

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3
4
5
6

7 CHIEF ADMINISTRATIVE OFFICER
8 OF THE OCCUPATIONAL SAFETY AND
9 HEALTH ADMINISTRATION, DIVISION
10 OF INDUSTRIAL RELATIONS OF THE
11 DEPARTMENT OF BUSINESS AND
12 INDUSTRY,

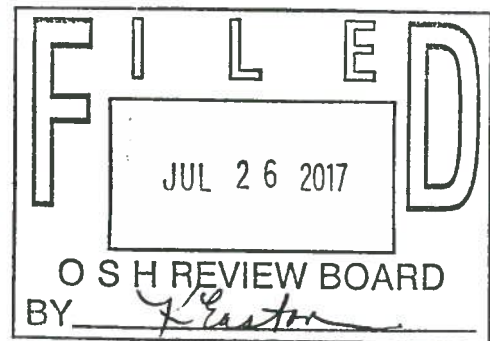
Complainant,

vs.

13 GILMORE CONSTRUCTION, LLC,

14 Respondent.
15 _____/

Docket No. LV 17-1862



16 **DECISION**

17 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
18 **REVIEW BOARD** at hearings on the 14th day of December 2016, and the 15th
19 day of June 2017, in furtherance of notices duly provided according to
20 law. MS. SALLI ORTIZ, ESQ., counsel appeared on behalf of the
21 Complainant, **Chief Administrative Officer of the Occupational Safety and**
22 **Health Administration, Division of Industrial Relations (OSHA)**; and MR.
23 CHRIS McCULLOUGH, ESQ. appeared on behalf of Respondent, **Gilmore**
24 **Construction, LLC**. The **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
25 **BOARD** finds as follows:

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

28 The complaint filed by the OSHA sets forth allegations of violation

RECEIVED

JUL 28 2017

DIR LEGAL
CARSON CITY OFFICE

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

3 Citation 1, Item 1, charges a violation of 29 CFR 1926.501(b) (13)
4 which provides:

5 "Residential Construction." Each employee engaged
6 in residential construction activities 6 feet
7 (1.8M) or more above lower levels shall be
8 protected by guardrail systems, safety net system,
9 or personal fall arrest system unless another
10 provision in paragraph (b) of this section provides
11 for an alternative fall protection measure.
12 Exceptions: When the employer can demonstrate that
13 it is infeasible or creates a greater hazard to use
14 these systems, the employer shall develop and
15 implement a fall protection plan which meets the
16 requirements of paragraph (k) of 1926.502.

17 29 CFR 1926.502(k):

18 "Fall protection plan." This option is available
19 **only** to employees engaged in leading edge work,
20 precast concrete erection work, or **residential**
21 **construction work** (See 1926.501(b) (2), (b) (12), and
22 (b) (13)) who can demonstrate that it is infeasible
23 or it creates a greater hazard to use conventional
24 fall protection equipment. The fall protection plan
25 must conform to the following provisions. (Emphasis
26 added)

27 Note: there is a **presumption** that it is **feasible**
28 and will not create a greater hazard to **implement**
29 **at least one of the above-listed fall protection**
30 **systems**. Accordingly, the employer has the burden
31 of establishing that it is appropriate to implement
32 a fall protection plan which complies with
33 1926.502(k) for a particular workplace situation,
34 in lieu of implementing any of those systems.
35 (Emphasis added)

36 Citation 1, Item 1, charges **in the alternative**, a violation of 29
37 CFR 1926.502(d) (16) (iii), which provides:

38 Personal fall arrest systems, when stopping a fall,
39 shall: Be rigged such that an employee can neither
40 free fall more than 6 feet (1.8 m), nor contact any
41 lower level.

