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NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

Docket No. RNO 15-1779

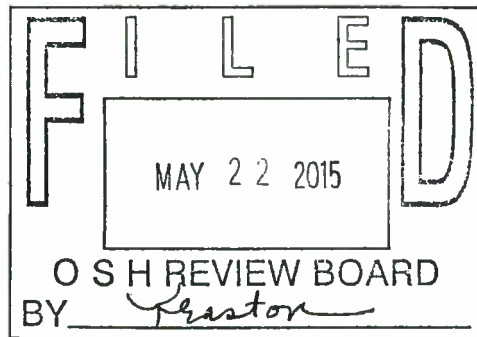
CHIEF ADMINISTRATIVE OFFICER
OF THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION, DIVISION
OF INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY,

Complainant,

vs.

PROVIDENCE ELECTRIC, INC.,

Respondent.



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 8th day of April 2015, in furtherance of notice duly provided according to law, MS. SALLI ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (OSHA)**; and MR. ALLAN SISIA, President and Owner, appearing on behalf of Respondent, **Providence Electric, Inc.**

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

The complaint filed by the OSHA sets forth allegations of violation

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1 of Nevada Revised Statutes as referenced in Exhibit "A", attached
2 thereto.

3 Citation 1, Item 1, charged a violation of NRS 618.375(1) commonly
4 known as the general duty clause, which provides in pertinent part:

5 Duties of employers. Every employer shall furnish
6 employment and a place of employment which are free
7 from recognized hazards that are causing or are
likely to cause death or serious physical harm to
his or her employees.

8 The complainant alleged that at a job site in Reno, Nevada three
9 respondent employees were utilizing a scissor lift in a way that was
10 unintended by the manufacturer, moving a light pole by resting it
11 against the guardrails (of the lift) and tying the pole to the anchor
12 point on the platform, exposing employees to a "struck by" and/or fall
13 hazard if the light pole were to fall or the scissor lift tip over. The
14 violation was classified as Serious. The proposed penalty for the
15 alleged violation is in the amount of \$300.00.

16 The parties stipulated to the admission of evidence identified as
17 complainant's Exhibits 1 and 2. Respondent offered no documentary
18 exhibits as evidence.

19 Counsel for the Chief Administrative Officer presented testimony
20 and documentary evidence with regard to the alleged violation.
21 Certified Safety and Health Officer and District Supervisor (CSHO) Mr.
22 Gil Klaiber, testified in support of violation. CSHO Klaiber referenced
23 the inspection and narrative reports at Exhibit 1, pages 9 through 14
24 in the course of testimony.

25 On or about October 17th, 2014 CSHO Chantelle Batton conducted an
26 inspection of the respondent worksite located at 1 East Liberty Street,
27 Reno, Nevada. Mr. Klaiber explained that CSHO Batton is no longer
28 employed by NVOSHA, and that he acted as her supervisor on the subject

1 inspection. Respondent Providence Electric was a subcontractor to
2 United Construction Company the general contractor responsible for
3 building a Starbucks facility. An opening conference was conducted with
4 the respondent and general contractor. The narrative and inspection
5 report in evidence, together with testimony of Mr. Klaiber, described
6 the "walk-around" inspection on October 17, 2014 by CSHO Batton and the
7 appropriate employer representatives, including Mr. Allan Sisia, owner
8 of Providence Electric. Respondent was identified as the **creating and**
9 **exposing employer** at the location classified as a multi-employer
10 worksite.

11 Mr. Klaiber testified that at the time of the inspection respondent
12 was utilizing a scissor lift to raise a light pole and secure it in
13 place. He referenced Exhibit 1, page 13 of the inspection narrative and
14 testified respondent employees were also observed utilizing the lift to
15 transport and relocate the light pole. During the inspection, one
16 employee of Providence Electric was observed and photographed standing
17 in the raised scissor lift guiding the light pole into an upright
18 position. The light pole was "resting" on the top guardrail of the
19 scissor lift as the employee guided the pole into position. The pole was
20 tied to an anchor point on the scissor lift using a hoisting strap. Two
21 employees on the ground were maneuvering the lower portion of the light
22 pole into place for connection.

