good law! - multi site - control/creation

NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

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

Complainant,

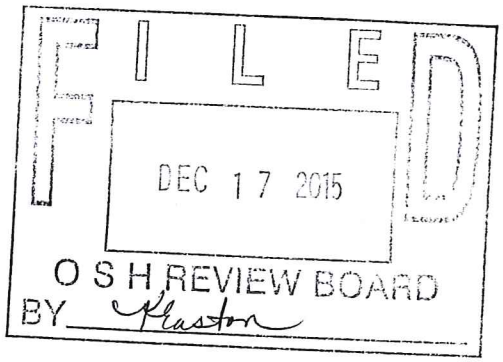
vs.

PANELIZED STRUCTURES,

Respondent.

_____/

Docket No. RNO 16-1814



DECISION

This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced November 9, 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). MR. BOB PETERSON, ESQ., appearing on behalf of Respondent, **Panelized Structures.**

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

Citation 1, Item 1, charges a violation of 29 CFR 1926.95(a) which provides in pertinent part:

> "Application." Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.
>
> Complainant alleged that located at the northwest end of the building, an employee was observed operating a propane Nissan Forklift model #MPF2A25DV, without wearing a seatbelt.

The citation was classified as Serious. The proposed penalty was in the amount of $300.00.

Citation 1, Item 2, charges a violation of 29 CFR 1926.151(a)(3) which provides in pertinent part:

> Smoking shall be prohibited at or in the vicinity of operations which constitute a fire hazard, and shall be conspicuously posted: "No Smoking or Open Flame."
>
> Complainant alleged that located at the northwest end of the building, an employee was observed operating a propane Nissan Forklift model #MPF2A23DV, while smoking a cigarette. Smoking a cigarette in the vicinity of the propane tank caused a fire hazard.

The citation was classified as Serious. The proposed penalty was in the amount of $300.00.

Citation 1, Item 3, charges a violation of 29 CFR 1926.501(b)(2)(i) which provides in pertinent part:

> Each employee who is constructing a leading edge 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, or personal fall arrest systems. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

> Complainant alleged that located on the north end of the roof, an employee constructing a leading edge was exposed to a 42 foot fall to the ground below. The employee was nailing down panels within eight feet of the leading edge, but was not protected by guardrail systems, safety net systems, or personal fall arrest systems.

The citation was classified as Serious. The proposed penalty was in the amount of $600.00.

Counsel for the complainant and respondent stipulated to the admission of evidence at complainant Exhibits 1 through 4. Respondent offered no exhibits for stipulation or admission in evidence.

Counsel for the Chief Administrative Officer presented witness testimony and documentary evidence with regard to the alleged violations.

Safety Specialist and Compliance Safety and Health Officer (CSHO) Mr. Luke Hendrickson testified he was assigned to and conducted a comprehensive inspection of a construction job site known as Red Rock 200 in Las Vegas, Nevada. The CSHO referenced the narrative report at Exhibit 1, pages 14 through 16 and testified accordingly. A three day programmed planned walkaround inspection was conducted by CSHO Hendrickson with Mr. Thomas Rushing, the superintendent of the general contractor, Alston Construction Company, and included various employer representatives as identified in Exhibit 1. Alston Construction was the general contractor responsible for erection of an approximate 200,000 sq. ft. warehouse building consisting of concrete tilt-up construction with a panelized roofing system. The inspection and opening conference also included Mr. Shane Carvalho, the foreman of Panelized Structures, Inc., a roofing subcontractor to Alston Construction Company. Messrs. Rushing, Carvalho, and CSHOs Hendrickson and Gillings observed an employee exposed to a fall hazard while working near the leading edge

of the low slope roof structure approximately 42 feet above ground. The employee was nailing plywood panels near the edge of the roofing structure, but without any fall protection systems in place. Mr. Henderickson identified the Exhibit 1, page 56 photograph he took of the exposed employee. The employee was instructed by the general contractor superintendent to come down from the roof. During the opening conference and discussions, foreman Carvalho reported that so long as an employee was eight feet away from the leading edge fall protection was not required. During the interview with the exposed employee, Mr. Chauteco, he stated that foreman Carvalho told him to stay at least eight feet away from the leading edge. CSHO Hendrickson referenced the preamble to final ruling of the "Safety Standards for Fall Protection in the Construction Industry" providing that federal OSHA determined there is "no safe distance from an unprotected edge that would render fall protection unnecessary." Upon inspection of the roof, CSHO Hendrickson observed the panels near the leading edge contained anchor points along the entire width of the roof. He confirmed exposed employee Chauteco actually worked for Northern California Nail Co., Inc., a subcontractor of the respondent Panelized Structures, Inc. Contact was made with the owner of Northern California Nail and the conferences and inspection continued. He recommended that Panelized Structures be cited as a **controlling employer** based upon information obtained confirming Panelized Structures contracted with Northern California Nail to provide general supervisory authority over Northern California Nail Company employees.