42 NVOSHA alleged three employees of Gilmore
43 Construction, LLC were not protected from fall
44 hazards at the multi-family residential

1 construction project located at 3140 St. Rose Pkwy,
2 Henderson, NV 89183. The employees were working
3 from the top plate of the wood framed wall
4 installing prefabricated trusses on building 6 of
5 the project. The employees were using personal fall
6 arrest systems consisting of harnesses, self-
7 retracting lifeline, and anchor straps. The Werner
8 Autocoil 2, model R210030, self-retracting
9 lifelines were anchored to the top plate of the
10 wall beneath the employees. The top plate was
11 approximately 9 feet above the lower level. The
12 estimated free fall distance was approximately 7
13 feet. The Werner Autocoil 2, self-retracting
14 lifeline is designed to be anchored above the user.
15 The total estimated fall distance when using the
16 Werner Autocoil 2, self-retracting lifeline is 12
17 ½ feet from the bottom of the self-retracting
18 lifeline. The injuries the employees could sustain
19 from a fall of 9 feet to the level below are
20 fractures, contusions, and concussions.

21 GILMORE CONSTRUCTION, LLC WAS PREVIOUSLY CITED FOR
22 A VIOLATION OF A SUBSTANTIALLY SIMILAR OCCUPATIONAL
23 SAFETY AND HEALTH STANDARD, 29 CFR 1926.501(B)(13),
24 WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER
25 1072250, CITATION NUMBER 1, ITEM NUMBER 1 AND WAS
26 AFFIRMED AS A FINAL ORDER ON OCTOBER 6, 2015.

27 and

28 GILMORE CONSTRUCTION, LLC WAS PREVIOUSLY CITED FOR
A VIOLATION OF A SUBSTANTIALLY SIMILAR OCCUPATIONAL
SAFETY AND HEALTH STANDARD, 29 CFR 1926.501(B)(1),
WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER
316004597, CITATION NUMBER 1, ITEM NUMBER 1 AND WAS
AFFIRMED AS A FINAL ORDER ON OCTOBER 4, 2012.

and

GILMORE CONSTRUCTION, LLC WAS PREVIOUSLY CITED FOR
A VIOLATION OF A SUBSTANTIALLY SIMILAR OCCUPATIONAL
SAFETY AND HEALTH STANDARD, 29 CFR 1926.501(B)(13),
WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER
314891771, CITATION NUMBER 1, ITEM NUMBER 1 AND WAS
AFFIRMED AS A FINAL ORDER ON OCTOBER 25, 2011.

The violation was classified as "Repeat-Serious." The proposed
penalty for the alleged violation is in the amount of TWENTY-SEVEN
THOUSAND DOLLARS (\$27,000.00).

Citation 2, Item 1, charges a violation of 29 CFR 1910.1200(g)(8),
which provides:

1 The employer shall maintain in the workplace copies
2 of the required safety data sheets for each
3 hazardous chemical, and shall ensure that they are
4 **readily accessible** during each work shift to
5 employees when they are in the their work area(s).
6 (Electronic access and other alternatives to
7 maintaining paper copies of the safety data sheets
8 are permitted as long as no barriers to immediate
9 employee access in each workplace are created by
10 such options.) (Emphasis added)

11 NVOSHA alleged the Safety Data Sheet was not made
12 readily accessible for three employees of Gilmore
13 Construction, LLC, at the multi-family residential
14 construction project located at 3140 St. Rose Pkwy,
15 Henderson, NV 89183. Employees use Title Bond
16 Subfloor Adhesive on the project and the Safety
17 Data Sheet was not included in the employer-
18 provided Safety Data Sheet binders.

19 The violation was classified as "Other." There was no proposed
20 penalty for Citation 2, Item 1.

21 Complainant and respondent stipulated to the admission of
22 documentary evidence at complainant's Exhibits 1, 2, 3 and 4; and
23 respondent's Exhibits 1-A through 14.

24 Complainant presented testimony and documentary evidence with
25 regard to the alleged violations through Mr. Jeffrey Snell, Compliance
26 Safety and Health Officer (CSHO). He testified as to his investigation,
27 findings and the citation issued to the respondent employer.

