

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3
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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,

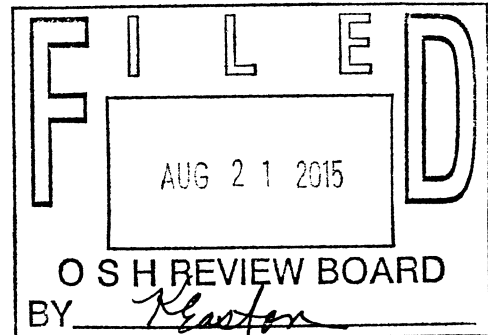
Docket No. RNO 15-1788

Complainant,

vs.

11 SILVERADO EXCAVATING dba SILVERADO
12 EXCAVATING COMPANY,

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 8th day of July 2015,
17 in furtherance of notice duly provided according to law, MS. SALLI
18 ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**
19 **Administrative Officer of the Occupational Safety and Health**
20 **Administration, Division of Industrial Relations (OSHA);** and MR. ROBERT
21 PETERSON, ESQ. appearing on behalf of Respondent, **Silverado Excavating**
22 **Company,** the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds
23 as follows:

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

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

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1 Citation 1, Item 1, charges a violation of 29 CFR 1926.601(b) (4) (i)
2 as follows:

3 **Citation 1, Item 1, 29 CFR 1926.601(b) (4) (i):** No employee
4 shall use any motor vehicle equipment having an obstructed
5 view to the rear unless: the vehicle has a reverse signal
6 alarm audible above the surrounding noise level.

7 The violation was classified as "Serious." The proposed penalty
8 for the alleged violation is in the amount of TWO THOUSAND FOUR HUNDRED
9 DOLLARS (\$2,400.0).

10 NVOSHA charged that at (The) Staging Area: a Kenworth, model T800B
11 truck with Ranco end dump trailer, did not have an operational audible
12 warning device. The truck was tested at the time of inspection
13 resulting with no audible alarm. The employer removed the truck from
14 service.

15 Complainant and respondent stipulated to the admission of
16 documentary evidence at complainant Exhibits 1, 2 and 3.

17 Complainant presented testimony and documentary evidence with
18 regard to the alleged violation through Ms. Jennifer Cox, Compliance
19 Safety and Health Officer (CSHO). She testified as to her inspection
20 and the citation issued to the respondent employer.

21 On or about January 14, 2015 CSHO Cox conducted an inspection of
22 respondent's worksite located at Makenna Drive in Reno, Nevada. The
23 inspection resulted after notification of a fatality to Nevada OSHA by
24 the Reno Police Department. Through investigation and interviews, Ms.
25 Cox determined a Silverado Excavating Company truck driver employee,
26 identified as Mr. Richard Gubany, was operating a Kenworth model T800B
27 with a Ranco end dump trailer at a multi-employer construction site. The
28 driver was backing the truck and trailer into a staging area when it
struck and killed Mr. Adan Chavez-Torres. Mr. Chavez-kTorres was an

1 employee of another subcontractor on the site, Florence Fence Inc. CSHO
2 Cox determined Mr. Chavez-Torres was standing or kneeling at the gutter
3 area of the roadway preparing to set a chalk line and establish the
4 property boundaries for installation of fencing. Mr. Chavez-Torres was
5 struck and run over by the rear left dual tires of the dump trailer.
6 The driver, Mr. Gubany called 911. The Reno Police, fire department and
7 ambulance responded. Mr. Chavez-Torres was pronounced deceased at the
8 accident scene.

9 The respondent project superintendent Mr. Brett Byram was asked
10 during the inspection to provide an operator for the Kenworth truck and
11 end dump trailer to demonstrate the backup alarm. The truck and trailer
12 was backed up for approximately 4 feet, however the backup alarm did not
13 sound. The backup alarm was tested twice with superintendent Byram
14 present, but did not function on any of the tests.