Mr. Hendrickson continued testimony under direct examination. He testified on his personal observations, the admissions by the violating employee and respondent supervisory personnel, and photographs at

Exhibit 1, pages 56 and 56A, which confirmed the employee was working 42 feet above ground level within eight feet of the edge of the roof without fall protection. He determined employer **control** and joint safety protection responsibility over the employee by both the direct employer Northern California Nail Co. and respondent Panelized Structures as well as the general contractor. The respondent was responsible for safety compliance by contract and admissions under its supervisory role; and Northern California Nail as the direct employer of Mr. Chauteco. He recommended citations to the general contractor, Northern California Nail and respondent Panelized Structures under the OSHA **multi-employer worksite doctrine.**

Respondent foreman Carvalho reported he was responsible for the employee of Northern California Nail on the job site. Mr. Hendrickson referenced the exhibits in evidence, particularly Exhibit 4, pages 117 to 120 identified as the OSHA Letters of Interpretation regarding fall protection requirements and safe working distances from an unprotected side or edge. He testified the interpretation of the standard was followed throughout Nevada based upon federal guidance. He specifically referenced Exhibit 1, page 58 and the photographic exhibits, pages 56-57. He confirmed his understanding of the Nevada OSHA interpretation of the guidance which expressly provides there is ". . . no safe distance in the OSHA standards under the federal interpretation letters . . . allowing work near a roof edge without fall arrest protection . . .." He further testified the violation was in **plain view**, and the **controlling, supervising and direct employers** were all aware of the employee working conditions without fall arrest protection. He determined **employer knowledge** proof was established from the reported statements at Exhibit 1, the admission of employee Chautaco, and the

responsible employer representative of respondent who enforced tie-off protection based upon understandings that so long as an employee worked eight feet from the edge no tie-off protection was required. He testified the respondent operated under an erroneous interpretation of the standard. There was no exception in the standard or the guidance permitting an employee to work or be present near a roof edge without the fall arrest protection under the referenced standard.

He testified on the classification of serious, the proposed penalty and his recommendations accordingly. He further testified with regard to gravity, probability and severity ratings.

Citation 1, Items 1 and 2, referenced forklift operational violations. Mr. Hendrickson testified that during conclusion of the walkaround inspection he and CSHO Gillings observed an employee of respondent operating a Nissan forklift while smoking a cigarette and without his seatbelt fastened. During interviews, the violating employee reported he simply overlooked fastening the belt and erred by smoking a cigarette. Mr. Hendrickson determined employer knowledge based upon his observations and interviews, noting the exposed employee was operating the forklift in "plain site." He testified that with any degree of reasonable diligence the employer could have detected and corrected the hazard exposures. The forklift was propane powered and substantial injury from exposure or fire could occur from smoking while operating the equipment.

Similarly at Citation 1, Item 2, without wearing a seatbelt, the employee was exposed to a crushing hazard in the event the forklift tipped over. Mr. Hendrickson referenced the federal OSHA interpretation letter of December 15, 2003 which required that an employer is responsible for assuring employees wear appropriate personal protective

equipment in all operations where there is exposure to hazardous conditions. He testified the cited standard was for personal protective equipment and while it doesn't reference "seatbelt" under the preamble interpretation at Exhibit 1, page 60, seatbelts are determined to be part of personal protective equipment (PPE) for operating earthmoving machinery. Accordingly he determined the standard was applicable to use of the forklift equipment under the same principle. The employee informed CSHO Hendrickson that he had simply forgotten to connect.

Respondent counsel conducted cross-examination. Mr. Hendrickson testified there were no photos of the employee operating the forklift while smoking or without seatbelt attachment. The evidence of violation was based on his observation and witness statements during the investigation as to Citation 1, Items 1 and 2.

