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, STATE OF NEVADA

Complainant,

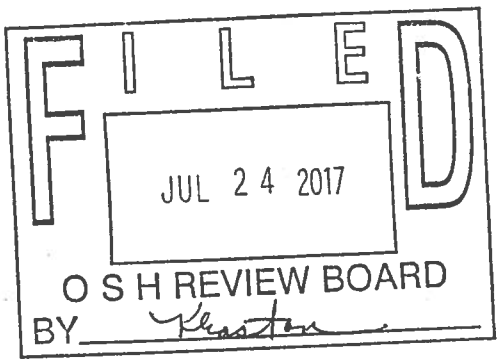
vs.

RENO FORKLIFT, INC.,

Respondent.

_____/

Docket No. RNO 16-1851



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of May 2017, in furtherance of notice duly provided according to law, MS. SALLI ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations** (OSHA); and MR. BRUCE MUNDY, ESQ., appearing on behalf of Respondent, **Reno Forklift, Inc.** the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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 1910.147(c)(4)(i) which provides in pertinent part:

> Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

Complainant alleged:

> A. The employer did not utilize their procedures to control **potentially hazardous energy**, which states, "Before performing **service or maintenance** on equipment or machinery where energy or motion **could release** and cause injury, the energy sources must be isolated and locked out." The employer allowed the practice of running conveyor systems while **servicing** and **maintenance was being performed**. As a result, employees were exposed to unguarded rotating rollers, and an employee's left arm was fractured after it was caught in the rollers of a conveyor. (Emphasis added)
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> B. The employer did not utilize their procedures to control potentially hazardous energy, which states, "Before performing **service or maintenance** on equipment or machinery where energy or motion **could release** and cause injury, the energy sources must be isolated and locked out." The employer allowed the practice of running conveyor systems while **servicing and maintenance as being performed**. As a result, employees were exposed to an unguarded sprocket and chain. (Emphasis added)
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> C. The employer did not develop, document, and utilize a written procedure for each piece or type of equipment (e.g. **conveyors**) as described in their program. A form entitled "LOTO Written Procedure (template)" was in their program but was not completed for conveyors. (Emphasis added)

The citation was classified as Serious. The proposed penalty is in the amount of $1,400.00.

Counsel for the complainant and respondent stipulated to the admission of evidence at complainant Exhibits 1 through 3, and respondent's RF 1 through 2.

The parties additionally stipulated to the accuracy of the penalty calculation.

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

Compliance Safety and Health Officer (CSHO) Mr. Robert Gillings, testified in furtherance of inspection, citation and facts discovered during interviews and investigation. Mr. Gillings identified and referenced complainants Exhibits 1, 2 and 3, and referenced particularly the inspection report and inspection narrative.

On April 7, 2016 CSHO Gillings conducted an inspection at a leased facility located at 5360 Capitol Court #100 in Reno, Nevada. The premises were occupied by a company identified as National Cash Register (NCR) as lessee. He referenced his narrative at the Exhibit 1, page 22. Reno Forklift was contacted because of problems involving a New London Engineering conveyor system at National Cash Register (NCR). On April 4, 2016 at approximately 9:30 a.m., Reno Forklift employee, Mr. Fred Blackwater, was trying to determine whether there was a faulty roller in the conveyor and reached into an unguarded belt bed of the running conveyor. The employee's left arm was caught in the conveyor roller resulting in injuries, including a fractured left forearm. Mr. Blackwater stated that he had used the procedure for checking faulty rollers with the conveyor in operation/running previously and did not know any other way to check for faulty rollers. Mr. Doug Ramsey, the installation supervisor and Mr. Bob Manning (Safety Director) reported that the conveyor has to be running to detect a faulty roller or track belt. Mr. Ramsey also informed CSHO Gillings that Mr. Blackwater should have used a tool instead of his hand to check the rollers.

