

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

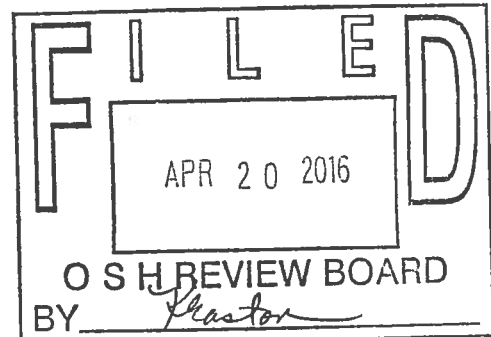
Docket No. LV 16-1825

Complainant,

vs.

12 STATE OF NEVADA ex rel. BOARD OF  
13 REGENTS OF THE NEVADA SYSTEM OF  
14 HIGHER EDUCATION on behalf of THE  
15 UNIVERSITY OF NEVADA, LAS VEGAS,

Respondent.



16 DECISION

17 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
18 **REVIEW BOARD** at a hearing commenced March 9, 2016, in furtherance of  
19 notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel  
20 appearing on behalf of the Complainant, **Chief Administrative Officer of**  
21 **the Occupational Safety and Health Administration, Division of**  
22 **Industrial Relations** (OSHA). MS. SUSAN CARRASCO O'BRIEN, ESQ.,  
23 appearing on behalf of Respondent, **University of Nevada, Las Vegas.**

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.

1 Citation 1, Item 2, charges a violation of 29 CFR 1926.415(a)(1)  
2 which provides in pertinent part:

3 No employer shall permit an employee to work in  
4 such proximity to any part of an electric power  
5 circuit that the employee could contact the  
6 electric power circuit in the course of work,  
7 unless the employee is protected against electric  
8 shock by de-energizing the circuit and grounding it  
9 or by guarding it effectively by insulation or  
10 other means.

11 Complainant alleged:

12 . . . on May 12, 2015 inside the main electrical  
13 room (1322) at the Science and Engineering Building  
14 (SEB) of The University of Nevada, Las Vegas  
15 (UNLV), an employee of Great Salt Lake (GSL)  
16 Electrical received 2<sup>nd</sup> and 3<sup>rd</sup> degree burns on 40%  
17 of his body, . . . as a result of an arc flash  
18 event while conducting energized electrical work  
19 . . . . GSL was contracted by UNLV to install a new  
20 chiller . . . and associated mechanical electrical  
21 components at the Satellite Energy Plant building  
22 (SEP). The project required GSL employees to enter  
23 an underground vault at the SEP to install  
24 electrical equipment. The vault contained feeders  
25 at 12,470 volts and needed to be de-energized  
26 before accessed by employees. The circuit in the  
27 vault requiring shut down, also known as the X-  
28 phase, supplied the SEB and SEP with standby power.  
X-phase supplied what is determined by UNLV to be  
essential equipment in SEB. The work in the SEP  
vault was projected to take 2 to 4 hours in a de-  
energized state, but UNLV determined that the  
critical equipment could only sustain a downtime of  
10 minutes. In order to facilitate the 10 minute  
shutdown window, GSL was compelled to install  
pigtaills on energized bussing in Panel 4 of SEB,  
enabling the system to be ready for connection to  
a generator during the 10 minute window. The X-  
phase conductors would have been disconnected at  
this time to prevent back feed to the SEP vault  
prior to starting the generator, effectively de-  
energizing the vault while maintaining power to SEB  
X-phase circuits. While installing these pigtaills,  
the arc flash event occurred. UNLV did not allow  
de-energizing and grounding the circuit to prevent  
the flow of electrical energy resulting in a  
serious, permanent injury.

29 The citation was classified as Serious. The proposed penalty was  
30 in the amount of \$6,000.00.

1 It is noted that Citation 1, Item 1 originally charged in the  
2 complaint was withdrawn prior to commencement of the hearing.

3 Counsel for the complainant and respondent stipulated to the  
4 admission of evidence at complainant Exhibits 1 through 2, and  
5 respondent's A, B and C.

