

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

4 CHIEF ADMINISTRATIVE OFFICER
5 OF THE OCCUPATIONAL SAFETY AND
6 HEALTH ADMINISTRATION, DIVISION
7 OF INDUSTRIAL RELATIONS OF THE
8 DEPARTMENT OF BUSINESS AND
9 INDUSTRY,

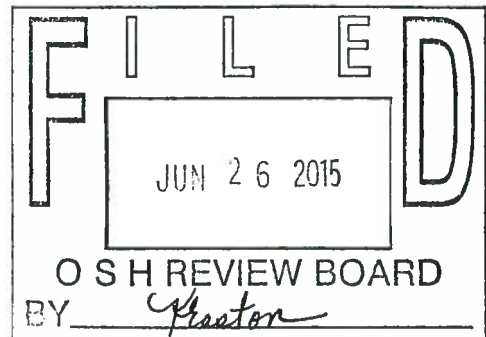
Docket No. LV 15-1781

Complainant,

vs.

10 UNION ERECTORS, LLC,

Respondent.



11
12
13 **DECISION**

14 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
15 **REVIEW BOARD** at a hearing commenced May 13, 2015, in furtherance of
16 notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel
17 appearing on behalf of the Complainant, **Chief Administrative Officer of**
18 **the Occupational Safety and Health Administration, Division of**
19 **Industrial Relations** (OSHA). Mr. Matthew T. Dushoff, Esq. and Mr. Jason
20 Bacigalupi, Esq. appearing on behalf of Respondent, **Union Erectors, LLC.**

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

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

26 Citation 1, Item 1, charges a violation of 29 CFR 1926.352(d) which
27 provides in pertinent part:

28 Suitable fire extinguishing equipment shall be
immediately available in the work area and shall be
maintained in a state of readiness for instant use.

1 Complainant alleged that a respondent employee was performing fire
2 watch duties during welding operations using a fire extinguisher that
3 was overdue for an annual inspection. Employees were exposed to serious
4 injuries such as smoke inhalation and burns.

5 The violation was classified as "Serious". The proposed penalty for
6 the alleged violation is in the amount of \$918.00.

7 Citation 2, Item 1, charges a violation of 29 CFR 1926.300(a) which
8 provides in pertinent part:

9 Condition of tools. All hand and power tools and
10 similar equipment, whether furnished by the
11 employer or the employee, shall be maintained in a
safe condition.

12 Complainant alleged that respondent employees used a DeWalt angle
13 grinder with damage to the outer jacket of the power cord while
14 installing decking at the construction project. The complainant further
15 alleged the employer did not ensure the tools were maintained in a safe
16 condition.

17 The violation was classified as "other" and a zero penalty
18 proposed.

19 Citation 2, Item 2, charges a violation of 29 CFR
20 1926.405(g)(2)(iv) which provides in pertinent part:

21 Strain relief. Flexible cords shall be connected
22 to devices and fittings so that strain relief is
23 provided which will prevent pull from being
directly transmitted to joints or terminal screws.

24 Complainant alleged that respondent employees used a DeWalt hammer
25 drill with failed strain relief on the power cord while performing
26 decking operations at the construction site.

27 The violation was classified as "other" and a zero penalty
28 proposed.

1 Citation 2, Item 3, charges a violation of 29 CFR 1926.416(e) (1)
2 which provides in pertinent part:

3 Worn or frayed electric cords or cables shall not
4 be used.

5 Complainant alleged respondent employees used a damaged extension
6 cord to operate angle grinders and rotary hammers at the construction
7 site. Complainant further alleged the extension cord's outer jacket was
8 torn open exposing the shielding and wires.

9 The violation was classified as "other" and a zero penalty
10 proposed.

11 Counsel for the complainant and respondent stipulated to the
12 admission of evidence identified as complainant's Exhibits 1 and 2 and
13 Exhibit 3 consisting of three pages marked 214, 215 and 231.