23 Inspection interviews, employee statements and CSHO observations
24 in the inspection report at Exhibit 1 corroborated CSHO Klaiber
25 testimony that respondent employees used the scissor lift to take the
26 light pole down from a previous location at the job site then transport
27 it on the scissor lift to a new location because it interfered with
28 construction of a "drive thru" for the new Starbucks facility.

1 Respondent employees informed the CSHO that to remove and relocate the
2 light pole they "rested" the top of the pole on the guardrail of the
3 scissor lift and lowered it down. An employee on the ground was
4 responsible for handling the bottom of the pole. Once the light pole
5 was lowered they moved it to the new location. The top of the pole was
6 supported on the top guardrail of the scissor lift; the bottom of the
7 light pole supported by two employees. The employees informed the CSHO
8 the light pole weighed approximately 250 lbs.

9 Respondent supervisor Rob Doyle reported at the time of inspection
10 that using the scissor lift was the most logical way to move the light
11 pole because the job site was directly over a parking garage with a
12 weight limitation of 5,300 lbs. He explained that using a crane or
13 forklift would not have been feasible due to the job site configuration.

14 In continuing testimony, Mr. Klaiber referenced the exhibits in
15 evidence reporting that CSHO Batton contacted United Rentals to
16 determine whether the company would allow a scissor lift to be used as
17 she observed during inspection. Ms. Batton inquired as to any
18 alternative methods to move the light pole under the facts described.
19 She reported United Rentals informed her they would not allow materials
20 to be placed on the railing of the scissors lift. The representative
21 also informed CSHO Batton that a suitable alternative would be to use
22 two "hand-crank material lifts".

23 Mr. Klaiber identified photographs at Exhibit 1, pages 51 through
24 55 depicting the alleged violative conduct in support of his testimony
25 and the investigative report. He identified Exhibit, pages 16 through
26 18 and read into the record the witness statements relied upon in
27 approving the findings and recommendations of CSHO Batton. Mr. Klaiber
28 also read into the record portions of the witness statement taken from

1 respondent supervisor Mr. Rob Doyle dated October 17th, 2014 at Exhibit
2 1, page 16.

3 ". . . we are moving light poles. We took the
4 light pole down, **moved it** and set it back up in a
5 different location. We **used the lift to lower the**
6 **light pole, rested the pole on the lift and carried**
7 **it to the new location . . .** I don't know whether
8 the scissor lift can be used to lift poles . . . I
9 read the manual this morning and **nothing in the**
10 **manual said we could move poles with the scissor**
11 **lift . . .** the weight limit on the scissor lift is
12 700 lbs. . . . the light pole weighs about 300
13 lbs." (emphasis added)

14 Mr. Klaiber testified a serious citation was recommended for
15 improper use of the scissor lift exposing employees to the potential for
16 a "struck by" or "fall from" hazard if the pole were to fall or the
17 scissor lift tip over. He further testified Mr. Sisia reported the
18 parking garage weight limit left no other reasonable alternative to move
19 the light pole, so he believed using the scissor lift was the safest
20 method.

21 Mr. Klaiber testified he reviewed the manufacturer information and
22 operations manual for the scissor lift, at Exhibit 2, commencing at page
23 57. The manual use restrictions included pictorial and narrative
24 warnings which provided:

25 ". . . do not place materials on the guardrails or
26 materials that exceed the confines of the
27 guardrails . . .". He further noted at page 58 an
28 additional manufacturer's warning at item 1, that
"lanyard attachment anchorage . . . do not attach
belts/harnesses to any other point on the platform.
Do not use this point to lift, anchor, secure or
support the platform or any other apparatus or
material."