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

9 Compliance Safety and Health Officer (CSHO) Mr. Jason Burns  
10 testified in furtherance of his inspection, citation, and facts  
11 discovered during interviews and investigation. He identified his "walk  
12 around" report in evidence at Exhibit 1, page 23 and the interview  
13 statements at pages 26 through 40. At Exhibit 1, page 19 Mr. Burns  
14 testified on the worksite electrical circuit plan and explained the  
15 circuitry locations in the vault where employee work was conducted. He  
16 generally described the meetings, discussions, and proposed electrical  
17 work plans prior to and through the occurrence of the incident which  
18 resulted in GSL employee Mr. Adan Carrillo sustaining serious injuries.  
19 He identified page 52 as part of the original worksheet and summary of  
20 the management statements taken at the time of the inspection. Mr.  
21 Burns read directly from the statements and testified to explain his  
22 understanding of the information obtained. He referenced his worksheet  
23 and testified particularly on the determinations made by GSL and UNLV  
24 personnel as to the workplace conditions. He described the project and  
25 the contract bidding process eventually resulting in an award to GSL and  
26 pointed out the full knowledge of the scope of work provided and  
27 discussed.

28 Mr. Burns referenced his notes identifying information received

1 from an interview with Mr. Bill Quinn, the UNLV facilities supervisor  
2 at Exhibit 1, page 38. Similarly at Exhibit 1, page 35, he testified  
3 as to his notes from an interview with Mr. Knight, UNLV Assistant  
4 Director for Research and Infrastructure.

5 CSHO Burns testified the essence of the information obtained during  
6 the investigative centered upon discussions and development of the work  
7 plan required due to the position taken by UNLV that it could not permit  
8 a shutdown of electrical power to the essential facilities for longer  
9 than a 10 minute period. This imposed condition required that UNLV and  
10 GSL cooperate to create to create a safe work plan to work on the system  
11 fully energized if some safe means could be developed to effectively  
12 guard against the recognized potential hazard for employee exposure to  
13 electrical shock.

14 Mr. Burns testified during his investigation that he was looking  
15 at the issue of **feasibility** under OSHA guidelines because it was  
16 important to know why a simple shutdown of the system to perform the  
17 work safely would cause substantial economic or other loss. He was  
18 informed that experiments underway in the facility required operation  
19 of the "chiller" which had to be maintained other than for an  
20 approximate 10 minute "window" to perform the work. Mr. Burns  
21 referenced Exhibit 1, page 29, identified as notes taken from the  
22 general GSL foreman Adan Carrillo interview and testified accordingly.

23 CSHO Burns identified and testified on the photographic exhibits  
24 at Exhibit 1, principally photographs 103A through 105, 107 through 113  
25 and the substantial employee injuries sustained.

26 At Exhibit 1, page 15, Mr. Burns referenced his interview with the  
27 president of GSL, Mr. Williams, focusing on answers to questions as to  
28 why he recommended a citation against Respondent UNLV as the injuries

1 had occurred to GSL employee Mr. Carrillo. Mr. Burns testified the  
2 project was determined to be a **multi-employer site** as defined and  
3 interpreted under occupational safety and health law which required  
4 threshold determinations to warrant issuance of citation for violation.  
5 He testified that the evidence from his investigation reflected that  
6 electrical contractor GSL requested and applied for authority to de-  
7 energize the system for an extended period but same was rejected.  
8 Repeated efforts to limit the time for a shut down were also rejected  
9 by UNLV as not being "feasible" due to the damage that would occur to  
10 laboratory experiments in process. As a result of the rejection of the  
11 permit by UNLV, continued efforts and discussions were undertaken by GSL  
12 working with UNLV personnel to develop an alternate safe working plan  
13 to address completion of the required work. He identified Exhibit 1,  
14 page 64 is an email from Mr. Knight to Mr. Hancock stating that no more  
15 than 10 minutes of shutdown time could be allowed.