14 Complainant presented testimony and documentary evidence of the
15 alleged violations through Compliance Safety and Health Officer (CSHO)
16 Mr. Delano Hill. On January 17, 2014 CSHO Hill conducted a **comprehensive**
17 inspection of a multi-employer worksite identified as the Konami Gaming
18 facility expansion located at 585 Konami Circle in Las Vegas, Nevada.
19 The work was under the direction and control of general contractor
20 Martin Harris Construction. The project consisted of adding an
21 additional 193,000 sq. ft. of corporate office and manufacturing space
22 to the Konami Gaming complex. CSHO Hill designated the project as a
23 **multi-employer worksite** noting nine subcontractors actively working on
24 the site at the time of inspection. He found four violative conditions
25 and proposed citations against the "exposing" subcontractor employer
26 Union Erectors LLC, the respondent in this matter. Mr. Hill identified
27 his inspection and narrative report at Exhibit 1, pages 8-10 in evidence
28 and referenced same during his testimony. He further identified the

1 photographs taken at the construction site admitted in evidence at pages
2 65-82.

3 CSHO Hill testified in support of Citation 1, Item 1, 29 CFR
4 1926.352(d). He observed a respondent employee performing fire watch
5 duties during welding operations in the basement warehouse area at the
6 construction site utilizing a portable fire extinguisher found overdue
7 for annual inspection. He interviewed the employee, identified as #2,
8 and confirmed his written witness statement at Exhibit 1, page 14.
9 Based upon the statement, his observations and discussions with employee
10 #2 Mr. Hill determined the employee relied on the fire extinguisher to
11 be in useable condition, but reported he had difficulty reading the date
12 on the inspection tag (label). CSHO Hill referenced photographic
13 exhibits 65A through 67A and testified the label on the extinguisher
14 confirmed expiration of the inspection period by approximately three
15 weeks. He explained the purpose of the inspection date tag (label) is
16 to assure a user the equipment is maintained in ready working condition
17 for instant use.

18 CSHO Hill identified the OSHA-1B "worksheets" at Exhibit 1 and
19 referred to pages 17-28 to support his findings of violation. He
20 testified 29 CFR 1926.352(d) requires fire extinguishing equipment be
21 maintained in a state of readiness for instant use. He referenced his
22 worksheet at page 18 and described the type of injuries likely to be
23 sustained by an exposed employee in the event of fire as smoke
24 inhalation and burns which could result in death.

25 Mr. Hill testified the company safety director, Matt Noto, informed
26 him respondent employees were trained on all aspects of fire protection;
27 but the company did not provide the portable fire extinguisher used by
28 employee #2. Mr. Noto attributed use of the particular portable fire

1 extinguisher to employee misconduct.

2 CSHO Hill testified and explained his classification of the
3 citation as serious in accordance with the operations manual. He
4 referenced Exhibit 2, pages 83 and 116 respectively, and testified the
5 respondent safety plan at page 116 required fire extinguishers be
6 inspected monthly.

7 Mr. Hill testified in support of his findings of violation at
8 Citation 2, Item 1 and referred to the Exhibit 1 safety narrative,
9 interview statements, and photographic exhibits stipulated in evidence.
10 Mr. Hill observed damaged hand tools located in the respondent
11 employer's "gang box". He determined that an angle grinder which bore
12 visible damage to the outer packet of the power cord, had been used by
13 respondent employees while installing decking. Mr. Hill referenced the
14 photographic exhibits in evidence, at pages 69-70A to support the
15 allegations of violation. He testified that he did not observe any
16 respondent employee actually utilizing the grinder or any damaged tools
17 during work efforts, but determined potential hazard exposure existed
18 because of "access" to the damaged equipment located in the employer's
19 gang box. Mr. Hill testified he also based employee exposure for
20 Citation 2, Item 1 on witness statements at Exhibit 1, pages 12, 15 and
21 16. He testified the company safety policy directs damaged tools be
22 "tagged out" for disposal. He identified and referenced Exhibit 2,
23 page 111 to support his finding of damaged tools as the employers
24 "Request for Loading and Shipping".

25 At Citation 2, Item 2, CSHO Hill testified he cited respondent for
26 a violation of 29 CFR 1926.405(g)(2)(iv) because employees used a hammer
27 drill with failed strain relief on the flexible power cord. He
28 identified photographs at Exhibit 1, pages 74-76A as depicting the

1 violative condition. Mr. Hill testified no employees were observed
2 using the equipment but had "access" to all tools and equipment in the
3 gang box.

4 At Citation 2, Item 3, CSHO Hill referenced his citation of 29 CFR
5 1926.406(e)(1). He testified respondent employees utilized a damaged
6 extension cord to operate angle grinders and rotary hammers. He
7 identified the photographs in evidence to support his finding. Mr. Hill
8 testified the subject cord(s) were located in a different gang box and
9 referenced Exhibit 3, photo number 231.