Mr. Hendrickson further testified that his conclusions of violations at Citation 1, Item 3, were based upon his direct observations, the photographic exhibits, documentary evidence, and the admission of the respondent representative that employee Chauteco was working within eight feet from the edge of the roof. He testified that he relied upon the federal OSHA interpretation letter, together with his personal observations and the information derived during the investigation. He confirmed his previous testimony that respondent representative Kozloski in his witness statement at Exhibit 1, page 18 reported ". . . Employees within 10 feet of a leading edge are required to be tied off . . .." Mr. Hendrickson did not measure the distance between the employee working and the roof edge, but estimated the proximity on his observations of the employee and the standard size of the plywood sheeting nailed in place. He also relied upon the employee's statement, and information provided by the respondent

representative. The employee was clearly not within the 50 foot allowance recognized under federal OSHA to make the violative condition de minimis. He further testified the photograph in evidence made it clear that the employee was working near the roof edge. There was no dispute, the work height was 42 feet above ground. The violative working distance without fall protection occurred in plain view and not denied by anyone during the inspection; only subject of erroneous employer interpretation to justify the employee working without protection. Mr. Hendrickson testified on his determination of **"controlling employer"** on the **multi-employer worksite.**

Respondent presented testimonial evidence from Mr. Ron Kozloski who identified himself as the chief operating officer of respondent. He testified that he was at the job site during the inspection and met with CSHO Hendrickson. Mr. Kozloski testified there is no specific OSHA definition of a **leading** "edge." He determined the leading edge in this case as shown at Exhibit 1, page 57A, as to the right of the blue line on the plywood panel near that edge, but not closer that eight feet. He testified no employees of Northern California Nail or respondent worked near the actual edge of the roof. He testified that his company was cited as a controlling employer because the Northern California Nail employee was exposed and respondent had the responsibility under an agreement to provide job supervision. He reconfirmed his understanding of the supervisory working arrangement.

Mr. Kozloski testified he conducted weekly safety meetings on the roof with employees to assure all safety protection was provided. He referenced Exhibit 1, page 9 and testified that he ". . . can't explain the '10 feet from leading edge' . . . the interpretation is uncertain because of the edge and leading edge distinctions."

At Citation 1, Items 1 and 2, Mr. Kozloski testified the CSHO notes taken during the investigation in Exhibit 1 reflect he recommended only an Other-than-Serious (OTS) classification for the forklift seatbelt and smoking violations.

On redirect examination Mr. Kozloski testified there were four employees nailing panels on the day of the inspection so as they worked the edge moved farther away from where they were actually working. He testified the employee depicted in the photographic evidence was not constructing a "leading" edge.

Complainant conducted cross-examination of Mr. Kozloski. He testified that it is okay under company policy for employees to work without fall arrest protection outside of eight feet from the edge of the roof structure. His understanding of the oSHA requirement was based upon the OSHA regulations as he read and interpreted them. He further testified that it was **"infeasible"** to continue to protect the "edge" because the work continually moved out farther and therefore made it impossible or infeasible to continue tying off. ". . . You cannot protect a continuing moving edge . . .." Counsel questioned Mr. Kozloski on his awareness of the requirements to prove a defense of "infeasibility." Counsel referenced the photographic exhibit and the metal plates located on the panels as depicted in the photographic exhibit. Mr. Kozloski testified ". . . those are tie-off anchor points located on the roof . . .." Counsel challenged the witness as to his claim of infeasibility by asking "so the employees could tie off on that roof to the plate?" The witness answered "yes." Mr. Kozloski further testified that he had ". . . all authority over the employees on the site . . .."

At the conclusion of evidence and testimony, both counsel presented

closing arguments.

Complainant referenced the photographic exhibit and unrefuted witness testimony as proof of Citation 1, Item 3. Mr. Chautaco, the subject employee of Northern California Nail was undisputed to be under the supervisory authority and responsibility of the respondent, and working within eight feet of the roof edge without any fall arrest protection. Counsel asserted the opinions of the various respondent personnel do not outweigh the terms of the standard or analysis and guidance from the federal OSHA interpretation letter in evidence. There was no evidence or dispute that employee Chautaco was working anywhere near the 50 foot recognized area to allow for a de minimis violation. There was no evidence the employer ever taught or interpreted the standard correctly, nor enforced it in accordance with the guidance. They simply operated under an erroneous policy. They enforced an eight to ten foot from the edge safety requirement which has no support under the law, and for which they offered no competent rebuttal evidence. Additionally, respondent offered no competent evidence to support the recognized defense for infeasibility. The pictures indicate very clearly that employee Chautaco was engaged in work tasks on the roof within eight to ten feet of the edge, near many anchor points but without tie-off protection, 42 feet above ground level. Fall arrest tie-off was clearly feasible.