28 On or about March 15, 2016 CSHO Jeffrey Snell conducted a
comprehensive site inspection at a multi-employer worksite located a
3140 St. Rose Pkwy, Henderson, NV. He described the work activities
underway at the time of the inspection and noted safety issues relating
to the respondent employer Gilmore Construction, LLC (Gilmore) which
lead to recommendation for issuance of the citations referenced. Mr.
Snell referenced his report and findings at Exhibit 1 and testified
accordingly. In the Gilmore storage container he discovered cases of
Tite Bond Sub Floor Adhesive. The employer onsite safety data sheet

1 binders did not contain the safety data information for the adhesive as
2 required under OSHA standards. He reported at Exhibit 1, pages 15-17
3 that he was informed the binders were recently updated but the employer
4 unable to produce an electronic copy of the safety data sheet at the
5 time of the inspection. The employer hazard communication program was
6 reviewed. CSHO Snell determined a violative condition existed based
7 upon the Safety Data Sheet (SDS) not made readily accessible for three
8 employees of Gilmore Construction at the subject job site. He
9 recommended the issuance of Citation 2, Item 1 for a violation of 29 CFR
10 1910.1200(g)(8).

11 In continued testimony CSHO Snell referenced complainant Exhibit
12 1, page 17 report and photographs in evidence at pages 64-67. He
13 testified that on the second level of building 6 respondent employees
14 were engaged in the work of installing trusses. He testified from his
15 narrative report findings that respondent employees were working while
16 standing on the top plate of a 9 foot high framing structure. The
17 employees were using a personal fall arrest system consisting of a
18 harness, retractable lanyard and anchor straps. The anchor strap was
19 wrapped around a top plate the employees were working from and the body
20 of the retractable hung below the top plate. The approximate total free
21 fall distance was initially determined to be 8 feet and the fall of the
22 level below the employees 9 feet.

23 Mr. Snell testified as to the employee interview statements at
24 Exhibit 1, pages 21 through 26. He further testified on his interviews
25 with employer representatives and his findings from the violation
26 worksheets at Exhibit 1, pages 27 through 35. The employee interviews
27 of Messrs. Gonzalez, Vasquez and Tadao were translated from Spanish to
28 English and hand written by associate CSHO Aldo Lizzaraga; then later

1 transcribed and included in the exhibit report.

2 CSHO Snell testified the photographic exhibits at Exhibit 1, pages
3 64 to 77 particularly depicted a respondent employee working while using
4 a retractable lifeline device. He described the retracting lifeline as
5 a Werner Autocoil 2 model R210030 which he observed anchored beneath the
6 employees at "foot level." He testified from his interviews,
7 observations and photographs that he determined employee exposure due
8 to the measured distance of a fall from the working platform of
9 approximately 9 feet and a free fall distance of approximately 7 feet.
10 He determined the Werner Autocoil (yoyo) device would not protect the
11 employee from the hazard exposure and potential serious injuries due to
12 a fall of 9 feet to the level below. He described the potential
13 injuries to consist of fractures, contusions, and concussions.

14 CSHO Snell testified he determined from his investigative findings
15 that Mr. Guitarez, the respondent superintendent, as well as company
16 managing partner/co-owner Larry Gilmore, Jr. were aware of the distances
17 and the potential hazards resulting from use of the yoyo retractable
18 device when tied off at foot level.

19 Mr. Snell testified email exchanges with representatives of the
20 Werner product manufacturer confirmed his determination that the
21 retractable Werner Autocoil is not recommended for use when tied off at
22 foot level.

23 On cross-examination, Mr. Snell testified on his interpretation of
24 the safety reasons for locating the tie-off point of the lanyard. His
25 primary focus was centered on the height of the fall to be arrested for
26 determining the relationship of the tie-off point. Mr. Snell performed
27 measurements and considered the manufacturer's information to determine
28 the effective length of the recoil line to protect against a potential

1 fall from the work platform. He testified there were alternate measures
2 of protection other than use of devices tied off at working foot levels
3 which he determined would not protect the employee from serious injury
4 or harm in the event of a fall. He testified the lanyards were wrapped
5 around framing material then connected to the harness and the
6 retractable line, however the distance of a fall would still be
7 approximately 9 feet. He testified on the company fall protection
8 policy and noted at respondent Exhibit 10, page 64, that employees were
9 allowed to tie off on trusses. He noted this was permissible, however
10 the subject citation was for the length of the lanyard in consideration
11 of the fall height before contact to the floor. "It all depends on if
12 the set up will stop . . . contact with the ground . . ."