Mr. Gillings further testified from his reported findings that the sprocket chain guard and the access cover for the belt bed were removed before the accident occurred. Mr. Blackwater requested Mr. Cody Holland, an NCR employee, to restart the conveyor shortly before the accident occurred. CSHO Gillings determined the employer's Lock Out Tag

Out Program (LOTO) does not instruct employees to use a tool for the described roller analysis process. He noted the Reno Forklift accident report reference under "corrective actions" provided "meeting with employee" and the "expected result . . . would be to explain an alternative way to detect a failing roller . . .." CSHO Gillings further found that the equipment owners manual provided that ". . . under maintenance safety . . . all access covers and safety guards must be securely replaced before restarting machinery, even temporarily." He testified Reno Forklift did not develop, document and utilize procedures to control potentially hazardous energy and referenced the allegations in the citation issued at subparagraphs A, B and C at Exhibit 1, page 42-52.

CSHO Gillings referenced the witness statement obtained from Mr. Blackwater on April 12, 2016 at Exhibit 1, page 30-31. He testified Mr. Blackwater informed him it was necessary to "peel the roller" to check the bearings so required it to be "running." Mr. Blackwater reported in his witness statement that he instructed Mr. Holland to start the conveyor so he could "find the noise." The witness statement further included reporting that ". . . to my knowledge there is no other way to **test** the rollers . . . I have **tested** rollers with the conveyor running in the past." The witness statement further provided Mr. Blackwater is a foreman and trained in Lock Out Tag Out procedures. He further reported that Cody (Mr. Holland) was there to assist or help in any way. He further described the LOTO procedures implemented by the employer which required communication between an employee and management official for the customer on lockout procedures. He further reported at Exhibit 1, page 31 ". . . it could be possible to take the rollers out individually to check for problems in the future."

Respondent counsel conducted cross-examination of CSHO Gillings. Counsel referenced respondent Exhibit at RF 1, page 2 and requested the witness read the portion of the standard cited at 1910.147(c)(4)(i) which provided procedures be documented and utilized for the control of potentially hazardous energy when employees are engaged in activities covered under the cited section. Mr. Gillings read the eight "exceptions" for "documentation of procedures" and explained the required elements for the exception to apply for compliance with the OSHA standard. "The employer need **not** document the required procedure for a particular machine or equipment, when **all** of the elements listed exist." Mr. Gillings testified as to element 6 on whether the equipment was under the **exclusive control** of the respondent. He testified that while NCR employee (Mr. Holland) was instructed to initially shut the power, he did not believe the control was **exclusive** because there was no lockout/tagout device attached to the power source. Mr. Gillings testified that it was not okay for a service employee to work on a machine while it is running.

Counsel continued cross-examination as to the referenced exceptions where an employer need not document required procedures for a particular machine or equipment. Counsel inquired whether there are any circumstances where a machine must be running to conduct a **test**. Mr. Gillings responded there were exceptions in procedures, but must include exclusive control and assurance of Lock Out Tag Out before the work can be performed. He testified respondent did not demonstrate any evidence of compliance with the subject elements to satisfy the exception.

On redirect examination counsel inquired as to the Federal interpretation letter regarding the exception to compliance and referenced Exhibit 2, at page 71. Mr. Gillings testified **all** factors

must be present to constitute exception. He further testified the machine was not locked out nor were the employees "removed from the area when energization and testing and/or positioning occurred . . .." Mr. Gillings testified Mr. Blackwater instructed the machine be energized while he had his hands near the rollers. Counsel referenced 29 CFR 1910.147(e)(2)(i) requiring all employees be safely positioned or removed from the area. Mr. Gillings testified the **only employee** in the area was the injured employee, Mr. Blackwater, who was **testing** the machinery.

Complainant presented testimony from witness Mr. Jake LaFrance, the OSHES Safety Supervisor. Mr. LaFrance testified as to the **applicability** of the cited standard to the **facts of violation** found by CSHO Gillings and confirmed by him as supervisor. He testified there was no company procedure to satisfy the exception for compliance under elements identified in the standard at 29 CFR 1910.147(c)(4)(i). He identified the employer LOTO program at Exhibit 3, pages 85 and 86 for control of the hazardous elements while performing **service** on the machinery. Mr. LaFrance testified the employer violated its own procedures in permitting employee Blackwater to **work** on the equipment while it was operating.