29 Mr. Klaiber testified the general duty clause was cited because
30 there were no applicable specific vertical standards for reference. He
31 testified the facts of violative conduct observed and documented
32 demonstrated an obvious hazard and one recognized in the industry. He

1 explained that leaning or resting a 250 lb. light pole against the
2 raised platform of the scissor lift violated the manufacture's warnings
3 and created the potential for a tipping of the lift resulting in falls
4 by or upon employees as well as related hazards of "struck by" contact
5 to the employees working in the area. He classified the violation as
6 "Serious" due to the potential for the employee in the raised platform
7 falling to the ground and sustaining serious injury or death if the pole
8 fell, bumped, or caused the lift to tip over. The same conditions also
9 created the potential for causing serious injury or death to the
10 employees assisting at ground level with positioning and guiding the
11 pole structure. Mr. Klaiber testified that respondent supervisor Doyle
12 did not review the manufacturer's operation manual in the company's
13 possession to understand safe scissor lift use for the subject work, nor
14 follow the manual restrictions. He referenced the Doyle witness
15 statement at Exhibit 1, page 16.

16 Mr. Klaiber testified on the **recognized** hazard element associated
17 with improper use of a scissor lift. He explained the potential for
18 serious injury or death from improperly using the lift contrary to the
19 manufacturer restrictions for transporting any materials that could not
20 be accommodated in the "basket", and/or using the lift basket/platform
21 as an anchorage point.

22 Respondent representative Mr. Allan Sisia conducted cross-
23 examination of CSHO safety supervisor Klaiber. Mr. Sisia asked if
24 anyone observed the light pole leaning against the platform of the lift.
25 The witness responded in the affirmative, and repeated his testimony and
26 references in the inspection report. Mr. Klaiber testified the
27 respondent employee witness statement at Exhibit 1, page 16 confirmed
28 the light pole was in fact "transported" by the scissor lift. Mr.

1 Klaiber answered questions as to whether the lift could be utilized to
2 transport materials; he responded the manual restricts transporting
3 anything outside the basket. Only items that could be accommodated
4 inside the platform/basket area could be transported under the
5 manufacturer use restrictions.

6 At the conclusion of the testimony, both parties presented closing
7 arguments.

8 Complainant argued OSHA's burden of proof had been met. The
9 evidence clearly established a violation of Nevada Revised Statutes
10 under the general duty clause. The undisputed facts and photographs in
11 evidence confirmed the respondent employer did not furnish employment
12 at the subject job site which was free from **recognized hazards** which
13 were **likely to cause death or serious injury** in the event of an
14 accident. Counsel asserted the respondent supervisor written statement,
15 pictorial evidence, and unrebutted testimony of CSHO Klaiber met all the
16 required elements under the burden of proof to establish a violation.
17 Utilization of the lift as an anchor point was demonstrated through the
18 photographic, documentary and unrebutted testimonial evidence. Counsel
19 argued there was no contradictory evidence the lift was not utilized as
20 an anchor point. Improper use of the lift was clearly depicted in the
21 photographic exhibits in evidence. The respondent's own supervisor
22 confirmed the facts of violation in his witness statement.

23 Exhibit 2 demonstrated there were other **feasible means** to
24 accomplish the work task to confirm the availability of safe
25 alternatives thereby eliminating any defense of "infeasibility".
26 Counsel asserted the "recognition" element of proof for improper unsafe
27 use of the scissor lift was established constructively by the
28 manufacturer's written use warnings to the industry, and the

1 availability of the manual to respondent.

2 Counsel concluded arguing that industry recognition was also
3 established under occupational safety and health law based upon the
4 **obvious** dangerous nature of the violative conduct. The equipment was
5 clearly not used as it was intended.

6 Respondent representative Sisia provided closing argument and
7 asserted the defense of **infeasibility**. He argued there was a necessity
8 for utilizing the scissor lift to remove and reset the light pole
9 because there were no technical or economically feasible alternatives
10 for completion of the job task. Respondent noted there were two garage
11 levels below with weight limits that prevented use of a crane or similar
12 heavy lifting equipment. He asserted that he and his employees had 20
13 to 32 years of industry experience and believed the operation was safe.
14 He never received an OSHA violation or experienced a serious injury at
15 any of his job sites. He asserted a competitor was noted on the site
16 just before the OSHA inspector arrived which he believes brought about
17 the citation.