13 Mr. Snell testified that Exhibit 1, page 30, at paragraph 20(e)
14 confirms the top of the plate of the wood deck was 9 foot 1 inch above
15 the ground based upon his interviews with by Mr. Gutierrez, the
16 respondent superintendent. CSHO Snell estimated the fall distance by
17 reference to his report at Exhibit 1, page 30, paragraph 20(e) which
18 provided:

19 "The length of the self-retractable lifeline, the
20 amount of lifeline extended out of the casing to
21 the users harness attachment point, and the length
22 of the anchor used would need to be added to the
23 free fall distance to calculate the total fall
24 distance. An estimate of this added length could
25 range from 3 feet to 6 feet depending on the user's
26 working position, kneeling or standing. Added to
27 Werner's free fall calculation, the user's free
28 fall could range from 5 feet to 9 feet before the
self-retracing lifeline would engage and start to
decelerate the user's fall."

26 Mr. Snell referenced photographs at Exhibit 1, pages 64A and 66 and
27 responded to questions with regard to the calculations he made as
28 opposed to those identified by the respondent. He testified the

1 respondent's position was that the yoyo device would "brake" the fall,
2 but he believed the employee would still strike the area below.

3 On cross-examination counsel challenged CSHO Snell on his
4 measurements and asserted they were incorrect and opposed to those
5 provided and subject of testimony by the respondent representatives.
6 On further cross-examination CSHO Snell testified with regard to
7 compliance considerations based upon **infeasibility, greater hazard,** and
8 **alternate means** of compliance as opposed to use of the Werner yoyo
9 device. He testified the requirements to demonstrate infeasibility and
10 greater hazard are specifically provided for in the standard and require
11 more evidence on the part of an employer beyond simply concluding
12 existent worksite conditions permitted safer use of the retractable
13 device.

14 Respondent presented witness testimony at the continued hearing
15 from Mr. Larry Gilmore, Jr. He denied statements by CSHO Snell
16 attributed to him at Exhibit 1, page 30. Mr. Gilmore testified there
17 was an apparent misunderstanding by the CSHO after a brief discussion
18 on the retractable device when he was describing various alternate means
19 of protection, notably a potential "pole" tie-off point; and use of
20 ladders or options he believed would have been ineffective and/or create
21 a greater hazard than use of the Werner retractable device. He
22 testified the nature of the particular framing work being performed at
23 the time of inspection was such that the yoyo device would work best and
24 prevent employees from hitting the lower area far more assuredly than
25 the various options raised and discussed. He testified the CSHO's
26 measurements at page 30 were not correct nor accurate. Mr. Gilmore
27 testified that 2 feet is the actual distance for the Werner device to
28 effectuate a reasonable level of protection for an employee equipped

1 with same. He admitted the manufacturer's instructions did not
2 recommend use of the retractable tied off at foot level; but he
3 (Gilmore) believed it was effective, conducted his own testing, and
4 understood it was permitted under OSHA standards during certain
5 configurations of work efforts. Mr. Gilmore testified the device
6 protected the employees from a fall injury while working in the
7 particular configuration of the framing. He further testified there was
8 no actual exposure to the fall hazard depicted in the photographs,
9 observed by CSHO Snell, nor supported by his calculations.

10 At the conclusion of evidence and testimony counsel presented
11 closing arguments.

12 Complainant asserted the facts of violation have been established
13 from the testimony and photographs at Exhibit 1 as well as the admitted
14 incorrect use of the Werner yoyo under the circumstances and
15 measurements calculated by CSHO Snell. Counsel asserted the burden of
16 proof was met as to the required elements; and there was no showing or
17 proof of the affirmative defenses for "greater hazard" or
18 "infeasibility" as recognized under occupational safety and health law.
19 Counsel argued there was no challenge to respondent's overall site
20 safety or its work plan, just one single operation subject of the fall
21 citation. ". . . This was a case where the manufacturer and OSHEs
22 believed that an employee simply cannot anchor the safety line below the
23 employee (foot level) if the line is not designed to prevent the
24 employee from hitting the lower level below. . . ." Counsel argued that
25 in this specific case there was no evidence by the defense that the
26 employee would not hit the lower deck because of the way the yoyo was
27 set up (anchored). It's obvious the potential hazard is depicted from
28 the photographs in evidence and the unquestioned use contrary to the

1 manufacturer's instructions.