Mr. LaFrance identified the photographic evidence at Exhibit 1, pages 66 and 67 and explained the facts of violation as alleged at subparagraphs A, B and C of the citation. He testified the steps shown for employee protection were not followed. Mr. LaFrance responded to questions as to each of the elements of the exceptions in 29 CFR 1910.147(c)(4)(i), noting that **all** had to be present for compliance under the cited standard. He testified that the general protective measures are set forth in the lockout/tagout standard and if there are

unusual circumstances found for any situation then those have to be developed and implemented under specific procedures that are determined to be compliant for an exception to apply.

Mr. LaFrance also testified as to the proof element of **employer knowledge** referencing the safety director witness statement at page 33 as to work on conveyor equipment while operational. He testified the employer knew the LOTO standards were not in effect, followed, nor supported by any special procedures in place to protect employees from the recognized hazard exposures of the operating equipment.

Mr. LaFrance testified he was informed by the employer that a maritime standard applied rather than the cited standard under general industry. He testified the operation was clearly not maritime in nature, but general industry. He confirmed the stipulation as to propriety of the penalty calculation and related factors performed in compliance with the operations manual to support the citation. He testified that for some **alternate compliance** defense to be effectuated with the energy active, employees needed to be removed from the area; and the employer have in place a developed and implemented procedure for something to "restrain the system" or otherwise prevent hands from contacting operating rollers. He responded to questions testifying that LOTO procedures must be in place to assure an employee is not injured; but also satisfy special procedures to protect employees from any energy when **servicing** equipment.

Complainant presented witness testimony from Mr. Freddie Blackwater, the injured respondent employee. He identified his witness statement at Exhibit 1, page 30, and confirmed ". . . to my knowledge there is no other way to **test** rollers" unless the conveyor is running. "I have **tested** rollers with the conveyor running in the past." Mr.

Blackwater testified it was possible to remove the rollers from the machine to test them or check for defects.

On cross-examination Mr. Blackwater testified that he instructed Cody to turn on the machine, but did not remove the LOTO device. Mr. Blackwater testified the LOTO device was not his because he was working at the premises owned by NCR.

Respondent presented evidence and witness testimony from Mr. George Pimpl, the owner of the company. He identified the LOTO procedures utilized, developed and documented by his company. He described the procedures for employees working on equipment and admitted the machine was running when Mr. Blackwater was injured. He identified the company safety program and explained the LOTO procedures and safety practices. Mr. Pimpl identified Exhibit RF 2 as a "sign up sheet for LOTO training." He testified that he never trained nor advocated an employee place his hand on the rollers while equipment is energized ". . . they must use a tool."

On cross-examination Mr. Pimpl testified that he is aware that employees service machines while they are running. On questions as to whether he was aware the company has no safety policy for such work on energizing conveyors, Mr. Pimpl responded "no." When asked what steps the employees take when working on energized equipment, Mr. Pimpl explained they first lockout the energy source, stand away from the equipment, and turn on the power with no one actually working on the machine. Counsel asked if he was aware they did not remove all employees from the area, he responded negatively. Mr. Pimpl then testified that ". . . I work on equipment energized and employees do too, so long as they comply with the safety requirements of the standard . . . and that Freddie (Mr. Blackwater) should not have had his hands

in the unit in accordance with company practice and policy."