16 CSHO Burns testified that his investigative interviews and  
17 documents in evidence demonstrated that Mr. Hancock, the UNLV  
18 Construction Project Coordinator was in **control** of the job and worksite  
19 plan. He further testified that the standard provides that "live work"  
20 (energized) is not allowed; but **infeasibility** is considered in  
21 particular cases where there are no alternatives available. This  
22 required information as to what methods could be developed to address  
23 safety and consider whether any "greater hazard" or "economic losses"  
24 could not be avoided. Mr. Burns also testified that while these are  
25 codified conditional elements under the general industry standards, they  
26 are not recognized or codified under the "construction standards." Mr.  
27 Burns further testified that notwithstanding the contract between UNLV  
28 and GSL, placing safety responsibility and various liabilities upon the

1 general contractor, occupational safety and health law does not  
2 recognize the ability of an employer, whether general, sub or other  
3 configuration to "opt out of liability" under the act. Reference was  
4 made to respondent's Exhibit A, page 287 under Article 7 identifying Mr.  
5 Hancock as the project manager at UNLV to have overall responsibility  
6 and in charge of the work underway.

7 On cross-examination, CSHO Burns testified that UNLV was cited as  
8 a "controlling employer" under OSHES multi-employer worksite doctrine  
9 because he found UNLV had "control" over the power being on or off  
10 during the employees of the contractor working on the system. Reference  
11 was again made to the contract as placing responsibility on the  
12 respondent GSL, as opposed to UNLV. CSHO Burns responded contract terms  
13 rarely determine the ability to issue citations under occupational  
14 safety and health law. He explained that regardless of contract terms,  
15 the parties cannot simply contract around application of the law which  
16 endangers employees, whether their own or those of others. He again  
17 testified that in making a determination for citation he found from the  
18 evidence gathered that UNLV was the "controlling employer" under the  
19 multi-employer worksite doctrine recognized by OSHA and supported by  
20 extended case law. CSHO Burns testified the liability of respondent  
21 existed notwithstanding the various contract provisions subject of  
22 repeated questioning by respondent counsel. He testified that UNLV had  
23 authority and control over the electrical power. He testified that Mr.  
24 Hancock repeatedly advised that ". . . everything . . . on the jobsite  
25 goes through me . . . and I am ultimately responsible for the project  
26 . . . ."

27 On further cross-examination as to why GSL would have gone forward  
28 with the work if it was unsafe or dangerous, Mr. Burns responded that

1 "GSL ultimately convinced UNLV they could do the job safely . . . ." He  
2 further testified that he is ". . . not imputing the accident to UNLV,  
3 just knowledge of the hazard . . . under OSHA law . . . ."

4 On continued cross-examination, Mr. Burns responded that from  
5 investigative information he found that GSL saw no hazards with turning  
6 off the power but he believed ". . . GSL was compelled to use the  
7 'pigtail system' because of the repeated shutdown limitations imposed  
8 on them by UNLV . . . ."

9 During continued cross-examination, counsel challenged Mr. Burns  
10 on use of the word "compelled" and his basis for using same to indicate  
11 GSL as the electrical experts were forced to engage in work on the  
12 energized electrical circuitry. In response to a question of whether  
13 he had any factual basis to establish that GSL told UNLV that "we cannot  
14 do the job like this . . . .?" Mr. Burns responded "no."

15 CSHO Burns testified on cross-examination from the "OSHA  
16 Instruction" pamphlet, although not in evidence but treated as subject  
17 judicial/administrative notice on OSHA citation policy at multi-employer  
18 worksites. He explained the policy and positions of OSHA and the  
19 thresholds for determination of responsibility of actual **direct**  
20 **employers** and/or others as **controlling employers** if found to be in  
21 **control** of the work process.

22 Complainant counsel presented witness testimony from Mr. Darrel  
23 Hancock, identified as the now retired but former UNLV Construction  
24 Project Coordinator. Mr. Hancock described the work effort, the  
25 concerns with shutting down power due to potential loss of experiments  
26 expressed by professors at UNLV and the need to work on the energized  
27 system. He testified that GSL was made fully aware of the need to find  
28 a method to safely perform the electrical work without shutdown beyond

1 10 minutes. Mr. Hancock refused the GSL requests for electrical de-  
2 energizing permits, and the parties (UNLV and GSL) together with their  
3 staffs, reviewed the various options or alternatives to a shut down of  
4 the power. They discussed shorter time shut downs, but the approaches  
5 other than a minimum of 10 minutes were consistently rejected by Mr.  
6 Hancock based upon the instructions he received from his superiors based  
7 upon the professor staff. He testified that after the accident the  
8 power was shut down for hours, but had no idea if there was any lost  
9 time, economic or other damage to the experiments.