2 Counsel further argued the violation at Citation 2, Item 1 was
3 clear and the facts undisputed. The wrong SDS was at the job site.
4 This was a simple "paper" violation classified as "other" and without
5 penalty.

6 Respondent argued the anchor point is the controlling factor and
7 it must be located such that an employee can safely perform work and not
8 come into contact with floor below if an accident occurs. There was no
9 **employee exposure** to injury while working attached to the recoil device.
10 He asserted **employer knowledge** was not proven based upon the testimony
11 of CSHO Snell. Mr. Snell's testimonial recollections of his discussions
12 with Mr. Gilmore at the jobsite during inspection were not credible.
13 There was no proof that Mr. Gilmore had knowledge that an employee would
14 strike the floor below during a fall while using the Werner device. Mr.
15 Gilmore explained in his testimony what would actually happen if a
16 recognized "pole system" were used in conjunction with the device.
17 Counsel argued the accurate measurements and analysis under the facts
18 in evidence demonstrate there was no burden of proof to show the yoyo
19 would not function to arrest a fall as used. Counsel argued the CSHO's
20 determinations were simply not accurate by referencing a 12 foot 6 inch
21 distance at Exhibit 1 and during his testimony to be the bottom point
22 of the self-retractable lifeline to the lower level. "He utilized the
23 wrong calculations . . . the math was incorrect . . ." The top plate
24 was 9 foot 1 inch on which the employees were standing and the CSHO
25 admitted the employee would have stopped his fall by 1-2 inches above
26 the floor surface based upon the facts in evidence. There was simply no
27 evidence to prove the subject employee depicted in the photograph using
28 the Werner recoil system was working in violation of the standard.

1 There was actually 2 more feet of protected distance before reaching the
2 floor level under a correct analysis of the measurements and
3 calculations. Therefore the burden of proof for a violation was not met
4 which is incumbent upon the complainant.

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

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

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

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

16 NAC 618.788 (NRS 618.295) In all proceedings
17 commenced by the filing of a notice of contest, the
burden of proof rests with the Chief.

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,*
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)

25 A respondent may rebut allegations by showing:

- 26 1. The standard was inapplicable to the situation
27 at issue;
- 28 2. **The situation was in compliance; or lack of**
access to a hazard. See, *Anning-Johnson Co.*,

1 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).
2 (emphasis added)

3 NRS 618.625 provides in pertinent part:

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

14 NRS 618.635 provides in pertinent part:

15 Any employer who willfully or repeatedly violates
16 any requirements of this chapter, any standard,
17 rule, regulation or order promulgated or prescribed
18 pursuant to this chapter, may be assessed an
19 administrative fine of not more than \$70,000 for
20 each violation, but not less than \$5,000 for each
21 willful violation. (emphasis added)

22 The Board finds no preponderant evidence under the complainant's
23 burden of proof to support findings of violations as charged at Citation
24 1, Item 1, nor Citation 2, Item 1. It is undisputed the employer
25 provided a Werner Autocoil self-retracting lifeline safety device for
26 use by its employees at the subject worksite. A core factual analysis
27 to determine a violation at Citation 1, Item 1 centers upon an effective
28 fall protection use of the device when anchored at the "foot level" of
employees working at approximately 9 foot 1 inch about the ground level.
While OSHES premised its case of violative conduct on permitting the
tie-off point at the working platform foot level, this Board does not
interpret the applicable law to prevent that type of tie-off
configuration **under certain circumstances and particularly those here**
in evidence.