Respondent provided closing argument. Counsel argued Citation 1, Item 3, fails to recognize reasonable safety requirements and the realistic practices of the construction industry. He asserted none of the respondent employees were exposed to any hazards at the job site. The respondent employer was determined a "controlling contractor" over the conduct of an employee of Northern California Nail. Counsel argued

the old interpretation letter from the 1990s is "contra reality" - no one can fall off an edge if they are working eight feet from that point. It is simply not a "leading" edge. The OSHA letter says everything on a roof is unsafe, which is effectively a leading edge and requires protection. That is neither realistic nor fair. This Nevada Board should take the position that it is simply absurd to consider any place on a roof to require protection as a "leading edge"; and particularly one where an employee cannot fall from if he's working eight feet from that edge.

At Citations 1, Items 1 and 2, respondent asserted even the CSHO recognized the seatbelt and smoking conduct should not be classified as serious when he entered the phrase "OTS" in his report. Those citations should be considered unsupported by any preponderant evidence, or reduced based upon the facts described. Counsel concluded by asserting that an employer can't see everything that happens on a worksite such as an occasional employee without a seatbelt or who happens to be smoking a cigarette.

In reviewing the testimony, documents and exhibits including arguments of counsel, the Board is required to measure the evidence against the required elements to establish violations under occupational safety and health law based upon the statutory burden of proof and competent evidence.

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. (See NAC 618.788(1).
>
> All facts forming the basis of a complaint must be proved by a preponderance of the evidence. See *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).
>
> Preponderance of the evidence means evidence that enables a trier of fact to determine that the

existence of the contested fact is more probable than the nonexistence of the contested fact. NRS 233B, Sec. 2. *Nassiri v. Chiropractic Physicians' Board of Nevada,* 130 Nev. Adv. Op. No. 27, 327 P.3d 487 (2014)

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

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

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

> To prove a violation of a standard, the Secretary must establish (1) the **applicability** of the standard, (2) the existence of **noncomplying conditions**, (3) **employee exposure or access**, and (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 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003). (emphasis added)

A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;

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

3. Proof by a preponderance of substantial

evidence of a recognized defense.

At Citation 1, Items 1 and 2, referencing the respondent employee forklift operations without a seatbelt attached and smoking, the evidence might meet the initial burden of proof to establish an initial case of violation, however it was rebutted by the preponderant facts in evidence and lawful inference of an **isolated incident of unpreventable employee misconduct.** While the testimony of CSHO Hendrickson is recognized as credible, there were no photographs or other evidence to actually prove the violative conduct through independent competent or non-hearsay evidence. Similarly, CSHO Hendrickson who observed the conduct appropriately noted the conduct should have been classified as other than serious. The evidence demonstrated the respondent had an acceptable safety plan, which by inference included compliant practices as none were cited during the subject **comprehensive** inspection. The brief factual occurrences noted when the CSHOs observed the forklift employee's violative conduct should be appropriately and fairly recognized as an isolated incident of employee misconduct and the serious citations dismissed.

The elements required for the defense of unpreventable employee misconduct were supported and/or reasonably inferred from the facts in evidence. The employer is required to establish work rules, adequately communicate those rules, take steps to discover violations, and enforce the rules. There was no citation for any safety plan deficiencies. The alleged violative conditions were subject of only hearsay testimony and reporting; but not corroborated nor subject of legally competent proof. A reasonable finding and conclusion, if any violative conditions might be lawfully inferred from the evidence, is that were at best isolated occurrences of unforeseeable employee misconduct.

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

No employer can absolutely assure or police every moment of an employee's work day to guarantee compliance nor is there any OSHA requirement for same. The case law measures the elements of violation against **reasonable prevention and foreseeability.**

> *National Realty and Construction Co., Inc. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973), is the fountainhead case repeatedly cited to relieve employers responsibility for the allegedly disobedient and negligent act of employees which violate specific standards promulgated under the Act, and sets forth the principal which has been confirmed in an extensive line of OSHC cases and reconfirmed in *Secretary of Labor v. A. Hansen Masonry*, 19 O.S.H.C. 1041, 1042 (2000).
>
> **An employer cannot in all circumstances be held to the strict standard of being an absolute guarantor or insurer that his employees will observe all the Secretary's standards at all times.** An isolated brief violation of a standard by an employee which is unknown to the employer and is contrary to both the employer's instructions and a company work rule which the employer has uniformly enforced does not necessarily constitute a violation of [the specific duty clause] by the employer. *Id.*, 1 O.S.H.C. at 1046. (emphasis added)
>
> It is further noted that "**employers are not liable under the Act for an individual single act of an employee which an employer cannot prevent.**" *Id.*, 3 O.S.H.C. at 1982. The OSHRC has repeatedly held that "employers, however, have an affirmative duty to protect against preventable hazards and preventable hazardous conduct by employees. *Id.* See also, *Brock v. L.E. Meyers CO.*, 818 F.2d 1270 (6th Cir.), *cert. denied* 484 U.S. 989 (1987). (emphasis added)

At Citation 1, Item 3, the preponderant evidence established a violation of the cited fall arrest safety requirements of the standard.