10 CSHO Hill testified no employees were observed using any of the
11 damaged equipment but based upon information obtained at the time of his
12 inspection three respondent employees were constructively exposed
13 because they had **access** to the tools in the employer gang box. He
14 testified the respondent had knowledge of the violative conditions
15 because of its ownership and **control** over the equipment and working
16 conditions.

17 CSHO Hill classified the citation 2 violations as "other than
18 serious" (other) and explained the bases for the classifications by
19 reference to his worksheet at Exhibit 1, page 17.

20 Respondent counsel conducted cross-examination of CSHO Hill as to
21 each of the four violations alleged and subject of direct testimony.

22 On cross-examination as to Citation 1, Item 1, Mr. Hill explained
23 his bases for citing the respondent for the fire extinguisher violation.
24 In response to a question of what materials were a "combustible" fire
25 hazard, Mr. Hill responded there was ". . . nothing (combustible) in the
26 immediate area . . . except . . . the fire watch employee's clothing
27 could catch fire . . .". He admitted the portable fire extinguisher
28 subject of the citation was "suitable" for use in a fire that might be

1 caused from welding operations at the worksite. Mr. Hill explained he
2 cited for the extinguisher under the referenced OSHA standard because
3 the expiration date on the inspection tag (label) meant it was not
4 "immediately available and ready for use . . ." as required by the term
5 of the standard. Mr. Hill admitted the fire extinguisher was readily
6 available to the fire watch employee.

7 CSHO Hill testified the subject fire extinguisher was "charged",
8 as the indicator gauge showed in the "green good" range. He again
9 explained his interpretation of the cited standard and testified he
10 believed the extinguisher was not **immediately available for instant use**
11 because it was not timely inspected and "red tagged". Mr. Hill
12 testified he did not test the fire extinguisher during his inspection.
13 On further questioning as to whether he was aware the fire extinguisher
14 tested "good the day after his inspection", Mr. Hill responded "I am now
15 aware . . . of that fact . . .".

16 CSHO Hill continued responses to cross-examination questions. He
17 clarified his written report at Exhibit 1 page 18 on the number of
18 employees exposed at Citation 1, and testified there was only one
19 exposed employee identified as the fire watch employee #2. Mr. Hill
20 admitted employee exposure was based solely upon the "potential" for
21 ignition of the fire watch employee's clothing from welding sparks
22 because there were no other combustible materials in the worksite area
23 he described as an elevator shaft made of concrete and steel. Mr. Hill
24 testified he believed the fire watch employee could "catch on fire" if
25 the welding above him caused sparks or materials to fall onto this
26 clothing.

27 Counsel continued cross examination and referenced Citation 2, Item
28 1. CSHO Hill testified he did not observe any respondent employees

1 utilizing the angle grinder and had no personal knowledge of employee
2 use of the equipment. He testified the citation for the grinder hazard
3 was based solely upon his determination that it was accessible therefore
4 "available for use". On further cross-examination, Mr. Hill admitted
5 his report reflected a finding that employees "used" the grinder. He
6 explained the report entry was made at the time of his investigation
7 because Mr. Noto told him employees used the grinder. He admitted
8 nothing in his worksheet or report in evidence could corroborate the
9 statements or his allegations that any employees actually used the
10 grinder. Mr. Hill further testified that his report of "employee use"
11 of all the Citation 2 equipment was based solely upon his determination
12 of employee **access** and the comments made by Mr. Noto.

13 CSHO Hill testified on the employee interview statement at Exhibit
14 1, page 12. He confirmed the interview was conducted approximately one
15 month after the inspection, and admitted that nowhere in the document
16 does the employee state he **used** the damaged grinder. Mr. Hill testified
17 his worksheets in evidence referenced three employees utilizing the
18 grinder, but admitted employee #2 was not one of them. He further
19 testified he could not recall which respondent employees told him they
20 used or were exposed to the grinder hazard. Mr. Hill admitted he had
21 no other notes nor reporting data to corroborate the employee
22 information.

23 Mr. Hill testified as to his worksheets in evidence, his bases for
24 hazard exposure, and classification of the Citation 2 violations. He
25 again admitted he had no additional supporting data other than his
26 reports, nor written documentary evidence to establish direct hazard
27 exposure through employee use of the equipment.