The Board takes administrative notice of the United States

1 Department of Labor Federal OSHA Interpretation letter applicable to the
2 issue of permissibility to anchor a fall arrest system at employee foot
3 level. (Federal OSHA Interpretation Letter dated September 21, 2007
4 referencing Standard 1926.502(d)(16); 1926.502(d)(16)(iii).) The Board
5 finds, in conformance with the Federal Interpretation Letter advisory
6 and rationale:

7 "OSHA requirements do not specifically prohibit an
8 employer from anchoring a lanyard at or near an
9 employees's feet. Instead, OSHA standards require
10 that a personal fall arrest system be rigged such
11 that an employee cannot free fall more than 6 feet,
12 or contact any lower level..." (Emphasis added)

11 Accordingly, the fact of an anchor point at foot level is not
12 preponderant evidence, *per se*, of a **violative condition**; nor is a
13 manufacturer recommendation against such use. The focus of Board
14 analysis is not merely the anchor point, but rather the distance of a
15 potential fall from that anchor point to the ground level, vis-a-vis the
16 reasonable ability of safety equipment to sufficiently arrest an
17 employee fall before striking a hard surface.

18 At the hearings, complainant presented confusing testimony, facts,
19 and measuring data to endeavor support of necessary proof elements to
20 establish **employee exposure** to injuries from a fall. The testing,
21 measurements, calculations and safety system operational theories were
22 not clear, convincing, nor certainly preponderant evidence to establish
23 a violation under Nevada occupational safety and health law. Similarly,
24 respondent's arguments, assertions and estimates were confusing; however
25 it is the **complainant that bears the burden of proof to establish by**
26 **preponderant evidence all of the required proof elements to support a**
27 **finding of violation.** The evidence in total portrayed utilization of
28 a recognized safety device, **under the particular conditions at this**

1 **worksite**, that would reasonably address the protection required to
2 prevent an employee from striking the bottom level in the event of a
3 fall. Again, it is the complainant that must prove by preponderant
4 evidence that **exposure** to serious injury from a fall hazard could
5 potentially occur based upon allegations the safety line device was
6 misused and ineffective to protect the employee as required by the OSHA
7 standards.

8 A fair and independent review of all relevant factors at the
9 worksite to support a violation requires persuasive preponderant
10 evidence. Here, for example, the height of the employee involved was not
11 subject of measurement or submitted competent evidence. For example a
12 5 foot 2 inch employee standing or kneeling on a work platform 9 foot
13 1 inch from the ground level and attached to the Werner yoyo device,
14 could fall and a resultant arrest occur well above the hard surface.
15 While it is arguable an employee attached to the lifeline while moving
16 around on the work surface; and/or a fall occur during an assumed
17 retraction operation of the device resulting in possible contact with
18 the surface below, that is speculative. This would require the Board
19 to rely on speculation **estimates, assumptions, and/or inferences** as to
20 what might or could occur in a series of events. However, it is
21 incumbent upon the **complainant to meet the burden of proof by**
22 **preponderant evidence to establish a violation.**

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

1 When the Secretary has introduced evidence showing
2 the existence of a hazard in the workplace, the
3 employer may, of course, defend by showing that it
4 has taken **all necessary precautions to prevent the
occurrence of the violation.** *Western Mass. Elec.
Co., 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981).*
(Emphasis added)

5
6 The Board concludes that reasonable protection was in place at the
7 **subject employer worksite** in compliance with required fall safety
8 protection standards through employee use of the recoil device anchored
9 at foot level. Utilization of the recoil device, merely contrary to
10 manufacturer's instructions; and/or the various opinions or estimates
11 as to a failure point for "braking" or arresting a fall were not proven
12 to be in violation of the standard by a preponderance of evidence.
13 Accordingly OSHES did not meet the burden of proof as to **employee
exposure.**

14
15 Further there was no preponderant evidence for the proof element
16 of **employer knowledge.** While it appears the respondent manager, co-
17 owner and safety director were aware the Werner retractable device was
18 being utilized, there was no proof of **employer knowledge** of the
19 **existence of non-complying conditions** simply because the manufacturer
20 does not recommend tie-off at foot level. Indeed an anchor point at
21 foot level is recognized as being appropriate in **certain working
conditions or under circumstances** that would make the work operation
22 more difficult, impractical and/or dangerous even though not arising to
23 the level for defensive elements of **infeasibility, economic or
24 technological, or greater hazard.** The Board need not reach the proof
25 elements of **infeasibility** or **greater hazard** because there was no prima
26 facie case of violation established; nor is the respondent required to
27 prove same under the Board's analysis of the exceptions provided under
28

1 29 CFR 1926.502(k) based upon the finding of no exposure.