18 Mr. Sisia argued the scissor lift was not used to "carry the pole".
19 He asserted the witness statement of his supervisor at Exhibit 1, page
20 16 did not reflect what Mr. Doyle meant to say. He argued there were
21 no unsafe conditions exposing his employees to any actual hazards. The
22 light pole just "rested" on the lift briefly until the men could get
23 into a better position to manipulate it for placement and connection.
24 He argued the lift weighed 2-1/2 tons with the major portion in the
25 base, and therefore simply not susceptible to tipping over while working
26 with a 250 lb. light pole.

27 Respondent Sisia stated in closing argument that he now understands
28 a scissor lift should not be used to do a "crane lift"; but added he

1 believes it was a "reasonable call" under the circumstances. He argued
2 it would be absurd to use a mechanical lift as the United Rentals
3 representative informed CSHO Batton because it was more dangerous. Mr.
4 Sisia asserted he would not utilize a scissor lift in the same manner
5 again, although believed it was okay at the time, stating ". . . I now
6 realize there are special pieces of equipment that would have worked .
7 . .". He argued the violation should not have been classified as
8 serious. He expressed special concern for his reputation which
9 reflected many years of job site safety. He stated "I have never
10 endangered my men . . . and can't have a serious violation on my record
11 . . . and will not ever again utilize . . . a scissor lift in this
12 fashion . . .". Mr. Sisia concluded asserting ". . . if there is a
13 violation here, it should not be classified as serious, but I would
14 accept the penalty if an **other** violation was found . . .".

15 In considering the testimony, exhibits, and arguments of counsel,
16 the Board is required to review all evidence and established legal proof
17 elements to find violations under Occupational Safety & Health Law.

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

22 All facts forming the basis of a complaint must be
23 proved by a **preponderance of the evidence**. See
24 *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD
25 ¶16,958 (1973). (emphasis added)

26 NRS 618.375(1) commonly known as the **general duty clause** provides
27 in pertinent part:

28 ". . . Every employer shall:

1. Furnish employment and a place of employment which are **free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . .**" (emphasis added)

1 To establish a general duty clause violation, OSHA must prove:

2 (1) a **condition or activity in the workplace**
3 **presents a hazard** to an employee; (2) the condition
4 or activity is **recognized as a hazard**; (3) the
5 hazard is causing or is **likely to cause death or**
6 **serious physical harm**; and (4) a **feasible means**
7 **exists to eliminate or materially reduce** the
8 hazard. *National Realty and Construction Co., Inc.*
9 *v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973), the court
10 listed three elements that OSHA must prove to
11 establish a general duty violation; *Wiley Organics*
12 *Inc. v. OSHRC*, 124 F.3d 201, 17 OSH Cases 2125 (6th
13 Cir. 1997).

14 A respondent may rebut allegations by showing:

- 15 1. The standard was inapplicable to the situation
16 at issue;
- 17 2. The situation was in compliance; or lack of
18 access to a hazard. See, *Anning-Johnson Co.*,
19 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

20 NRS 618.625 provides in pertinent part:

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

19 The respondent employer was cited for a single violation of NRS
20 618.375(1) commonly known as the **general duty clause**. The burden of
21 proof to establish a violation under occupational safety and health law
22 requires elements of proof different from those to establish a specific
23 standard violation. The evidence at Citation 1, Item 1, charging
24 violation of the general duty clause and classification of the violative
25 conduct as Serious met the burden of proof by the preponderance of
26 evidence.

27 In citing an employer under the **general duty**
28 **clause**, it is specifically necessary to demonstrate
the existence of a **recognized hazard** as mandated by
the statute; whereas citing an employer under a

1 **specific standard** relies upon a recognition element
2 based upon codification by Congress and adoption of
3 certain recognition hazards for particular
4 industries. To establish a violation of the
5 general duty clause, the **complainant must do more
6 than show the mere presence of a hazard.** The
7 general duty clause, ". . . obligates employers to
8 **rid their workplaces of recognized hazards . . .**"
9 *Whitney Aircraft v. Secretary of Labor*, 649 F.2d
10 96, 100 (2nd Cir. 1981). (emphasis added)