28 Counsel reviewed the equipment photographic exhibits with CSHO

1 Hill. At Exhibit 1, page 70, Mr. Hill admitted he could not identify
2 any bared wires in the cord he alleged had the potential to cause
3 electrical shock. He conducted no electrical testing of the equipment
4 for shock hazard. He did not verify the extent of the equipment damage.
5 CSHO Hill admitted he understood respondent supervisor Wunch was onsite
6 in the area where the gang boxes containing the damaged equipment were
7 located. He continued his testimony and again admitted he had no direct
8 evidence of actual employee use of any of the equipment cited as damaged
9 at Citation 2, Items 1, 2 or 3. Mr. Hill testified that while he
10 recalled his worksheets reflected that supervisor Wunch informed him
11 three employees used the damaged equipment, he could now testify that
12 only the employee statement at page 15 provided "I could have used the
13 tools in the box . . .". He admitted he had no other written support
14 from interviews or field notes to show any employees actually used the
15 damaged extension cord referenced at Item 3.

16 Respondent offered direct testimony during the course of the
17 hearing from Mr. Ralph Wunch, the respondent supervisor foreman. He
18 testified as to the company policy and procedure for removing damaged
19 equipment from service. He identified the angle grinder referenced at
20 Citation 2, Item 1, and the hammer drill at Citation 2, Item 2 as having
21 been taken out of service by him, placed in the gang box and designated
22 the tools for disposal. He testified the cited tools and cords were not
23 available for employee use because he was in direct control of the
24 equipment gang boxes. He was in charge of issuing equipment to
25 employees stored in gang boxes. He testified that he would not allow
26 employees to use any damaged equipment located in the gang boxes under
27 his supervision. The damaged equipment was identified and designated
28 for removal from the worksite. He testified that he would have stopped

1 any employee who tried to use any of the designated damaged equipment.
2 He identified Exhibit 2, page 111 as a copy of the shipping request for
3 disposal of damaged equipment and time-stamped prior to the inspection.
4 Mr. Wunch testified that no employees used any of the damaged equipment
5 in the gang boxes subject of the citations, and none had "access . . .
6 because (he) controlled the gang boxes".

7 Mr. Wunch testified on the fire extinguisher citation at Citation
8 1, Item 1. He explained the fire extinguisher had been inspected
9 previously but the purpose of that inspection was to assure it would
10 work if needed, not for the date label.

11 On cross-examination Mr. Wunch testified he did not know why the
12 damaged equipment was located in separate gang boxes. He further
13 testified the damaged tools were distinguished from others by the
14 "rigging". He explained that he ran out of the tags to show the damaged
15 condition on some of the equipment the day of the inspection so he
16 couldn't complete all the specific information. Mr. Wunch testified the
17 gang boxes with equipment designated for removal were located in front
18 of his desk and under his direct observation, supervision and control.
19 He told employees they were not allowed to use any equipment out of any
20 gang boxes without his approval. Mr. Wunch further testified the
21 extension cord at Citation 2, Item 3 was "red tagged" and never used by
22 any employees.

23 At the conclusion of the presentation of all evidence and
24 testimony, complainant and respondent counsel presented closing
25 arguments.

26 Complainant argued that Citation 1, Item 1 was correctly cited
27 under 29 CFR 1926.352(d). ". . . Once the employer elected to utilize
28 the portable fire extinguisher equipment, as permitted by the standard,

1 that triggered compliance with the specific requirements . . .". The
2 standard was "applicable" to the fire extinguisher under the welding
3 conditions. Counsel asserted there was no evidence of any test
4 conducted by the employer the day after the inspection to prove the
5 extinguisher was operable; even had same been done, it's not authorized
6 under the standard to avoid compliance.

7 At Citation 2, Items 1, 2 and 3, counsel noted all were classified
8 as "other" and no penalties proposed. Counsel argued the employer never
9 informed OSHA until the time of this hearing that the equipment was out
10 of service. Counsel questioned why the employer, with three gang boxes
11 on site, two included damaged equipment; so how could it be believed a
12 system like that could work? The inspector found only three damaged
13 items in the gang boxes out of everything there, so why were all the
14 other items in the same gang box scheduled for disposal? Counsel
15 concluded that "legal access" to identified potential hazards was
16 established for at least one employee in his written statement ". . .
17 (he) could have used tools in the box . . .". So that's enough to find
18 "legal access" under the law.