2 Additionally, respondent witnesses testified they believed the
3 employees to be better protected under utilization of the Werner device
4 than various options that might have been available which approximated,
5 although not proven, to be a greater hazard or infeasible. They
6 believed OSHA permitted tie off at foot level. The testimony was
7 credible. That belief was supported in the federal OSHA interpretation
8 letter. Inferences may be drawn from the totality of testimony and
9 evidence from both sides to support the admitted evidence. Accordingly,
10 the Board further finds and concludes there was no sufficient
11 preponderant evidence to prove the element of **non-complying conditions**
12 at the employer jobsite for an unprotected fall hazard.

13 When the Secretary has introduced evidence showing
14 the existence of a hazard in the workplace, the
15 **employer may, of course, defend by showing that it**
16 **has taken all necessary precautions to prevent the**
 occurrence of the violation. *Western Mass. Elec.*
 Co., (supra pg. 14) (Emphasis added)

17 At Citation 2, Item 1, the Board finds evidence the respondent
18 maintained the appropriate safety data (SDS) information. However, the
19 employer was unable to actually produce the document at the jobsite
20 during the initial OSHA request. The Board finds that while the
21 citation was classified as "other" and no penalty proposed, violations
22 of any type affect an employer's work record. The weight of evidence
23 and lawful inference demonstrated the existent SDS information, but an
24 incorrect document transmitted to the jobsite and not immediately
25 available electronically. The SDS was presented to OSHES, but not
26 timely. The condition was promptly abated. The testimony was credible
27 and un rebutted. On balance, the weight of facts in evidence, including
28 prompt abatement demonstrate effective compliance with the purposes of

1 the SDS requirements. However this specific finding is limited to the
2 facts and circumstances in evidence. Worksite safety requirements even
3 though of a "paper" violation nature should not be treated lightly by
4 respondent or any employer. The overall protective scheme for workplace
5 safety through OSHA standards is dependent upon a variety of components.
6 It was appropriate for CSHO Snell to investigate, request documentation,
7 and pursue the issue of the SDS. The Board's determination of no
8 violation is based upon a fairness analysis, and principally reliant
9 upon the SDS information having been actually existent, but simply not
10 timely produced. Therefore, an adjustment appropriate due to the
11 potential harsh results from a strict interpretation and finding of
12 violation. Citation 2, Item 1 and the proposed violation are dismissed.

13 The Board concludes, as a matter of fact and law, that no
14 violations occurred and the proposed penalty denied.

15 It is the decision of the NEVADA OCCUPATIONAL SAFETY AND HEALTH
16 REVIEW BOARD that no violation of Nevada Revised Statutes did occur as
17 to Citation 1, Item 1, 29 CFR 1926.501(b)(13) and the proposed penalty
18 is denied.

19 It is further the decision of the NEVADA OCCUPATIONAL SAFETY AND
20 HEALTH REVIEW BOARD that no violation of Nevada Revised Statutes did
21 occur as to Citation 2, Item 1, 29 CFR 1910.1200(g)(8) and the proposed
22 zero penalty and classification dismissed.

23 The Board directs counsel for the Respondent to submit proposed
24 Findings of Fact and Conclusions of Law to the NEVADA OCCUPATIONAL
25 SAFETY AND HEALTH REVIEW BOARD and serve copies on opposing counsel
26 within twenty (20) days from date of decision. After five (5) days time
27 for filing any objection, the final Findings of Fact and Conclusions of
28 Law shall be submitted to the NEVADA OCCUPATIONAL SAFETY AND

1 HEALTH REVIEW BOARD by prevailing counsel. Service of the Findings of
2 Fact and Conclusions of Law signed by the Chairman of the NEVADA
3 OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD shall constitute the Final
4 Order of the BOARD.

5 DATED: This 26th day of July 2017.

6 NEVADA OCCUPATIONAL SAFETY AND HEALTH
7 REVIEW BOARD

8 By, /s/
9 JAMES BARNES, Chairman

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28