The parties provided closing arguments. Complainant argued the burden of proof had been met and the facts of violation supported a finding of noncompliance with the cited standard to confirm the citation. Counsel argued there were no procedures utilized, developed or documented for LOTO while working on energized equipment. The company program does not provide for same nor did the subject work meet all of the exceptions contained in the standard to permit compliant work on operating machinery. Counsel referenced and asserted the findings made by CSHO Gillings in the citation at subparagraphs A, B and C were established. The employer did not maintain procedures to control the energy while employees performed service or maintenance on equipment and no procedures were in place on the day of the accident. The employer allowed the practice of running conveyor systems while servicing of equipment. However the employer did not utilize procedures to control the hazardous energy because the energy was not "locked out." As to subsection C, counsel referenced the employer written LOTO procedure in the safety plan and asserted the form had not been completed with regard to "conveyors." Counsel argued that Mr. Blackwater admitted he removed the chain guard and instructed the equipment be energized. Counsel argued Mr. Blackwater's testimony reflected he had been trained that way; and Mr. Pimpl testified that's the company procedure under its LOTO program. There was no testimony or evidence on how employees were trained to work on energized equipment. The employer referenced the exceptions in the standard at 1920.147(c)(4)(i), however there was no evidence the employer met "**all** of the requirements" for the exceptions to apply. Specifically, there was no LOTO device under the control of the employee. So it must be assumed that it was a situation where the

power was off at the switch, but still not under the **sole** control of the exposed employee. Counsel further argued that there was no compliance as to 1910.147(f)(1), noting page 4, that employees were not removed from the area when the power was energized. Mr. Blackwater was there, had his hand on the equipment, and it is undisputed he was the employee injured. There was no tool in use. So the evidence demonstrated it was not a situation where employees all stepped away from the equipment to observe the energized operations, but rather Mr. Blackwell remained working on the unit with his hands in contact with the rollers.

Counsel argued the federal interpretation letter references examples as to what can be done, but specifically provided ". . . that no employee can be exposed to operation without some developed and implemented procedures to protect the employee." Counsel further noted the standard referenced at page 69 applies "only" to the maritime industry.

Counsel concluded arguments by asserting there can't be a defense of employee misconduct because there was no evidence offered to support the defense. However there is evidence that Mr. Blackwater was trained and allowed to work on energized equipment; and Mr. Pimpl agreed.

Respondent provided closing argument. ". . . The standard cited was **not applicable** to the facts nor was there evidence of any violative conduct which is required to meet the complainant's burden of proof. . ." Counsel argued there was no issue as to the employer not having a LOTO procedure for conveyors because it is not relevant. Counsel argued that in the subject case the employer needed to work on energized equipment; and even with a perfect LOTO plan and documents in place, the injury could not have been prevented because Mr. Blackwater instructed power be turned on. The employee was not hurt because the

equipment accidentally or unexpectedly came on. The power was on and the employee knew it. There is no OSHA proof of causation of injury based on LOTO. The employee made a decision to turn on the power despite the employer's LOTO program and his training which was to never place hands into operating equipment including a conveyor belt. So the standard is not applicable; and no burden of proof of violation of the standard was met by complainant. They had a LOTO plan in place; procedures were developed and utilized for the control of the hazardous energy.

Mr. Pimpl testified the LOTO plan was followed in accordance with the OSHA standard. There was a single lockout in place under the **control** of Mr. Blackwater. A review of the **exceptions** to the standard at 1910.147(c)(4)(i) shows how the exceptions did in fact apply. This was not a case of unknown, sudden or reserve energy activating, so the real purpose behind LOTO was not in question. The company's LOTO plan was not violated and the facts were not applicable for finding a violation. The LOTO plan recognizes an exception because there's an understanding that often times equipment must be serviced or worked on while it is operational. The power had to be energized and the employee followed all procedures. Mr. Blackwater was trained and complied with the exceptions referenced in the standard. Unfortunately he used his hand, instead of a tool as trained. Mr. Blackwater instructed the helper, Cody, to shut off the power so it couldn't be accidentally turned on. So he did "**control**" the energy, but he did it through another employee. All other elements of the exception were satisfied. There is simply no proof of a violation. The employee had the right to lawfully service this equipment while it was energized. As to the failure to meet the exception for clearing of all employees from the area, the only employee

was Mr. Blackwater who was working on it and injured when he stuck his finger into the rollers instead of a tool. That is just simply an obvious part of all training; an employee does not put his hands or his fingers into operating equipment. So it is obvious that all the exceptions were followed; the LOTO plan was in place to protect the employees, the employer has never instructed, trained, nor permitted employees to put their hands in an operating piece of equipment if it must be worked on while energized. They must use a tool, so all the protections were in place. There is no satisfaction of the burden of proof by complainant and the citation must be dismissed.