11 The elements of a **general duty clause** violation
12 identified by the first court of appeals to
13 interpret Section 5(a)(1) have been adopted by both
14 the Federal Review Commission and the Courts. In
15 *National Realty and Construction Co., Inc. v. OSHRC*,
16 489 F.2d 1257 (D.C. Cir. 1973), the court
17 listed three elements that OSHA must prove to
18 establish a general duty violation; the Review
19 Commission extrapolated a fourth element from the
20 court's reasoning: (1) a **condition or activity in
21 the workplace presents a hazard** to an employee; (2)
22 the condition or activity is **recognized as a
23 hazard**; (3) the hazard is causing or is **likely to
24 cause death or serious physical harm**; and (4) a
25 **feasible means exists to eliminate or materially
26 reduce** the hazard. The four-part test continues to
27 be followed by the courts and the Review
28 Commission. E.g., *Wiley Organics Inc. v. OSHRC*,
124 F.3d 201, 17 OSH Cases 2125 (6th Cir. 1997);
Beverly Enters., Inc., 19 OSH Cases 1161, 1168
(Rev. Comm'n 2000); *Kokosing Constr. Co.*, 17 OSH
Cases 1869, 1872 (Rev. Comm'n 1996). The *National
Realty*, decision itself continues to be routinely
cited as a landmark decision. See, e.g., *Kelly
Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321,
11 OSH Cases 1889 (5th Cir. 1984); *Ensign-Bickford
Co. v. OSHRC*, 717 F.2d 1419, 11 OSH Cases 1657
(D.C. Cir. 1983); *St. Joe Minerals Corp. v. OSHRC*,
647 F.2d 840, 845 n.8, 9 OSH Cases 1946 (8th Cir.
1981); *Pratt & Whitney Aircraft Div. v. Secretary
of Labor*, 649 F.2d 96, 9 OSH Cases 1554 (2d Cir.
1981); *R.L. Sanders Roofing Co. v. OSHRC*, 620 F.2d
97, 8 OSH Cases 1559 (5th Cir. 1980); *Magma Copper
Co. v. Marshall*, 608 F.2d 373, 7 OSH Cases 1893 (9th
Cir. 1979); *Bethlehem Steel Corp. v. OSHRC*, 607
F.2d 871, 7 OSH Cases 1802 (3d Cir. 1979).
Rabinowitz Occupational Safety and Health Law,
2008, 2nd Ed., page 91. (emphasis added)

26 When the Secretary has introduced evidence showing
27 the existence of a hazard in the workplace, the
28 **employer may, of course, defend by showing that it
has taken all necessary precautions to prevent the
occurrence of the violation.** *Western Mass. Elec.
Co.*, 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981).
(emphasis added)

1 The testimony of safety supervisor Klaiber, the stipulated
2 documentary evidence at Exhibits 1 and 2, the witness statement of
3 respondent supervisor Doyle and the manufacturer warning information on
4 limitations of use established the violative conduct at the jobsite.
5 The closing argument of Mr. Sisia included an admission - that he
6 realizes alternate equipment was available and feasible to safely
7 perform the subject work. The evidence satisfied the elements of proof
8 under well established occupational safety and health law.

9 The facts in evidence demonstrated a patent and obvious **recognized**
10 hazardous condition as charged at Citation 1, Item 1. Utilizing a
11 scissor lift with a man in platform "basket" extended in the air as a
12 "resting" and/or anchorage point is clearly industry recognized as an
13 unsafe and hazardous workplace condition. The legal duty of respondent
14 under occupational safety and health law is not to protect against
15 unknown, unforeseen or extreme events, but rather **recognized hazards**.
16 Recognition is established in various ways, including but not limited
17 to, industry practices, equipment manufacturers use restrictions, and/or
18 warnings in operational instructions.

19 To satisfy the burden of proof for an alleged general duty clause
20 violation under established occupational safety and health law, the
21 division is required to prove **by a preponderance of evidence** there
22 existed a "**recognized hazard**" of which the **employer had knowledge**
23 (actual or **constructive**) to **foresee** and, therefore, prevent injury or
24 harm to its employees by utilizing **feasible** measures that would reduce
25 the hazard and likelihood of injury. The availability of the manual
26 warnings and operational restrictions to the respondent at Exhibit 2
27 corroborated the unrebutted testimony of CSHO Klaiber and established
28 actual and constructive notice of employer knowledge.

