precedent guidelines for appropriate assessment of penalties under  
6 multiple violations. The penalty assessment at Citation 1, Item 1 for  
7 the willful violation of \$30,800.00 is reasonable and approved. In  
8 accordance with the operations manual the penalty calculation was  
9 \$70,000.00 and could easily have been confirmed but for the credits  
10 rendered.

11 Respondent asserted claims and charges with regard to an improper,  
12 inappropriate or unlawful inspection and enforcement process. The  
13 defense of **unreasonable inspection** is recognized under occupational  
14 safety and health law. However the respondent offered no evidence to  
15 support the defense of unreasonable inspection. The CSHOs were admitted  
16 to the worksite by the general contractor.

17 Section 8(a) of the Act authorizes OSHA 'to inspect  
18 and investigate during regular working hours and at  
19 other *reasonable times*, and *within reasonable*  
20 *limits and in a reasonable manner*, any such place  
21 of employment and all pertinent conditions . . . .'  
22 29 U.S.C. §651(a)(2) (emphasis added)

23 **To establish the defense of an unreasonable**  
24 **inspection, the employer must introduce sufficient**  
25 **evidence of unreasonable conduct by the OSHA**  
26 **investigator such that the employer's preparation**  
27 **or defense is prejudiced. The remedy for failure**  
28 to comply with Section 8(a) **is not dismissal** of the  
29 citations, but suppression of evidence gained from  
30 the inspection. (emphasis added)

31 Unreasonable inspection challenges can assert a  
32 variety of actions by the investigator including  
33 alleged violations of OSHA's Field Operations  
34 Manual (FOM). The Review Commission has held,  
35 however, that the FOM is only a guide to OSHA  
36 personnel to promote efficiency and uniformity, is  
37 not binding on OSHA, and does not accord the  
38 employer any procedural or substantive rights or

1 defenses. *Hamilton Fixture*, 16 OSH Cases 1073,  
2 1077 (Rev. Comm'n 1993), *aff'd*, *Hamilton Fixture v.*  
3 *Secretary of Labor*, 16 OSH Cases 1889 (6<sup>th</sup> Cir.  
4 1994). *Environmental Utils. Corp.*, 5 OSH Cases  
5 1195, 1196-97 (Rev. Comm'n 1997 (footnote omitted)).  
6 See, e.g., *L.R. Willson and Sons, Inc.*, 17 OSH  
7 Cases 2059, 2060-63 (Rev. Comm'n 1997) (videotaping  
8 worksite without notice to employer permissible);  
9 *GEM Indus. Inc.*, 17 OSH Cases 1184 (Rev. Comm'n  
10 1995) (gathering evidence prior to opening  
11 conference permissible); *Suttles Truck Leasing,*  
12 *Inc.*, 20 OSH Cases 1953 (Rev. Comm'n 2004)  
13 (inspector's prior misconduct resulting in  
14 discipline did not warrant rejection of testimony).  
15 *Hamilton Fixture*, 16 OSH Cases at 1079, see also  
16 *Consolidated Freightways Corp.*, 16 OSH Cases 1317,  
17 1323 n.10 (Rev. Comm'n 1991).

18 Here there was no evidence whatsoever to support the claims of an  
19 unreasonable inspection rather only naked assertions. It is further  
20 noted that even had there been some competent evidence of unreasonable  
21 conduct that would not in and of itself constitute a defense and  
22 dismissal of the citation, but rather only a suppression of evidence  
23 from portions of the inspection. Here respondent Curiel admitted the  
24 existence of violative conditions and his belief that no protection was  
25 required under the standard during the loading process because it was  
26 simply infeasible but offered nothing more. So had there been any  
27 evidence of an unreasonable inspection, **here there was not**, it would not  
28 have satisfied any defensive element to dismiss the citation.

29 The Board is reluctant to impose a willful violation upon  
30 respondent or any Nevada employer. However, the magnitude of evidence  
31 and lack of any reasonable mitigation leaves no alternative under the  
32 established law. Workplace employee safety is the paramount purpose  
33 under the occupational safety and health act.

34 Based on the preponderance of substantial evidence, it is the  
35 decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that  
36 a Willful violation of Nevada Revised Statutes did occur as to Citation

1 1, Item 1, 29 CFR 1926.501(b) (13) and the proposed penalty in the amount  
2 of \$30,800.00 is reasonable, appropriate, and confirmed.

3 The Board directs counsel for the **Complainant**, Chief Administrative  
4 Officer of the Occupational Safety and Health Administration, to submit  
5 proposed Findings of Fact and Conclusions of Law to the **NEVADA**  
6 **OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing  
7 counsel within twenty (20) days from date of decision. After five (5)  
8 days time for filing any objection, the final Findings of Fact and  
9 Conclusions of Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY**  
10 **AND HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings  
11 of Fact and Conclusions of Law signed by the Chairman of the **NEVADA**  
12 **OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final  
13 Order of the **BOARD**.

14 DATED: This 17th day of March 2015.

15 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
16 REVIEW BOARD

17 By:                     /s/                      
18                     JOE ADAMS, CHAIRMAN                      
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