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

> NAC 618.788 (NRS 618.295) In all proceedings commenced by the filing of a notice of contest, the **burden of proof** rests with the Chief. (Emphasis added)
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> 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). (Emphasis added)
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> NRS 233B(2) "Preponderance of 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.
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> 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;
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> 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). (emphasis added)

NRS 618.625 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 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)

The proof elements required for a finding of violation of the cited standard were not met by complainant as to **applicability, noncompliant conditions, nor employer knowledge.** The statutory burden of proof by a preponderance of evidence under occupational safety and health law is upon the complainant NVOSHES. The Board finds from the facts in evidence, the employer was cited and prosecuted under the incorrect standard. Employee Blackwater was engaged in **testing work** at the time of the accident as opposed to **service/maintenance work.** The standards specifically address the differences and safety compliance requirements under the two separate work efforts, i.e. **service/maintenance** and **testing.** Further, the standards specifically provide **exceptions** to the requirement that procedures be developed, documented and utilized for the control of potentially hazardous energy.

29 CFR 1910.147(c)(4)(i) which was the charging violation provides:

> Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

Note: **Exception: The employer need not document the required procedure for a particular machine or equipment, when all of the following elements exist:** (1) The machine or equipment has no potential for stored or residual energy or reaccumulation of stored energy after shut down which could endanger employees; (2) the machine or equipment has a single energy source which can be readily identified and isolated; (3) the isolation and locking out of that energy source will completely deenergize and deactivate the machine or equipment; (4) the machine or equipment is isolated from that energy source and locked out during servicing or maintenance; (5) a single lockout device will achieve a locked-out condition; (6) the lockout device is under the exclusive control of the authorized employee performing the servicing or maintenance; (7) the servicing or maintenance does not create hazards for other employees; and (8) the employer, in utilizing this exception, has had no accidents involving the unexpected activation or reenergization of the machine or equipment during servicing or maintenance. (Emphasis added)

29 CFR 1910.147(a)(2)(ii) provides:

> Normal production operations are not covered by this standard . . .

29 CFR 1910.147(f)(1) provides:

> **Testing** or positioning of machines, equipment or components thereof. In situations in which lockout or tagout devices must be temporarily removed from the energy isolating device and the machine or equipment **energized to test** or position the machine, equipment or component thereof, the following sequence of actions shall be followed:
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> 29 CFR 1910.147(f)(1)(i) **Clear the machine or equipment of tools** and materials in accordance with paragraph (e)(1) of this section;
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> 29 CFR 1910.147(f)(1)(ii) **Remove employees from the machine or equipment area** in accordance with paragraph (e)(2) of this section;
>
> 29 CFR 1910.147(f)(1)(iii) **Remove the lockout or tagout devices** as specified in paragraph (3)(3) of this section;
>
> 29 CFR 1910.147(f)(1)(iv) **Energize and proceed with testing** or positioning;
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> 29 CFR 1910.147(f)(1)(v) **Deenergize all systems** and reapply energy control measures . . . (Emphasis added)

The cited standard and the citation charges relied upon by OSHES constrained an analysis and proof of the employer's responsibilities to a **service** work effort that was not applicable to the facts in evidence. The testimony is replete with references to the work effort involving "**testing.**" It was undisputed the work effort underway when the accident occurred was only **testing.** However, generalized terms used during the hearing blurred the actual conditions at the jobsite as well as the actual employee work effort, safety requirements and appropriate conduct. The preponderant evidence showed the employee work effort was only **testing** the equipment. Review and comparison of the specific standards in 29 CFR 1910.147(1) and subreferences demonstrates jobsite conditions and a work effort not as portrayed in the citation allegations, proof elements and/or analyses provided by the complainant in its case in chief.