The evidence was undisputed the employee was subject **of respondent's supervisory control** and working within eight to ten feet of the roof edge without any fall arrest protection systems in place. The defense was focused on an interpretation of the cited standard by the respondent contrary to the recognized federal OSHA guidance and **plain meaning** of the standard. The subject employee was not working anywhere close to the 50 foot letter determination allowance for a de minimis citation. It was admitted by respondent witness Kozloski and in closing arguments the subject employee was working within eight to ten feet from the edge of the building, 42 feet above ground level, without any tie-off or other fall arrest systems in place. It was further admitted there were tie-off anchor points located near the employee and depicted in the photographic exhibit in evidence. The defense of **infeasibility** was not established. No further analysis need be made as to the violative conditions and the preponderant proof. The citation was clearly established and must be confirmed as a serious violation and the penalty approved.

The remaining defense arguments raised by respondent relate to the citation policy for Nevada OSHA **multi-employer worksites,** and whether the respondent was a **"controlling employer."** Respondent witness Mr. Kozloski admitted **"all authority"** over the violating employee of another contractor, Northern California Nail Co. There was no evidence offered to the contrary.

> OSHA's **multi-employer citation policy** describes four classes of employers that may be cited: exposing, creating, correcting, and **controlling. A "controlling" employer is an employer that could reasonably be expected to prevent or detect and abate the violative condition by reason of its control over the worksite or its supervisory capacity.** The reasonable efforts that a controlling employer must make to prevent or detect and abate

violative conditions depend on multiple factors, including the **degree of its supervisory capacity**, its constructive or actual **knowledge of**, or expertise with respect to, the **violative condition**, the cause of the violation, the **visibility of the violation** and length of time it persisted, and what the controlling employer knows about a subcontractor's safety programs. It does not depend on whether the controlling employer has the manpower or expertise to abate the hazard itself. *IBP, Inc. v. Herman,* 144 F.3d 861 (D.C. Cir. 1998); *Marshall v. Knutson Constr. Co.,* 566 F.2d 596, 6 OSH Cases 1077 (8th Cir. 1977). *See Blount Int'l Ltd.,* 15 OSH Cases at 1899-1900; *Sasser Elec. & Mfg. Co.,* 11 OSH Cases 2133 (Rev. Comm'n 1984); *Grossman Steel & Aluminum Corp.,* 4 OSH Cases 1185 (Rev. Comm'n 1976) *Marshall v. Knutson, 566 F.2d at 601. McDevitt Street Bovis,* 19 OSH Cases 1108 (Rev. Comm'n 2000); *David Weekley Homes,* 19 OSH Cases at 1119-20; *Centex-Rooney,* 16 OSH Cases at 2130. *R.P. Carbone Constr. Co. v, OSHRC,* 166 F.3d 815, 18 OSH Cases 1551 (6th Cir. 1998). *Blount Int'l Ltd.,* 15 OSH Cases 1897 (Rev. Comm'n 1992) (citing Red Lobster Inns of Am., Inc., 8 OSH Cases 1762 (Rev. Comm'n 1980)). *IBP Inc.,* 144 F.3d at 867, 18 OSH Cases 1353. *United States v. MYR Grp. Inc.,* 361 F.3d 364, 20 OSH Cases 1614 (7th Cir. 2004); *cf. Reich v. Simpson, Gumpertz & Heger, Inc.,* 3 F.3d 1, 16 OSH Cases 131 (1st Cir., 1993) (same holding based on 29 CFR §1910.12). *See, e.g. Summit Contractors Inc.,* 20 OSH Cases 1118 (Rev. Comm'n J. 2002), Homes by Bill Simms, Inc., 18 OSH Cases 2158 (Rev. Comm'n J. 2000). Occupational Safety and Health Law, 3rd Ed., Dale & Schudtz. (emphasis added)