1 The un rebutted facts in the record further demonstrate by a
2 preponderance of evidence that the employer scissor lift operations
3 created a clear and **obvious** potential hazard to exposed employees. The
4 hazard potentials were readily foreseeable. The violative conduct
5 confirmed in the evidence portrays an **obvious** hazard.

6 The courts have long recognized that an **obvious or**
7 **glaring nature of a hazard** may itself suffice to
8 provide the basis for a finding of **recognition** in
9 the context of a "recognized hazard", a required
proof element under the general duty clause. See,
Kelly Springfield Tire Co. v. Donovan, 729 F.2d
317, 321, 11 OSH Cases 1889 (5th Cir. 1984).

10 It also is reasonable to **infer from the direct evidence** that an
11 extended scissor lift platform utilized as a resting and/or lifting
12 anchorage point, has the potential to tip and cause injury to employees
13 working from or near the scissor lift.

14 **Alternate** technical equipment and economically **feasible** work
15 practices to remove and reset the light pole were confirmed available
16 by the preponderant evidence.

17 There was no competent proof of technical or economical
18 infeasibility. There was substantial evidence of alternate feasible
19 methods to conduct the work safely as demonstrated by complainant and
20 admitted by respondent in closing argument. Both identified other
21 equipment available to accomplish the same work task in a recognized
22 safe manner.

23 The preponderant complainant testimonial evidence, exhibits and
24 photographs, together with lack of any competent rebuttal evidence by
25 respondent to support a defense of infeasibility requires the finding
26 of violation at Citation 1, Item 1.

27 While occupational safety and health law recognizes citations may
28 be vacated if the employer proves a lack of feasibility, a preponderance

1 of evidence is required under the legal proof burden.

2 A citation may be vacated if the employer proves
3 that: (1) the means of compliance prescribed by the
4 applicable standard would have been infeasible
5 under the circumstances in that either (a) its
6 implementation would have been **technologically or**
7 **economically infeasible** or (b) necessary work
8 operations would have been **technologically or**
9 **economically infeasible after its implementation;**
10 **and** (2) either (a) an **alternative method of**
11 **protection was used** or (b) there **was no feasible**
12 **alternative means of protection.** *Beaver Plant*
13 *Operations Inc.*, 18 OSHC 1972, 1977 (Rev. Comm'n
14 1999), rev'd on another ground, 223 F.3d 25, 19
15 OSHC 1053 (1st Cir. 2000); *Gregory & Cook, Inc.*, 17
16 OSHC 1189, 1190 (Rev. Comm'n 1995); *Siebel Modern*
17 *Mfg. & Welding Corp.*, 15 OSHC 1218, 1228 (1991);
18 *Mosser Constr. Co.*, 15 OSHC 1408, 1416 (Rev. Comm'n
19 1991); *Dun-Par Engineered Form Co.*, 12 OSHC 1949
20 (1986), rev'd on another ground, 843 F.2d 1135, 13
21 OSHC 1652 (8th Cir. 1988). (emphasis added)

22 Complainant met the statutory burden of proof and established the
23 serious violations found by a preponderance of evidence at Citation 1,
24 Item 1.

25 The violation was appropriately classified as **serious**. The
26 proposed penalty in the amount of \$300.00 was reasonable and fairly
27 assessed.

28 NRS 618.625 provides in pertinent part:

29 ". . . a serious violation exists in a place of
30 employment if there is a **substantial probability**
31 **that death or serious physical harm could result**
32 **from a condition** which exists, or from one or more
33 practices, means, methods, operations or processes
34 which have been adopted or are in use in that place
35 of employment **unless the employer did not and could**
36 **not, with the exercise of reasonable diligence,**
37 **know of the presence of the violation."**

38 The testimony, including extended explanations by CSHO Klaiber,
39 demonstrated the serious nature of the violation as classified and
40 supported by the un rebutted evidence.

41 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**