19 Respondent presented closing argument. Counsel asserted there was
20 no preponderant evidence to support any of the CSHO findings of
21 violation in the reports in evidence nor anything to corroborate his
22 testimony or allegations. There was no preponderant evidence to prove
23 employee use of damaged equipment. Mr. Hill admitted he found no
24 evidence of actual use. There was no preponderant evidence to establish
25 the potential of employee hazard exposure constructively by **access** to
26 the damaged equipment contained in the gang boxes. The un rebutted
27 evidence was the boxes were under the supervision and control of foreman
28 Wunch. Mr. Wunch's testimony was credible and unrefuted. He testified

1 his job was to assure no damaged tools were utilized by employees from
2 the gang boxes under his direct control.

3 Counsel asserted the fire extinguisher violation must be dismissed.
4 He argued the purpose of the standard is to assure suitable fire
5 extinguishers are available to employees in good working order. Mr.
6 Hill admitted the basis of his citation was the expiration date on the
7 tag and he did not test the fire extinguisher. CSHO Hill also admitted
8 the gauge on the fire extinguisher showed it was "good" meaning charged
9 for use. OSHA cited the violation just because of the label which was
10 only three weeks out of date. The respondent was cited under the
11 incorrect standard for fire extinguisher inspection labeling. There was
12 no proof of any hazard exposure to the fire watch employee. The fire
13 extinguisher was in compliance with OSHA.

14 In reviewing the facts, documents and testimony in evidence
15 together with the arguments of counsel, the Board must measure same
16 under the established law developed through the Occupational Safety and
17 Health Act (OSHA), Code of Federal Regulations (CFR) and Nevada Revised
18 Statutes (NRS).

19 . . . All federal occupational safety and health
20 standards which the Secretary of Labor promulgates,
21 modifies or revokes, and any amendments thereto,
22 shall be deemed Nevada occupational safety and
23 health standards unless the Division, in accordance
24 with federal law, adopts regulations establishing
25 alternative standards that provide protection equal
26 to the protection provided by those federal
27 occupational safety and health standards. (NRS
28 618.295(8))

29 In all proceedings commenced by the filing of a
30 notice of contest, the **burden of proof rests with**
31 **the Administrator.** N.A.C. 618.788(1). (emphasis
32 added)

33 All facts forming the basis of a complaint must be
34 proved by a **preponderance of the evidence.** The
35 decision of the hearing examiner shall be based

1 upon a consideration of the whole record and shall
2 state all facts officially noticed and relied upon.
3 **It shall be made on the basis of a preponderance of**
4 **reliable and probative evidence.** 29 CFR 1905.27(b).
5 *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD
6 ¶16,958 (1973). *Olin Construction Company, Inc. v.*
7 *OSHARC and Peter J. Brennan, Secty of Labor*, 525
8 F.2d 464 (1975). (emphasis added)

9 To prove violation of a standard, the Secretary
10 must establish (1) the **applicability** of the
11 standard, (2) the existence of **noncomplying**
12 **conditions**, (3) **employee exposure or access**, and
13 (4) that the **employer knew** or with the exercise of
14 reasonable diligence could have known of the
15 violative condition. See *Belger Cartage Service,*
16 *Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
17 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
18 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC
19 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
20 (No. 76-1408, 1979); *American Wrecking Corp. v.*
21 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
22 2003). (emphasis added)

23 A respondent may rebut allegations by showing:

- 24 1. The **standard was inapplicable** to the situation
25 at issue;
- 26 2. The **situation was in compliance; or lack of**
27 **access to a hazard.** See *Anning-Johnson Co.*,
28 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).
(emphasis added)

18 A "**serious**" violation is established upon a preponderance of
19 evidence in accordance with NRS 618.625(2) which provides in pertinent
20 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 at that place
27 of employment unless the employer did not and could
28 not, with the exercise of reasonable diligence,
know the presence of the violation. (emphasis
added)

27 An "**other than serious**" violation is established upon a
28 **preponderance of evidence** where:

1 ". . . is one in which there is a **direct and**
2 **immediate relationship between the violative**
3 **condition and occupational safety and health** but
4 not of such relationship that a resultant injury or
 illness is death or serious physical harm."
 Crescent Warf & Warehouse CO., 1 OSH Cases 1219,
 1222 (Rev. Comm'n 1973). (emphasis added)

5 Requirements of **standard applicability and citation particularity**
6 to establish violations under the recognized occupational safety and
7 health law were raised and challenged through the testimony, documentary
8 evidence and arguments of counsel.