The Board finds the facts in evidence establish the work effort to be that of **testing** and should have been cited under 1910.147(f)(1) and analyzed for compliance under the applicable specific standard accordingly. See transcript pages 19:9, 24:23, 25:16, 28:13, 21, 25, 29:4, 7, 35:22, 45:13, 88:9, 90:17, 91:8, 22, 94:5.

Complainant witness Steigerwald testified that if **testing** of machinery is absolutely necessary while equipment is energized, Code of Federal 1910.147(f)(1) must be followed. He further confirmed in response to a question that he would ". . . agree there are some circumstances when it's proper to work on the machine, in this case a conveyor, while running. Transcript page 25, lines 14-22. There was no persuasive nor preponderant evidence to establish the position of OSHES that the safety measures required under 1910.147(f)(1) were not essentially met simply because the employee performing the testing, Mr.

Blackwater, remained. Further, the customer employee Cody with whom Mr. Blackwater was in direct contact was at the control box and deenergized and reenergized the system under the controlling instructions of Mr. Blackwater. The unrefuted evidence is that **only testing was underway, prior to any actual service or maintenance** being conducted. A reasonable analysis of the facts in evidence established a compliant worksite under the testing procedure governed by the specific standard at 29 CFR 1910.147(f)(1) et seq. Obviously an employee performing the testing **cannot remove himself** from the area otherwise there would be no testing. Further, a core principle for LOTO procedures is safeguarding against accidental reenergizing of power or release of stored energy unknown to an exposed employee. Here again, Mr. Blackwater was in **control** of the energy source through his direct contact with employee Cody who was at the power box.

The employer was not required to document the testing procedures because the **exception** provided under the standard 1910.147(c)(4)(i) were satisfied under a plain and reasonable reading of the standard, **supra** pg. 14 line 4.

Once the facts in evidence and the work effort underway are analyzed, a reasonable finding and conclusion must result in a determination of no violation. Again, this was a case of **testing** not one of **maintenance/service**. Neither complainant nor respondent presented a clear distinction of the work effort throughout the proceeding however the burden of proof is upon the complainant. The facts, evidence and witness responses to questioning require a review of the cited standard and **exceptions** at 1910.147(c)(4)(i) as well as the **service** and **maintenance** special standard under 1910.147(a)(2)(ii) and the **testing** standard and subsections thereunder at 1910.147(f)(1),

(f)(1)(i), (f)(1)(ii), (f)(1)(iii), (f)(1)(iv) and (f)(1)(v). **Common sense and plain meaning** demonstrate an employee performing the testing obviously could not remove himself. There were no tools, equipment or materials to be "cleared" relevant to the allegations. The lockout/tagout (LOTO) issues were under the **control of Mr. Blackwater** through Mr. Cody. The equipment was **energized** at the **direct instructions** of Mr. Blackwater to Mr. Cody to "proceed with testing" as provided in 1910.147(f)(1)(iv). Lastly, the equipment was deenergized after the accident and therefore the subsection at 1910.147(f)(1)(v) for reenergization is not relevant to the findings of violation or compliance.

The Board further finds the standards recognize there are instances when employees are able to perform **service and maintenance** work on energized machinery provided certain conditions are followed. The Board takes administrative notice that in general industry and the maritime industry, provisions and work safety **exceptions** and directives exist in various types of operations which do **not** require documented procedures. See 29 CFR 1910.147(c)(4)(i) and "Exceptions" supra at pg. 14, line 4. A fair reading of those exceptions relieve the employer of liability even as cited.