In construction industry cases, several courts have, to one degree or another, held that general contractors **or certain higher level subcontractors** may in some circumstances be cited under Section 5(a)(2) even if the exposed employees are not theirs. *Secretary of Labor v. Trinity Indus.,* 504 F.3d 297 (3d Cir. 2007); *Universal Constr. Co. v. OSHRC,* 182 F.3d 726, 728-31, 18 OSH Cases 1769 (10th Cir. 1999); *United States v. Pitt-Des Moines Inc.,* 168 F.3d 976, 18 OSH Cases 1609 (7th Cir. 1999); *R.P. Carbone Const., Co. v. OSHRC,* 166 F.3d 815, 18 OSH Cases 1551 (6th Cir. 1998); *New England Tel. & Tel. Co. v. Secretary of Labor,* 589 F.2d 81, 81-82 (1st Cit. 1978); *Equip. Leasing Inc. v. Secretary of Labor, 577 F.2d 534, 6 OSH Cases 1699 (9th Cir. 1978); Marshall v. Knutson Constr. Co., 566 F.3d 596, 6 OSH Cases 1077 (8th Cir. 1977); Brennan v. OSHRC (Underhill Constr. Corp.),* 513 F.3d 1032, 1038, 2 OSH Cases 1641 (2d Cir. 1975).

Occupational Safety and Health Law, 3rd Ed., Dale & Schudtz. (emphasis added)

Occupational safety and health law has long recognized the **inability of an employer to avoid employee OSHA safety protection by contract or agreement.** *Frohlick Crane Service, Inc. v. Occupational Safety and Health Review Commission, 521 F.2d 628 (1975).*

The U.S. Department of Labor Instruction under Occupational Safety and Health Administration has issued guidance on the multi-employer citation policy. In addition to the case law and treatise commentary above referenced, the guidance on determination of a **controlling employer** recognizes the realistic principles often practiced by the construction industry. The OSHA enforcement guidance provides:

> **. . . Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice . . ..**
>
> Control Established by Contract. To be a **controlling employer,** the employer must itself be **able to prevent or correct a violation or to require another employer to prevent or correct the violation.** One source of this ability is **explicit contract authority.** This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers. U.S. Dept. Of Labor, Multi-Employer Citation Policy (emphasis added)

The evidence of record was undisputed that there was a contract or agreement between the respondent and Northern California Nail, and that respondent had supervisory authority over the Northern California Nail employees. Respondent COO Kozloski admitted the employees of Northern California Nail were working under the supervisory control of respondent. The admission corroborates the fact reported to CSHO Hendrickson during inspection where the general contractor and subcontractors Northern California Nail and Panelized Structures were

present. Mr. Kozloski testified in response to a direct question on cross-examination of control over Northern California Nail employee Chauteco that he had "all authority . . .." (Transcript page 59.)

Based upon the evidence, the record of testimony, and the reported credible findings and observations of CSHO Hendrickson, Northern California Nail employee Chautaco was working in violation of the fall arrest protection standard. The respondent here through its COO testified of the company wide erroneous interpretation of the standard. The undisputed evidence was the parties had an understanding and/or agreement that respondent was responsible and had control over the Northern California Nail employees performing the same construction functions as the respondent. Based upon the preponderant evidence and reasonable inference, the respondent here was a **controlling employer,** and equally responsible for the safety compliance of Mr. Chauteco as his **direct employer** Northern California Nail. Preponderant evidence confirmed a supervisory contract or agreement, written or verbal, corroborated by the testimony of Mr. Kozloski confirming the arrangement of his authority over the Northern California Nail and Panelized Structures employees.

The unsupported assertions and arguments of some inability to cite both subcontractors belies the long-standing OSHA practices at the federal level which provides a reliable body of guidance for the Nevada Review Board. The enforcement principles, including federal court case references to support a legal conclusion based upon the facts in evidence that both subcontractors had joint responsibilities for employee Chautaco's safety compliance.

Based upon facts, evidence and testimony, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation of

Nevada Revised Statutes did occur at Citation 1, Item 1 29 CFR 1926.95(a) and Item 2, 29 CFR 1926.151(a)(3) the violations, classification and proposed penalties are denied.

It is further the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation did occur as to Nevada Revised Statutes at Citation 1, Item 3, 29 CFR 1926.501(b)(2)(i). The Serious classification is confirmed and the proposed penalty in the amount of $600.00 approved.

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

DATED: This 17th day of December 2015.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JOE ADAMS, CHAIRMAN