9 The standard referenced at Citation 1, Item 1, 29 CFR 1926.352(d),
10 can apply to suitable fire extinguishing equipment for fire prevention
11 under the welding and cutting subpart J of the Code of Federal
12 Regulations. However the testimony and evidence offered demonstrated
13 the charges were based upon the label/tag expiration terms proscribed
14 under 29 CFR 1926.150(c). 29 CFR 1926.150(c) provides that portable
15 fire equipment be located at the site. Note particularly subsection
16 (a)(4) specifically governs **periodic inspections, maintenance, operating**
17 **condition,** and access. 29 CFR 1926.150(c) applies to the facts in
18 evidence and can apply to the conditions found by CSHO Hill at the
19 worksite.

20 CSHO Hill admitted the fire extinguisher at the worksite was
21 "suitable" under the **cited standard** terms of 29 CFR 1926.352(d). He
22 also admitted it was located near the fire watch employee. Mr. Hill
23 admitted the gauge on the fire extinguisher displayed in the "green,
24 good" charged condition. The preponderant evidence established a
25 **suitable** fire extinguisher was "**immediately available**", **in working**
26 **order,** and "**maintained in a state readiness for instant use . . .**".

27 The evidence offered to prove a violation of the 29 CFR 1926.352(d)
28 specific standard terms was based upon the inspection tag out of date

1 by approximately three weeks. OSHA alleged the stale tag was evidence
2 of violation under the cited standard claiming it proved the
3 extinguisher was not "maintained" or in "readiness" and therefore not
4 "suitable" equipment to protect the employee from a potential fire
5 hazard. However, claims, inferences and/or assumptions are not
6 sufficient evidence required to satisfy complainant's burden of proof
7 for violation of the **cited** standard under recognized occupational safety
8 and health law.

9 The testimony of CSHO Hill while appearing honest and forthright,
10 was equivocal. The complainant provided no preponderant testimonial or
11 documentary evidence of violation.

12 The Board finds that notwithstanding arguments of which standard
13 is **more** appropriate or **more** applicable, the citation for a the **cited**
14 violation of 29 CFR 1926.352(d) at Item 1 was not established under the
15 burden of proof. The competent preponderant evidence demonstrates the
16 respondent and worksite in **compliance with the cited standard, and no**
17 **potential employee hazard exposure.**

18 The Board finds and concludes this matter is governed under the
19 well established critical legal proof elements of **employee potential**
20 **hazard exposure** and **worksite compliance** under the cited standard.

21 Arguments focused upon the meaning of words in the cited standard
22 interpreting the terms "immediately available" and "maintained in a
23 state of readiness" cannot run counter to the "**plain meaning rule**" and
24 **common sense understanding.**

25 *Caminetti v. United States*, 242 U.S. 470, 485, 37
26 S.Ct. 192, 194, 61 L.Ed. 442 (1917) (citations
27 omitted). It is a long established rule that,
28 **absent ambiguity, a statute's plain meaning**
controls, and no further analysis is permitted.
State Farm Mut. Auto. Ins. Co. v. Commissioner of
Ins., 114 Nev. 535, 540, 958 P.2d 773, 736 (1998).
(emphasis added)

1 The plain meaning of words must be recognized and
2 if needed, ascertained by first considering its
3 **commonsense meaning.** *General Motor Corp.*, 17 OSHC
1217 (1995), affirmed, 89 F.2d 313 (1996).
(emphasis added)

4 Accordingly, while the Board determines the appropriate standard
5 under the facts in evidence may have been 29 CFR 1926.150(c) rather than
6 the **cited** standard to satisfy the requirement of **citation particularly**,
7 that does not alter the finding of no violation under 29 CFR
8 1926.352(d). The substantial preponderant evidence demonstrated **no**
9 **potential hazard exposure to the fire watch employee** and no **existence**
10 **of non-complying conditions.** The proof elements under the burden of
11 proof upon complainant were not met to establish a violation under the
12 **cited standard as charged.** *American Wrecking Corp. v. Secretary of*
13 *Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003); *Anning-Johnson Co.*, 4 OSHC
14 1193, 1975-1976 OSHD ¶ 20,690 (1976) *supra* at page 13. The violation
15 fails because the **worksite was in compliance** and there was no **employee**
16 **exposure** to the alleged hazard. There was no sufficient proof and
17 certainly none by a preponderance to support finding a violation.