15 CSHO Cox interviewed the driver Mr. Gubany and questioned him with
16 regard to the backup alarm functioning at the time of the accident. Mr.
17 Gubany informed her the backup alarm was working at the time of the
18 accident. He reported that he had performed the company required
19 vehicle inspection, including the alarm test, prior to leaving the yard
20 before the accident.

21 CSHO Cox identified and testified on the witness statement at
22 Exhibit 1 provided by Mr. Gubany at the time of her inspection. Ms. Cox
23 referenced the witness statement at pages 21 and 22 as reported by Mr.
24 Gubany at the time of the inspection which provided "Fill out pre-trip
25 book." She read from the list: "Check lights, pound tires, . . . check
26 king pin and glide plate, throw in reverse, check alarm . . . no
27 problems with the backup alarm - I hear it every morning."

28 CSHO Cox referenced the additional witness statements obtained at

1 the time of the accident. She identified Exhibit 1, page 23 as the
2 witness statement taken from the loader operator providing ". . . the
3 end dump was backing up . . . it was noisy - don't know if the truck had
4 an alarm . . . I looked up and saw the truck backing . . . I got out of
5 my loader and yelling to stop the truck . . . by the time I got there
6 the truck had already backed over the person . . ."

7 CSHO Cox identified Exhibit 1, page 24 and responded to questions
8 referencing portions of the witness statement from an employee of
9 subcontractor Florence Fence. She read portions of the statement
10 providing: "Adan (deceased employee) was putting a nail in the ground
11 looking for the property line . . . I was inside our truck and got out
12 and saw Adan on the ground . . . I heard a horn, but by that time
13 everything had happened . . .". Ms. Cox further read at Exhibit 1, page
14 26, of the witness statement ". . . the driver was in (sic) his cell
15 phone . . . the driver got on his truck and he (sic) did not see if the
16 driver was on the phone when he was backing up the truck . . ."

17 Ms. Cox continued direct testimony in support of her recommendation
18 for issuance of the citation. She explained Nevada OSHA enforcement
19 policy and calculation factors for classification of the violation as
20 "serious," and application of the OSHA enforcement manual to determine
21 proposed penalties. Ms. Cox testified that although Mr. Gubany was
22 trained, the employer should have better assured protection from the
23 known hazards on construction sites associated with vehicle activity,
24 noise and alarms. She confirmed company training records for employee
25 Gubany, including instructions for signaling before backing up,
26 referencing Exhibit 1, pages 59 and 60. Ms. Cox testified the training
27 records demonstrated the employer **recognized the hazards** associated with
28 vehicle backup movement and requirements for signals and alarms on a

1 construction worksite.

2 When questioned whether she determined the potential for **employee**
3 **misconduct** before recommending the citation, Ms. Cox responded ". . . it
4 is not my responsibility to determine"

5 Respondent counsel waived cross-examination, but elected to conduct
6 direct examination of CSHO Cox. Ms. Cox testified affirmatively in
7 response to the question ". . . the reason the citation was issued was
8 because after the accident, you determined the backup alarm was not
9 functional" She testified Mr. Gubany informed her there were no
10 problems with the alarm when he tested it as confirmed in his witness
11 statement. She testified negatively to the question "did you sense that
12 Mr. Gubany was lying" by responding "no." The employer inspection
13 report form did not include an area or "box" for checking a backup
14 alarm. Testing of the backup alarm occurred ". . . a couple hours after
15 the accident." Ms. Cox testified she did not ask anyone else if they
16 did or did not hear the alarm prior to the accident. In further
17 responses to counsel, Ms. Cox testified affirmatively that it was ". . .
18 possible that the backup alarm could have been working at the time of
19 the accident."