10 On cross-examination Mr. Hancock testified that when GSL was asked  
11 could they do the job with the "pigtail" option, they responded "yes,  
12 we do it all the time." When asked if GSL ever told him during the job  
13 live work was impossible, Mr. Hancock answered "no." He testified GSL  
14 never said the job couldn't be done, or while energized; but would  
15 prefer to do it de-energized. He was never told the job could not be  
16 done safely under the pigtail option. He testified that "one of my  
17 bosses suggested the pigtail option, and GSL said yes we've done that  
18 before and can do it here safely . . . ." GSL never said pigtail was  
19 unsafe or not doable.

20 Mr. Bill Quinn, UNLV Facilities Manager, was involved in the  
21 shutdown discussions and project planned alternatives to develop a safe  
22 work plan. He did not know who suggested the "pigtail option."

23 Mr. Erik Knight was identified as the UNLV Assistant Director for  
24 Research Infrastructure Science and Engineering Building with 18 years  
25 experience. He testified "my involvement was to notify faculty and  
26 others of a power shut down. There were several meetings to develop a  
27 safe work plan and I was involved in some . . . ." He testified that the  
28 feedback from the faculty was the ". . . maximum time they could live



1 without power was about 10 minutes, to maybe just a bit longer . . . ."  
2 He testified that he was informed multi-million dollar equipment was  
3 under experiment and that substantial losses would result if the power  
4 had to be shut down.

5 Mr. Dustin Williams identified himself as a licensed electrician  
6 and the GSL Special Project Manager on the subject worksite and the  
7 project coordinator. He testified his initial involvement was limited  
8 and only ". . . called in to provide a temporary generator to the  
9 facility, but understood Mr. Hancock had the authority to do the job  
10 with a generator." He provided initial notice to UNLV that GSL required  
11 a shutdown of the electrical power, which was the safest way to complete  
12 the work. Mr. Williams testified he was not unduly surprised by the  
13 accident because it was the type that might be expected when undertaking  
14 live work. He further testified that ". . . only competent trained  
15 electricians can do hot work . . . ." On the day of the accident the  
16 performance of such work under the electrical code and standards was not  
17 prohibited, however now company policy and new regulations prohibit live  
18 work on higher voltage such as was done in the subject case.

19 On cross-examination Mr. Williams testified that when he was told  
20 that shutting down the system was not an option he was "not happy about  
21 the pigtail alternative . . . ." He testified that under the contract  
22 the pigtail alternative determination was to be made by UNLV, and  
23 referenced the contract documents at page 228. This required GSL to do  
24 "lots of things" to assure a safe work effort. He testified that  
25 injured employee Carrillo was a "competent employee" and therefore  
26 qualified as an electrician to work on energized systems. Mr. Williams  
27 further testified as a licensed electrician and GSL employee that it is  
28 possible ". . . to do hot work under appropriate conditions and have

1 done so on the past . . . ." He testified that he "never told UNLV hot  
2 work can't be done - but said he didn't want to do it that way, however  
3 it had been done in the past so it was doable . . . ."

4 Mr. Adan Carrillo, the General Foreman of GSL testified he is now  
5 a project coordinator, but was the foreman on the UNLV project and also  
6 the injured employee who sustained severe burns from the electrical arch  
7 and resultant "shock." He initially set a 2 to 5 hour window for  
8 shutdown to perform the work under the safest conditions per GSL policy.  
9 He testified Mr. Knight at UNLV said it was "not feasible" because  
10 without the chiller in operation valuable experiments would be  
11 jeopardized. Mr. Carrillo testified he searched for other ways to do  
12 the work and proposed a 30 minute shutdown; but Mr. Knight came back  
13 with a rejection as to that alternative due to the experiments underway.  
14 Mr. Carrillo testified ". . . in a roundtable discussion of UNLV and GSL  
15 personnel, someone (didn't recall who) raised the pigtail option", and  
16 he (Carrillo) said "we've done it before so it's okay." He testified  
17 GSL tried twice to convince UNLV to go with the shutdown, but it was  
18 not supportable.