The Act (Occupational Safety and Health Act), NVOSHES and this Board as an appellate review body, are principally focused upon dangers and hazardous worksites where employees perform work on **unguarded** energized equipment whether providing service, maintenance, testing or normal operations. However, reasonable **exceptions** are codified and/or recognized. Worksites must be realistically reviewed under a fair and reasonable analysis of the applicable standards to the actual work being performed. The 1910.147 standards specifically recognize distinctions

in the types of potentially violative work conduct. However, NVOSHA erroneously cited a violation for unsafe work involving **service/ maintenance versus testing.**

> The test for the **applicability** of any statutory or regulatory provision **looks first to its text and structure.** When determining a standard's applicability, it is necessary that the standard be given a **reasonable and common-sense interpretation.** *Secretary of Labor v. Precision Concrete Construction*, 19 O.S.H.C. 1404, 1406 (2001). *Secretary of Labor v. Saugus Construction Corp.*, 19 O.S.H.C. 1431, 1432 (2001).
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> It is well settled that the test for the applicability of any statutory or regulatory provision looks **first to the text and structure of the statute** or regulations whose applicability is questioned. If no determination can be reached, courts may then refer to contemporaneous legislative histories of that text. If this inquiry into the meaning of the text does not settle the question, the courts then defer to a **reasonable interpretation** developed by the agency charged with administering the challenged statute or regulation.
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> *Unarco Commercial Prod.*, 16 BNA OSHC 1499, 1502-03 (1502-03, 1993); *Kiewit Western Co.*, 16 BNA OSHC 1689, 1693 (No. 91-2578, 1994). The Commission has also held that standards should be given **reasonable and common-sense interpretations.** *Globe Indus., Inc.*, 10 BNA OSHC 1596, 1598 (No. 77-4313, 1982).

The Board finds there was no preponderant proof of **employer knowledge** that an employee performing **testing or servicing/maintenance work** would use his hand rather than a tool into or near the operating area of a machine. That is clearly and obviously recognized prohibited conduct under **common sense** work safety practices, OSHA standards, and the training provided by Mr. Pimpl subject of his testimmony. Further, the subject employee Mr. Blackwater was a supervisor with advanced OSHA certification and extended experience in the field.

Employer knowledge is an essential proof element required under occupational safety and health law. It must be proved through

preponderant evidence to have occurred either directly or constructively.

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

No **actual** employer knowledge was alleged or subject of preponderant evidence, therefore the Board must look to the recognized principles and case law to find proof to support the required element constructively by imputation to the employer. The evidence established Mr. Blackwater was an experienced foreman supervisory employee who had been trained by the company. He was expected to comply with the OSHA standards and company safety policies including the LOTO program. Generally, violative employee conduct can be imputed to the employer, including that of a supervisory employee charged with the responsibility of enforcing company and OSHA safety standards. The theory is that a responsible employer who does not **actually know** of violative employee conduct should, through the exercise of due diligence, be aware, and therefore knowledgeable that employees are not complying with company safety policies and/or OSHA standards. Similarly, if a supervisory employee is involved in self-misconduct or failure to enforce safety compliance, that too can be subject of imputation under established Review Commission, Federal District Court, and Nevada law. *Division of Occupational Safety and Health vs. Pabco Gypsum,* 105 Nev. 371, 775 P.2d 701 (1989). *Terra Contracting, Inc. vs. Chief Administrative Officer of*

the Occupational Safety and Health Administration, et al., citing ComTran Grp., Inc. vs. U.S. Dep't of Labor, 722 F.3d 1304, 1316 (11 Cir. 2013) The Nevada Supreme Court in *Terra, supra* established the legal guidance for when and how supervisory employee misconduct, whether his own or by employees for whom he is charged with supervisory responsibility, can be by imputed to the employer. *Terra,* pages 3, 4.

The unrefuted evidence here was the supervisory foreman injured employee, Mr. Blackwater, admitted he made a mistake and placed his hand in a point of contact with the rollers when he instructed the power be reenergized. While his testimony reflected he had performed work on energized equipment in the past, there was no persuasive or preponderant evidence that Mr. Pimpl knew that he (Blackwater) either serviced or particularly **tested** energized equipment using his hand near activating rollers rather than a tool. Mr. Pimpl testified he had no knowledge of Mr. Blackwater or any other employees using other than a tool to test active machinery. (Transcript, pg. 94.) The testimony was credible, unrebutted, and not impeached. To impute **knowledge** of the supervisory employee violative conduct to the employer as proof for the element of "**employer knowledge**" requires preponderant evidence. Accordingly, the evidence must establish the employer should have **foreseen** and therefore constructively **known** foreman Blackwater would not perform the job tasks as trained, which included compliance with the company safety rules, and OSHA standards.