20 Respondent presented witness testimony from truck driver employee
21 Mr. Richard Gubany and referenced the complainant's documentary Exhibits
22 1, 2 and 3. Mr. Gubany described the vehicle pre-check process he
23 performed and confirmed his written witness statement to Nevada OSHA in
24 evidence at Exhibit 1. He explained the details of his normal vehicle
25 pre-check routine. Mr. Gubany described the alarm testing procedure to
26 include engaging the truck in reverse gear and noting the audible alarm
27 sound function. He identified the vehicle inspection report at Exhibit
28 3, page 65, as the form provided by DOT (the Department of

1 Transportation) which he completed and signed on the day of the
2 accident. He explained the lack of a box on the form for the backup
3 alarm check and testified ". . . even though it's not on there, common
4 sense tells you . . . but it's required by me." When asked if that was
5 what was told to the OSHA inspectors, he answered "yes."

6 Mr. Gubany testified he was not on his cell phone at the time of
7 the accident, the first time he used the cell phone was to call 911
8 after the accident occurred. When questioned as to whether he had any
9 knowledge when the alarm stopped working if it did, Mr. Gubany responded
10 "No . . . I was shocked . . . when . . . told it wasn't . . ."

11 On further examination, when asked if it was correct that he has no
12 hearing out of his right ear? Mr. Gubany testified he has "Very, very
13 limited." He explained that it's been an ongoing condition for years,
14 but testified he did not mention it to OSHA at the time of the
15 inspection. Mr. Gubany testified in response to questions of his
16 ability to hear what was going on around him with the following: "I'm in
17 my driver's seat, my window is down, my good ear is out, and that backup
18 alarm is located on my tractor. I'm basically sitting on it." (Tr. 59,
19 lines 1-5). On questions of "You have previously said this was an
20 extremely congested worksite, correct?," Mr. Gubany responded "Yes,
21 ma'am." In response to the question of "Is it fair to say it was also
22 extremely noisy?" Mr. Gubany responded "It sounds like a cage of birds
23 with all that backup equipment and loaders and dozers and bobcats and
24 trucks and private vehicles. It sounds like a cage full of birds on
25 those job sites." (Tr. 59, lines 12-15). Counsel questioned "And the
26 window was open all the way, correct?" He responded "No. I had it
27 halfway down. It was the middle of January. It's not warm outside."
28 (Tr. 59, lines 17-18). Counsel questioned "Was the noise able to get

1 into the truck?" Mr. Gubany responded "Yes, ma'am." Counsel
2 questioned: "That was your one good ear that was facing out, correct?"
3 The witness responded "The window is right next to my head." (Tr. 59,
4 lines 21-23).

5 Counsel continued cross-examination and asked "So you don't believe
6 with all the noise . . . there's any possibility you mistook someone
7 else's alarm for yours." Mr. Gubany responded "I had no reason to
8 believe that mine wasn't working because I heard it that morning during
9 pre-trip." When questioned if there was any possibility that the backup
10 alarm you heard was some other truck's backup alarm? ". . . I know that
11 the alarm I was hearing was mine."

12 Mr. Gubany testified confirming Exhibit 1, page 61 of the safety
13 meeting attendance form he signed on January 12, 2015, two days prior to
14 the accident.

15 Counsel for complainant and respondent presented closing arguments.

16 Complainant argued that regardless of the fatality accident, the
17 citation was issued because the OSHA standard requires an operational
18 alarm. Counsel asserted there is no claim nor dispute the alarm did not
19 work when tested after the accident. The truck was taken out of
20 service. Nevada OSHA believes a major factor to support the citation is
21 based upon the proof of **employer knowledge**. Nevada OSHA is not claiming
22 the employer actually knew, (the alarm was not functioning) however the
23 citation is grounded on **constructive knowledge** which requires an
24 employer in the exercise **due diligence** would have known of a defective
25 alarm if there were proper procedures in place.