19 On cross-examination Mr. Carrillo testified that ". . . he never  
20 told UNLV the pigtail could not be done or that it was unsafe, but  
21 rather not the best way the job could be done . . . ." He further  
22 testified that the pigtail method was not prohibited nor unlawful at the  
23 time; however NFPA no longer permits that type of work to be done due  
24 to new regulatory limitations adopted shortly after the accident. He  
25 knew limitation for occurred shortly after the accident. On continued  
26 cross-examination through a question that ". . . so it was not illegal  
27 at the time and GSL said they could do it and had done it before so UNLV  
28 then agreed . . . ." Mr. Carrillo responded "yes." He further testified

1 that the "idea of a pigtail was a collective idea between GSL and UNLV,  
2 but he thinks it was UNLV that suggested it, but cannot recall."

3 At the conclusion of presentation of testimony and documentary  
4 evidence, the parties reserved the right for closing argument.

5 Complainant presented closing argument and asserted the multi-  
6 employer worksite citation policy provides that multiple employers can  
7 be responsible for the safety of other contractor employees. The tests  
8 issued by OSHA and recognized through the case law for how to determine  
9 who is a "controlling employer" for example contractual or in practice -  
10 provide the factors referenced by CSHO Burns who recommended the  
11 issuance of a citation after the investigation. Counsel asserted there  
12 was no evidence today that UNLV did not have overall authority and  
13 control over the worksite, including the efforts performed by GSL.  
14 Counsel asserted the major evidence of control in UNLV is that GSL  
15 wanted to do a shutdown, but the permit request was denied by UNLV.  
16 UNLV asserts that the contract document between the parties demonstrates  
17 that GSL is responsible but the contract under existing law cannot  
18 relieve UNLV of its liability. Mr. Hancock made the final decision,  
19 despite the hazard, because he said GSL assured him they could do it.  
20 Counsel asserted that even under the general industry standards, hot  
21 work can only be done under special cases, but under the construction  
22 standards there are no acceptable provisions for performing such work  
23 on live electricity. Counsel further argued there was no evidence the  
24 chiller system was critical or shutdown would result in a greater hazard  
25 other than mere references. There was no proof of infeasibility; and  
26 in fact the shut down after the accident did not result in any evidence,  
27 based on the testimony today, of any losses through experiments or  
28 otherwise.

1 Respondent counsel presented closing argument. She asserted that  
2 ". . . simply stated GSL are the experts, not UNLV . . ." and the  
3 company representatives testified that despite their preferred way of  
4 doing the work, that "we can and will do it, it's not a violation of law  
5 and we've done it before." Counsel further asserted that "what's a  
6 person to do?" UNLV hired experts, and told them what they wanted. The  
7 experts, while preferring another way, advised there was a safe system  
8 through the pigtail option which they had utilized before so the job  
9 work could be done. Counsel argued that GSL could have simply said  
10 "no." GSL was never asked to do anything illegal nor noncompliant under  
11 the OSHA standards, electrical code or any other regulatory guidelines.

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

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

19 All facts forming the basis of a complaint must be  
20 proved by a preponderance of the evidence. See  
*Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD  
21 ¶16,958 (1973).

22 Preponderance of the evidence means evidence that  
23 enables a trier of fact to determine that the  
existence of the contested fact is more probable  
24 than the nonexistence of the contested fact. NRS  
*233B, Sec. 2. Nassiri v. Chiropractic Physicians'*  
25 *Board of Nevada*, 130 Nev. Adv. Op. No. 27, 327 P.3d  
487 (2014)

26 A "serious" violation is established in accordance with NRS  
27 618.625(2) which provides in pertinent part:

28 . . . a **serious violation** exists in a place of

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

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

18 To prove a violation of a standard, the Secretary  
19 must establish (1) the applicability of the  
20 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**  
23 **reasonable diligence could have known** of the  
24 violative condition. See *Belger Cartage Service,*  
25 *Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
26 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);  
27 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC  
28 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)

18 A respondent may rebut allegations by showing:

- 19 1. The standard was inapplicable to the situation  
20 at issue;
- 21 2. The **situation was in compliance;** or lack of  
22 access to a hazard. See *Anning-Johnson Co.*,  
23 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).  
24 (emphasis added)
- 25 3. Proof by a preponderance of substantial  
26 evidence of a recognized defense.