Complainant alleged the citation was for the failure of the employer to demonstrate ". . . procedures developed, documented and utilized for the **control** of potentially hazardous energy when employees are engaged in the activities covered by this section. . . ." Here, the weight of preponderant evidence was that supervisory employee Blackwater

was **trained** and in **control** of the potentially hazardous energy. The general procedures and policies of the company and OSHA training, as well as the existence of a LOTO program for control of hazardous energy were not proven to be non-existent by a preponderance of evidence. Further, this was not a case of unexpected re-energization or stored energy activation - rather it was a case of supervisory employee Blackwater in **control** of the potentially hazardous energy and instructing it be activated so that he could perform his **testing** procedures.

Effective compliance under the **exceptions for no requirement to develop or document energy control procedures** is permitted under 29 CFR 1910.147(c)(4)(i). The employee **utilized** control procedures for **testing**; and also effectively satisfied the conditions for compliance under the **exceptions for service/maintenance**. There was no proof of violation of the standard as cited, nor **applicability** to **service/maintenance** work.

In applying the facts in evidence to the rationale set forth by the Nevada Supreme Court in *Terra, supra*, there was insufficient competent preponderant evidence of **foreseeability** on the part of the respondent employer upon which to impute **employer knowledge** for violation of the standard.

Complainant counsel asserted in closing argument, but offered no competent, persuasive, nor preponderant evidence, that the employer had previously instructed, allowed, or acknowledged that his foreman would fail to enforce or personally engage in work which violated the terms of the company LOTO program, OSHA standards, or general safety. Clearly a long-standing employee at a supervisory level should not be expected to insert his hand in unguarded operating equipment that he instructed and knew to be energized. Similarly an employer should not be expected

to foresee that any employee, and particularly a supervisor, would intentionally use his hand near roller contact as opposed to a tool. The Nevada Supreme Court in *Terra* requires specific supportive preponderant evidence to establish constructive employer knowledge.

Hazardous work tasks are regularly encountered by employees in the subject and other industries and must be reasonably protected and enforced under recognized safe work plans. However, merely because an accident occurred, is not alone a basis for finding a violation under occupational safety and health law. OSHA does not impose **strict liability** upon employers to ensure that every worksite is **accident free.** Rather, OSHA requires employers recognize and address working conditions to eliminate all known or reasonably foreseeable hazards.

> **The OSH Act does not require employers to provide "certainty" or to eliminate all "inherent" risks, but only to take "reasonable precautionary steps" against "foreseeable" hazards.** *Brennan v. OSHRC,* 494 F.2d 460, 463 (8th Cir. 1974). As the Supreme 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 Nat'l Realty & Constr. Co. v. OSHRC,* 489 F.2d 1257 (D.C. Cir. 1973)("Congress quite clearly did not intend the general duty clause to impose strict liability."); *Pelron Corp.,* 12 BNA OSHC 1833, 1986 WL 53616, at *3.)(No. 82-388)(same). (emphasis added)
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> 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.** (emphasis added) 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)
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> . . . the mere occurrence of a safety violation does not establish ineffective enforcement, *Secretary of Labor v. Raytheon Constructors Inc.*, 19 O.S.H.C. 1311, 1314 (2000).

The Board concludes, as a matter of fact and law, that no violation of the cited standard occurred; the citation is dismissed and the proposed penalty denied.

It is the decision of the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD that no violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR 1910.147(c)(4)(i) and the proposed penalty is denied.

The Board directs counsel for the Respondent 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 24th day of July 2017.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JAMES BARNES, Chairman