26 Counsel argued that while the employer provided a Department of
27 Transportation (DOT) motor vehicle checklist which was completed by Mr.
28 Gubany, there was no alarm (test) box to check. The employer should

1 have had it plainly identified. The respondent employer is presumed
2 knowledgeable in the backup hazards at construction site workplaces and
3 required to assure a working alarm signal. The employer included a
4 requirement on the DOT form to assure personal signaling for motor
5 vehicle back up maneuvers, but elected the alternative audible alarm
6 safety option, however did not enforce the protection.

7 Counsel asserted the burden of proof was met for all the required
8 elements to prove a violation: the standard applies, violative
9 conditions existed, the employer had constructive knowledge of the
10 hazard and employee exposure established from the testimony and reported
11 evidence of the conditions found at the worksite. Counsel further
12 argued the respondent offered no evidence of employee misconduct nor any
13 proof of an affirmative defense.

14 Respondent presented closing argument. Counsel argued the wrong
15 standard was cited, asserting 29 CFR 1926.602 was more **applicable**. The
16 citation was issued due to the tested non-functioning alarm condition of
17 the **truck**. The citation and charges were about "the truck or was it the
18 end-dump?" Yet the respondent was cited only for the truck non-
19 functioning alarm. Counsel requested dismissal of the case based upon
20 citation of the incorrect standard.

21 Counsel further argued there was no satisfaction of the burden of
22 proof by NVOSHA. He asserted OSHA law does not impose strict liability.
23 Mr. Gubany testified he followed the DOT procedures, completed the DOT
24 form and particularly inspected the alarm function during his vehicle
25 pre-check prior to arriving at the worksite. He testified under oath
26 and was credible stating ". . . the alarm was working before the
27 accident." Counsel further argued that he (Mr. Gubany) had his window
28 half way down and heard the alarm working during the day while he was

1 operating the vehicle. Counsel also argued that CSHO Cox admitted
2 during examination that it was **possible** the alarm was working at the
3 time of the accident.

4 The parties concluded the closing arguments and submitted the case
5 for decision.

6 The Board is required to review the evidence and recognized legal
7 elements to prove violations under established occupational safety and
8 health law.

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

11 All facts forming the basis of a complaint must be
12 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD
13 ¶16,958 (1973).

14 NRS 233B(2) "Preponderance of evidence" means
15 evidence that enables a trier of fact to determine
16 that the existence of the contested fact is more
probable than the nonexistence of the contested
fact.

17 NAC 618.788 (NRS618.295) In all proceedings
18 commenced by the filing of a notice of contest, the
burden of proof rests with the Chief.

19 To prove a violation of a standard, the Secretary
20 must establish (1) the **applicability** of the
standard, (2) the existence of **noncomplying**
21 **conditions**, (3) **employee exposure** or access, and
22 (4) that the **employer knew or with the exercise of**
reasonable diligence could have known of the
violative condition. See *Belger Cartage Service,*
Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
23 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
24 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
(No. 76-1408, 1979); *American Wrecking Corp. v.*
25 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
2003). (emphasis added)

26 A respondent may rebut allegations by showing:

- 27 1. The standard was **inapplicable** to the situation
28 at issue;

1 2. The situation was in **compliance**; or lack of
2 access to a hazard. See, *Anning-Johnson Co.*, 4
3 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).
 (emphasis added)

4 NRS 618.625 provides in pertinent part:

5 ". . . a **serious** violation exists in a place of
6 employment if there is a substantial probability
7 that death or serious physical harm could result
8 from a condition which exists, or from one or more
9 practices, means, methods, operations or processes
 which have been adopted or are in use in that place
 of employment **unless the employer did not and could**
 not, with the exercise of reasonable diligence,
 know of the presence of the violation." (emphasis
 added)

10 29 CFR 1926.601(b)(4)(i):

11 No employee shall use any **motor vehicle** equipment
12 having an obstructed view to the rear unless: the
13 vehicle has a **reverse signal alarm audible above**
 the surrounding noise level. (emphasis added)

14 The Board finds the elements to prove violation of the cited
15 standard at Citation 1, Item 1 were established by a preponderance of
16 evidence.