27 In reviewing the evidence and applicable case law, the issues  
28 presented before this Board are whether there was a **violation of the**  
**cited standard** and respondent liable as a **"controlling employer"** under  
the recognized NOSHA **multi-employer worksite doctrine.**

1       The threshold issue for review is whether there was preponderant  
2 evidence to first prove any **violative conduct** prohibited by the cited  
3 specific standard. If a violation is proven, the follow on issue  
4 becomes whether the respondent here, UNLV, can be held responsible as  
5 a **controlling employer**.

6       The terms of the specific standard provide that no employer shall  
7 permit an employee to work in proximity of an electrical power circuit  
8 that is energized **unless the employee is protected against electrical**  
9 **shock** by de-energizing the circuit and grounding it **or by guarding it**  
10 **effectively** by insulation **or other means**. UNLV retained GSL, a licensed  
11 electrical contractor with expertise in commercial installations, to  
12 perform contract work on its high voltage power system. During the  
13 course of developing the equipment installation plan, the working  
14 conditions required changes based upon discovered information of an  
15 inability to de-energize the system for more than ten (10) minutes while  
16 the contract work was to be performed. The un rebutted evidence  
17 demonstrated that GSL continuously took the position that while it  
18 **preferred** to work on the system de-energized, there was **no code**  
19 **violation or other prohibition for working on the energized system, so**  
20 **long as a safe means was developed**.

21       29 CFR 1926.416(a)(1) requires a **means**, ("other means") be  
22 developed to protect employees against electrical shock if a system is  
23 to be subject of work while energized. A pigtail means was developed  
24 through GSL and UNLV discussions to eliminate the hazard and protect  
25 employees from electrical shock. Unfortunately it did not work and GSL  
26 employee Carrillo was seriously injured.

27       However, a recognized safe "means," as required by the specific  
28 standard was developed and implemented by agreement of GSL and UNLV.

1 Accordingly there was no **"violative conduct,"** nor evidence to prove  
2 existence of **violative or non-complying conditions.** GSL, the qualified  
3 licensed electrical contractor with an expertise in the field discussed,  
4 reviewed, co-developed and implemented a mutually agreed upon "pigtail"  
5 system previously utilized to eliminate the hazard and permit employee  
6 work on the energized circuits. The un rebutted testimony was the  
7 electrical code and various other regulations have changed, which would  
8 now prevent the subject work being performed similarly. However at the  
9 time of the work and accident, there was no such prohibition.  
10 Accordingly, the threshold finding by this Board must be there was no  
11 proof by a preponderance of the evidence to establish the **existence of**  
12 **violation or non-complying condition.** These are essential proof  
13 elements well established under occupational safety and health law. The  
14 complainant's burden of proof was not met. Accordingly, without a  
15 threshold **violation by the employees of the direct employer,** the  
16 question of whether UNLV can be liable as a **controlling employer** under  
17 the OSHA multi-employer worksite doctrine becomes academic and moot.

18 Notwithstanding the foregoing, issues of **employer control** and the  
19 **multi-employer worksite doctrine** were subject of testimony and argument;  
20 therefore appropriate for general review here.

21 OSHA's **multi-employer citation policy** describes  
22 four classes of employers that may be cited:  
23 exposing, creating, correcting, and **controlling.**  
24 A **"controlling" employer is an employer that could**  
25 **reasonably be expected to prevent or detect and**  
26 **abate the violative condition by reason of its**  
27 **control over the worksite or its supervisory**  
28 **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