18 At Citation 2, Items 1, 2 and 3, the Board finds no preponderant
19 evidence of the required critical proof elements to establish potential
20 employee hazard exposure directly or **constructively under the rule of**
21 **access.**

22 While exposure can be based upon a **rule of access**
23 and technically involve only a single employee, the
24 **burden of proof by a preponderance is to establish**
25 **that the defective or hazardous equipment is**
26 **available for employee use.** *Dover Electric*, 16 OSH
27 Cases 1281 (Rev. Comm'n 1993) (employer can avoid
28 citation by taking **direct positive measures to deny**
employees access to defective equipment while it is
being repaired). An employer can avoid citation by
taking **direct positive measure to deny employees**
access to defective equipment . . ." (emphasis
added)

1 The undisputed evidence confirmed no **actual employee use** of any
2 damaged tools or equipment. CSHO Hill admitted the potential hazard
3 exposure to violative conditions alleged at Citation 2, Items 1, 2 and
4 3 was based solely upon the **rule of access**. However there was no
5 legally competent proof of employee access; rather, merely an inference
6 from one employee witness statement that he ". . . could have used tools
7 in the box . . .". Here there was no clear, convincing or preponderant
8 evidence of employee exposure through constructive access to use of any
9 damaged tools or equipment from or located in any gang box. It is
10 notable the admitted evidence demonstrated that in all the respondent
11 gang boxes at the worksite only three items were alleged damaged. The
12 only supporting evidence for violations under the rule of access is
13 based upon an inference that one employee "could have used a tool . .
14 . in the box . . .". At best it is a mere inference and requires an
15 assumption. The statement standing alone with no corroborative or
16 supporting competent evidence, cannot prove constructive use through the
17 recognized rule of access under occupational safety and health law.

18 The allowed damaged tools and equipment were under the **control** and
19 supervision of foreman Wunch. His sworn testimony in that regard was
20 not rebutted nor impeached. He testified employees were **denied access**
21 to defective equipment. His testimony that damaged tools/equipment were
22 designated for removal from the worksite was **corroborated** by the
23 shipping statement in evidence at Exhibit 3, page 111. *Dover Electric*,
24 16 OSH Cases 1281 (Rev. Comm'n 1993), supra at page 17.

25 The essential elements required for the complainant to meet its
26 burden of proof requires **preponderant evidence** of **non-complying**
27 **conditions** and **employee exposure from direct use**, or **constructively** by
28 the rule of access. The CSHO testimony at Citation 2, Items 1, 2 and

1 3 was not clear, convincing, nor the reporting hearsay corroborated.
2 Without credible competent preponderant evidence to the contrary, the
3 sworn respondent witness testimony on lack of employee access to the
4 damaged tools rebuts even an inference of constructive exposure.

5 It is incumbent upon the **complainant to meet the burden of proof**
6 **to establish a violation by more than inferences, conjecture or**
7 **assumptions.**

8 . . . The **Secretary's obligation** to demonstrate the
9 alleged violation by a **preponderance of the**
10 **reliable evidence** of record **requires more than**
11 **estimates, assumptions and inferences . . .** [t]he
12 Secretary's reliance on mere conjecture is
13 insufficient to prove a violation . . . [findings
14 must be based on] 'the kind of evidence on which
15 responsible persons are accustomed to rely in
16 serious affairs.' *William B. Hopke Co., Inc.*, 1982
17 OSAHRC LEXIS 302 *15, 10 BNA OSHC 1479 (No. 81-206,
18 19820 (ALJ) (citations omitted). (emphasis added)

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

18 Accordingly, the undisputed admitted evidence of no observed or
19 direct use of damaged equipment through CSHO Hill, and the unimpeached
20 testimony of Mr. Wunch that no defective equipment under his control was
21 actually in use or accessible by employees provides no bases to
22 establish potential employee hazard exposure.

23 The Board finds no preponderance of evidence to meet the burden of
24 proof to establish violations of the cited standards.

25 It is the decision of the Nevada Occupational Safety and Health
26 Review Board that no violation of Nevada Revised Statutes did occur as
27 to Citation 1, Item 1, 29 CFR 1910.352(d). The violation classification
28 of Serious and proposed penalty is denied.