17 The facts in evidence confirmed the terms of the referenced
18 standard **applicable** to the cited violative conditions. While challenged
19 by respondent counsel, there was no evidence to support inapplicability
20 of the standard. Counsel asserted the cited standard may have been
21 incorrect because only the **truck vehicle** alarm was the focus of citation
22 and testing rather than the **connected trailer**, which actually struck an
23 employee. Counsel argued provisions of 29 CFR 1926.602 were more
24 applicable to the facts and therefore the citation should be dismissed.
25 The Board noted that .602 is captioned "material handling equipment" and
26 references off highway trucks as well as other earthmoving equipment.
27 However the Board finds the truck and trailer met the threshold criteria
28 of the standard as **motor vehicle equipment without an audible alarm** when

1 tested in **reverse** gear shortly after the accident. Whether the alarm
2 was on the truck or the attached trailer equipment is not a controlling
3 element to establish the violative conditions cited.

4 Preponderant evidence of driver view **obstruction** was established at
5 Exhibit 1, page 54, the CD Rom disc videos taken during the testing
6 procedures after the accident. The videos depicting the size and
7 configuration of the truck and trailer were persuasive and preponderant
8 evidence of an "obstructed view to the rear."

9 The undisputed facts in evidence established employee Chavez-Torrez
10 was kneeling at ground level when struck by the rear wheels of the
11 trailer equipment connected to the truck. Reasonable inference drawn
12 from the evidence of record confirmed the ground level behind the
13 trailer connected to the truck was obstructed or could not be observed
14 by the driver.

15 The test for the applicability of any statutory or
16 regulatory provision looks first to its text and
17 structure. When determining a standard's
18 applicability, it is necessary that the standard be
19 given a reasonable and common-sense interpretation.
20 *Secretary of Labor v. Precision Concrete*
21 *Construction*, 19 O.S.H.C. 1404, 1406 (2001).
22 *Secretary of Labor v. Saugus Construction Corp.*, 19
23 O.S.H.C. 1431, 1432 (2001).

24 A **plain meaning and commonsense interpretation** of the standard and
25 the facts in evidence confirmed the citation as appropriate and
26 satisfies the element of applicability to establish the violation. A
27 statute's plain meaning controls, and no further analysis is permitted.
28 *State Farm Mut. Auto. Ins. Co. v. Commissioner of Ins.*, 114 Nev. 535,
540, 958 P.2d 733, 736 (1998).

29 **Non-complying conditions** were established from the facts in
30 evidence. CSHO Cox testified there were two alarm tests conducted
31 immediately following the accident (approximately 2-3 hours) in the

1 presence of respondent supervisory employee Byram. There was no
2 evidence nor claim disputing that the backup alarm failed to function
3 during testing. The truck was immediately taken out of service to abate
4 the hazard conditions.

5 **Employer knowledge** was established through CSHO Cox un rebutted
6 testimony, and reference to the governing law for reliance upon
7 **constructive** employer knowledge. Evidence of the pre-check form,
8 including the need for signaling, established the employer was on notice
9 and aware of the recognized construction site workplace hazards involved
10 with large trucks maneuvering and backing up in congested work areas.
11 At very active, noisy construction sites where many employees are
12 working while motor vehicles are maneuvering and backing up, a
13 reasonably prudent employer knows, or should have known, of the need to
14 take meaningful precautionary measures to assure effective appropriate
15 signaling. The employer elected use of an alarm signal device option
16 and was therefore required to assure it was fully functioning. The
17 employer is presumed to have **constructive knowledge** of the critical
18 importance of assured back up signal protection for the potential
19 hazards.

20 The un rebutted testimony of CSHO Cox further confirmed employer
21 knowledge based upon the evidence of record that it specifically trained
22 for employee awareness of backup hazards.