1 the controlling employer knows about a  
2 subcontractor's safety programs. It does not  
3 depend on whether the controlling employer has the  
4 manpower or expertise to abate the hazard itself.  
5 *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998);  
6 *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 6  
7 OSH Cases 1077 (8<sup>th</sup> Cir. 1977). See *Blount Int'l*  
8 *Ltd.*, 15 OSH Cases at 1899-1900; *Sasser Elec. &*  
9 *Mfg. Co.*, 11 OSH Cases 2133 (Rev. Comm'n 1984);  
10 *Grossman Steel & Aluminum Corp.*, 4 OSH Cases 1185  
11 (Rev. Comm'n 1976) *Marshall v. Knutson*, 566 F.2d at  
12 601. *McDevitt Street Bovis*, 19 OSH Cases 1108 (Rev.  
13 Comm'n 2000); *David Weekley Homes*, 19 OSH Cases at  
14 1119-20; *Centex-Rooney*, 16 OSH Cases at 2130. *R.P.*  
15 *Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 18 OSH  
16 Cases 1551 (6<sup>th</sup> Cir. 1998). *Blount Int'l Ltd.*, 15  
17 OSH Cases 1897 (Rev. Comm'n 1992) (citing *Red*  
18 *Lobster Inns of Am., Inc.*, 8 OSH Cases 1762 (Rev.  
19 Comm'n 1980)). *IBP Inc.*, 144 F.3d at 867, 18 OSH  
20 Cases 1353. *United States v. MYR Grp. Inc.*, 361  
21 F.3d 364, 20 OSH Cases 1614 (7<sup>th</sup> Cir. 2004); cf.  
22 *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1,  
23 16 OSH Cases 131 (1<sup>st</sup> Cir., 1993) (same holding  
24 based on 29 CFR §1910.12). See, e.g. *Summit*  
25 *Contractors Inc.*, 20 OSH Cases 1118 (Rev. Comm'n J.  
26 2002), *Homes by Bill Simms, Inc.*, 18 OSH Cases 2158  
27 (Rev. Comm'n J. 2000). Occupational Safety and  
28 Health Law, 3<sup>rd</sup> Ed., Dale & Schudtz. (emphasis  
added)

16 In construction industry cases, several courts  
17 have, to one degree or another, held that general  
18 contractors or certain higher level subcontractors  
19 may in some circumstances be cited under Section  
20 5(a)(2) even if the exposed employees are not  
21 theirs. *Secretary of Labor v. Trinity Indus.*, 504  
22 F.3d 297 (3d Cir. 2007); *Universal Constr. Co. v.*  
23 *OSHRC*, 182 F.3d 726, 728-31, 18 OSH Cases 1769 (10<sup>th</sup>  
24 Cir. 1999); *United States v. Pitt-Des Moines Inc.*,  
25 168 F.3d 976, 18 OSH Cases 1609 (7<sup>th</sup> Cir. 1999);  
26 *R.P. Carbone Const., Co. v. OSHRC*, 166 F.3d 815, 18  
27 OSH Cases 1551 (6<sup>th</sup> Cir. 1998); *New England Tel. &*  
28 *Tel. Co. v. Secretary of Labor*, 589 F.2d 81, 81-82  
(1<sup>st</sup> Cit. 1978); *Equip. Leasing Inc. v. Secretary of*  
*Labor*, 577 F.2d 534, 6 OSH Cases 1699 (9<sup>th</sup> Cir.  
1978); *Marshall v. Knutson Constr. Co.*, 566 F.3d  
596, 6 OSH Cases 1077 (8<sup>th</sup> 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, 3<sup>rd</sup> Ed., Dale &  
Schudtz. (emphasis added)

27 UNLV liability as a **controlling employer** under occupational safety  
28 and health law requires preponderant evidentiary factors. **Employer**



1 **knowledge** of violative conditions must be proved. That requires proof  
2 of employer **foreseeability** of violative conditions. Accordingly the  
3 question becomes: what **violative conditions** could UNLV have foreseen  
4 under the work plan. Clearly both parties, GSL and UNLV, were aware of  
5 the **potential** hazards and risk. They were extensively analyzed,  
6 discussed, debated and subject of planning. The "pigtail" work  
7 performed was not in violation of the standard because it constituted  
8 a professionally recognized **guarding** from electrical shock to eliminate  
9 the hazard, therefore "**other means**" as required by the standard terms.  
10 GSL as the experts implemented what they reported was a safe plan and  
11 **means** previously utilized for performing work on energized systems; and  
12 it was agreed to and accepted by UNLV. However the pigtail protective  
13 means adopted to prevent electrical shock failed and the accident  
14 occurred. Failure of a recognized safe work practice is not itself the  
15 basis for finding of a violation under occupational safety and health  
16 law. There was no way for UNLV to foresee, guard against, or prevent  
17 a "violation" because the hazard recognized during the work plan  
18 development was mitigated by GSL and believed by all to be eliminated  
19 through adoption of a safe "pigtail" guarding **means**.