23 **Employee exposure** was proven **directly** from the observed and
24 reported employee fatality; and **constructively through access** to the
25 hazardous conditions by the worksite employees. At a worksite where
26 multiple employers and employees are commonly engaged in work efforts,
27 an employer **creating** or **controlling** hazardous conditions is responsible
28 to protect not only its employees but any employees on the worksite with

1 "access" to a zone of danger.

2 Under Occupational Safety and Health Law, there
3 need be **no showing of actual employee exposure in**
4 **favor of a rule of access** based upon reasonable
5 predictability - (1) the zone of danger to be
6 determined by the hazard; (2) access to mean that
7 employees either while in the course of assigned
8 duties, personal comfort activities on the job, or
9 while in the normal course of ingress-egress will
10 be, are, or have been in the zone of danger; and
11 (3) the employer knew or could have known of
12 employee presence so it could have warned the
13 employees or prevented them from entering the zone
14 of danger. *Gilles & Cotting, Inc.*, 3 OSHC 2002,
15 1975-1976 OSHD ¶ 20,448 (1976); *Cornell & Company,*
16 *Inc.*, 5 OSHC 1736, 1977-1978 OSHD ¶ 22,095 (1977);
17 *Brennan v. OSAHRC and Alesea Lumber Co.*, 511 F.2d
18 1139 (9th Cir. 1975); *General Electric Company v.*
19 *OSAHRC and Usery*, 540 F.2d 67, 69 (2d Cir. 1976).

20 "... liability is imposed ... on a contractor who
21 creates a hazard **or who has control over the**
22 **condition on a multi-employer worksite ...**". See,
23 *Brennan v. OSHRC (Underhill Construction Corp.)*,
24 513 F.2d 1032 (2nd Cir. 1975). The commission and
25 courts have recognized that protection from hazard
26 exposure to employees is the responsibility of the
27 employer and confirmed that "... policy is best
28 effectuated by placing responsibility for hazards
on those who create them."

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

6 Respondent did not meet its burden of proof to rebut the prima
7 facie evidence of violation.

8 The defensive position asserted on behalf of respondent, in
9 addition to the standard being **inapplicable** as previously addressed, was
10 that the worksite safety conditions were **in compliance.** Respondent
11 argued the employer did all that it could be expected to do under
12 occupational, safety and health law to assure a functioning alarm

1 signaling device on the vehicle for worksite employee protection.
2 Counsel asserted the employer acted reasonably in requiring a pre-work
3 check of its motor vehicles, including the subject truck, and referenced
4 the sworn testimony of Mr. Gubany. However, the testimony was not
5 persuasive nor preponderant evidence of employer compliance with
6 appropriate safety assurances required under the facts and worksite
7 conditions.

8 The Board finds from the facts in evidence and governing applicable
9 law the respondent employer, with the **exercise of reasonable diligence**
10 should have known and **foreseen** the potential violative conditions and
11 more appropriately protected the subject worksite and employees.

12 The truck and trailer equipment were owned and under the **control** of
13 the respondent. An audible alarm function is easily tested and
14 reasonably inferred to be in **plain view**. The employer was required to
15 do more directly and/or through its supervisory personnel to protect
16 worksite employees from such a well-known critical hazard to employees
17 working where trucks are "backing up" and/or continuously maneuvering.
18 A "signaler," or special assurance of a functioning alarm and/or other
19 precautions are **reasonably** expected to protect against such known
20 dangerous conditions. Under particular working conditions, such as a
21 congested job site, an employee signaler is a reasonable assured option.
22 Here, the audible alarm alternative was elected and should have been
23 subject of operational assurance.

24 The Board finds it "reasonably foreseeable" by a prudent employer
25 that a major hazardous condition existed at the subject worksite
26 involving multiple employers and employees working in the presence of
27 large construction motor vehicle equipment maneuvering, particularly
28 backing up equipment with an obstructed view of the ground level. An

1 employer must assure employee safety within the **zone of danger** during
2 backup maneuvers. With many vehicles, operating equipment, alarm noise,
3 and multiple employees at work, an employer is responsible to undertake
4 **appropriate measures** to assure a clear safe work path so employees are
5 meaningfully warned away from the recognized hazards associated with
6 large motor vehicles maneuvering in congested areas. It is reasonable
7 to impose an obligation on an employer when **foreseeability** of such
8 hazards is so well known in the industry; and particularly by the
9 respondent here who, as the evidence demonstrated, trains its own
10 employees on the subject dangerous condition.

11 Actual knowledge is not required for a finding of a
12 serious violation. **Foreseeability and**
13 **preventability** render a violation serious provided
14 that a **reasonably prudent employer**, i.e., one who
15 is safety conscious and possesses the technical
16 expertise normally expected in the industry
17 concerned, would know of the danger. *Candler-*
18 *Rusche, Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723
19 (1976), appeal filed, No. 76-1645 (D.C. Cir. July
20 16, 1976); *Rockwell International*, 2 OSHC 1710,
21 1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d
22 1283 (6th Cir. 1976); *Mountain States Telephone &*
23 *Telegraph Co.*, 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365
24 (1973). (emphasis added)

25 OSHA safety compliance requirements on a **multi-employer worksite**
26 are deemed the responsibility of a **controlling employer** under
27 occupational safety and health law.

28 The facts in evidence establish the subject worksite was a **multi-**
29 **employer worksite**. It was undisputed there were at least two or more
30 "employers of employees" working on the site. The respondent, while not
31 the employer of the deceased or other contractor employees, exposed them
32 to hazardous conditions of truck operations under its **control** at the
33 worksite. The respondent was in **control** of the subject truck
34 operations, including safety compliance and assurance of backup

1 precautions, whether they be in the form of signaling through an
2 assistive employee, added supervision, or an assured functioning audible
3 backup alarm system. The respondent, through its foreman and/or
4 supervisory employees with direct **or constructive knowledge** of the
5 hazards at the worksite, is responsible for the cited violation under
6 well established occupational safety and health law.

7 "... liability is imposed ... on a contractor who
8 **creates a hazard or who has control over the**
9 **condition on a multi-employer worksite ...**". See,
10 *Brennan v. OSHRC (Underhill Construction Corp.)*,
11 513 F.2d 1032 (2nd Cir. 1975). The commission and
12 courts have recognized that protection from hazard
13 exposure to employees is the responsibility of the
14 employer and confirmed that "... policy is best
15 effectuated by placing responsibility for hazards
16 on those who create them."

17 It is well settled that the **knowledge, actual or**
18 **constructive, of an employer's supervisory**
19 **personnel** will be imputed to the employer, unless
20 the employer establishes **substantial grounds** for
21 not doing so. *Ormet Corp.*, 14 BNA OSHC 2134, 1991-
22 93 CCH OSHD ¶29,254 (No. 85-531 1991).

23 The Board finds a violation as a matter of fact and law at Citation
24 1, Item 1, confirms the classification of serious and approves a penalty
25 in the amount of \$2,400.00.

26 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
27 **REVIEW BOARD** that a violation of Nevada Revised Statutes did occur at
28 Citation 1, Item 1, 29 CFR 1926.602(b)(4)(i), the Serious classification
confirmed and the penalty imposed in the amount of TWO THOUSAND FOUR
HUNDRED DOLLARS (\$2,400.00).

The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION,
DIVISION OF INDUSTRIAL RELATIONS to prepare and submit proposed Findings
of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND**
HEALTH REVIEW BOARD and serve copies on opposing counsel within twenty

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

7 DATED: This 21st day of August 2015.

8 NEVADA OCCUPATIONAL SAFETY AND HEALTH
9 REVIEW BOARD

10 By _____ /s/
11 JOE ADAMS, Chairman
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