20 There was no evidence to support the allegation that GSL was  
21 intimidated or forced by UNLV to perform dangerous work. GSL could have  
22 simply refused to perform the work if unable to develop a satisfactory  
23 safe work plan. This would likely have resulted in another contractor  
24 called in to perform the work possibly under the same or similar  
25 recognized alternative means. Complainant counsel asserted and one  
26 might infer or extrapolate, UNLV exercised pressure on GSL to perform  
27 the work "live" or within an unrealistic 10 minute window of shutdown;  
28 however there was no testimonial or documentary evidence to support such

1 intimidation. Notably, the GSL employees, including injured employee  
2 Carrillo, all testified there was a **preferred** way (de-energized) to  
3 perform the work, but the alternate pigtail means was **lawful, doable,**  
4 **and had been utilized by them in previous practice.** None testified they  
5 were forced or intimidated to perform the work. Inferences, assumptions  
6 or extrapolations cannot be the basis for finding violations under  
7 occupational safety and health law.

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 Additionally, while not essential to the decision herein, the Board  
19 notes respondent assertions that it can simply avoid NOSHA liability by  
20 contract terms is misplaced. Occupational safety and health law has  
21 long recognized the **inability of an employer to avoid employee OSHA**  
22 **safety protection by contract or agreement.** *Frohlick Crane Service,*  
23 *Inc. v. Occupational Safety and Health Review Commission*, 521 F.2d 628  
24 (1975).

25 Notwithstanding the foregoing general principle, the U.S.  
26 Department of Labor Instruction under Occupational Safety and Health  
27 Administration guidance on the multi-employer citation policy recognizes  
28 the realistic practices in the construction industry. **Control** of a

1 worksite can be established by **contract or practice** under particular  
2 facts and circumstances through preponderant evidence; however the  
3 controlling employer must be able to **prevent or correct a violation.**

4 Here there is no proof of a violation because a safe recognized  
5 alternate means of protection (pigtail) was implemented to eliminate the  
6 hazard by the direct employer GSL. GSL was the expert in the field.  
7 UNLV had no basis to know, prevent or correct a violative condition.  
8 UNLV believed it was not a standard violation and a safe workable plan.  
9 The un rebutted evidence established GSL used the pigtail system before  
10 and agreed to implement it at UNLV.

11 The evidence in the record did not meet the burden of proof to  
12 establish a finding of violation or violative conduct; nor prove the  
13 respondent liable as a controlling employer.

14 Clearly at many construction worksites, hazardous work tasks are  
15 regularly encountered, and must be subject of recognition and  
16 development of safe work plans. However, merely because an accident  
17 occurred, despite use of a recognized safe means to protect employees,  
18 is not a basis for finding a violation under occupational safety and  
19 health law. OSHA does not impose **strict liability** upon employers to  
20 ensure that every worksite is **accident free.** Rather OSHA requires  
21 employers recognize and address working conditions to eliminate all  
22 known or reasonably foreseeable hazards.

23 **The OSH Act does not require employers to provide**  
24 **"certainty" or to eliminate all "inherent" risks,**  
25 **but only to take "reasonable precautionary steps"**  
26 **against "foreseeable" hazards.** *Brennan v. OSHRC,*  
27 *494 F.2d 460, 463 (8<sup>th</sup> Cir. 1974).* As the Supreme  
28 Court has explained, **"the statute was not designed**  
**to require employers to provide absolutely risk-**  
**free workplaces** whenever it is technologically  
feasible," but rather to **reduce "significant risks**  
**from harm."** *Indus. Union Dep., AFL-CIO v. Am.*  
*Petroleum Inst., 448 U.S. 607, 642 (1980); see also*

