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,

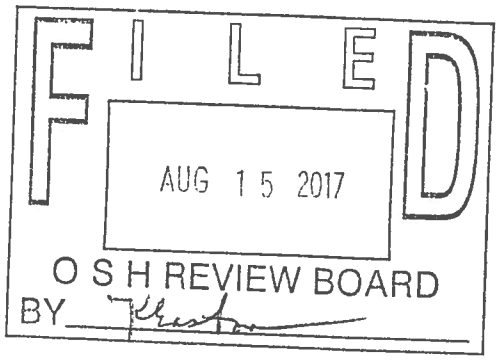
vs.

HARBER CO., INC. dba MOUNTAIN CASCADE OF NEVADA,

Respondent.

_____/

Docket No. LV 17-1902



DECISION

This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced July 12, 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). MR. ROBERT PETERSON, ESQ., appearing on behalf of Respondent, Harber Co., Inc. dba Mountain Cascade of Nevada.

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 NRS 618.987(2), which provides:

> NRS 618.987 Requirements to present employer with completion card.
>
> 2. If a supervisory employee on a construction site fails to present his or her employer with a current and valid completion card for an OSHA-30 course not later than 15 days after being hired, the employer shall suspend or terminate his or her employment.

Complainant alleged:

> Harber Company, Inc. dba Mountain Cascade of Nevada did not suspend or terminate supervisory employees for failing to present them an OSHA 30 card within 15 days of being hired. The employees were supervising the installation of a replacement sewer line in a trench located to the north of the intersection of South Durango Drive and West Agate Avenue, Las Vegas, NV 89113, on March 10, 2017. One employee was the superintendent who had worked for the company since 2015 in a different state, but had started working in Nevada on February 13, 2017. The other employee was the foreman who had worked for the company since 2011.
>
> HARBER COMPANY, INC. DBA MOUNTAIN CASCADE OF NEVADA WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD, NEVADA REVISED STATUTES 618.983(2), WHICH WAS CONTAINED IN OSHA INSPECTION NUMBER 316510247, CITATION NUMBER 1, ITEM NUMBER 3, AND WAS AFFIRMED AS A FINAL ORDER ON JANUARY 4, 2013, WITH RESPECT TO A WORKPLACE LOCATED AT 1515 NATIONAL GUARD WAY, RENO, NV 89502.

The citation was classified as "Repeat/Other." The proposed penalty for the alleged violation is in the amount of ONE THOUSAND DOLLARS ($1,000.00).

Citation 2, Item 1, charges a violation of 29 CFR 1926.652(a)(1), which provides in pertinent part:

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when: 1926.652(a)(1)(i) Excavations are made entirely in stable rock; or 1926.652(a)(1)(ii) Excavations are less than 5 feet (1.52 m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Citation 1, Item 1, charges in the alternative, a violation of 29 CFR 1926.652(b)(2), which provides in pertinent part:

> Design of sloping, and benching systems. The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or in the alternative, paragraph (b)(3); or in the alternative paragraph (b)(4), as follows: Determination of slopes and configurations using appendices A and B. Maximum allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in appendices A and B to this subpart.

Complainant alleged:

> "The trench located to the north of the intersection of South Durango Drive and West Agate Avenue, Las Vegas, NV 89113, had a sloped protective system that was not constructed in accordance with Appendix B of 92 CFR 1926 subpart P. Two employees of Harber Company, Inc., dba Mountain Cascade of Nevada were working in the trench installing a 24-inch sewer line. The approximate depth of the trench was 9 feet where the sewer line had not been placed, and 6 feet where the sewer line was placed. The trench was approximately 13 feet in width at the top and 3.5 feet in width at bottom. The employer classified the slope as type B which requires a slope of 1:1.
>
> At the 9-foot depth, this trench would need to be a minimum of 18 feet in width at the top (not including the bottom width) to meet the 1:1 slope. Accounting for the bottom width requires that this trench have a top width of 21.5 feet to produce a slope of 1:1.
>
> At the 6-foot depth, this trench would need to be a minimum of 12 feet in width at the top (not including the bottom width) to meet the 1:1 slope. Accounting for the bottom width requires that this trench have a top width of 15.5 feet to produce a slop of 1:1.
>
> At both depths the slope was too steep to meet a 1:1 ratio. The slope at the 9-foot depth was approximately 0.53:1. The slope at the 6-foot depth was approximately 0.79:1. (For every foot in depth, less than a foot in width was provided.)

> Based on observations and interviews, the trench's soil type was more consistent with Type C which requires a slope of 1.5:1.
>
> At the 9-foot depth, this trench's overall width would have to be 30.5 feet. At the 6-foot depth, this trench's overall width would have to be 21.5 feet.
>
> For Type B or Type C soil, the slope of this trench was too steep to meet the requirements of the standard, exposing the employees to possible serious injuries up to and including death from cave-in hazards.

The violation was classified as "Serious." The proposed penalty for the alleged violation is in the amount of ONE THOUSAND TWO HUNDRED DOLLARS ($1,200.00).

Counsel for the complainant and respondent stipulated to the admission of evidence at complainant's Exhibits 1 through 3 and respondents Exhibit A.

Counsel for the parties further stipulated to the withdrawal of contest as to Citation 1, Item 1.

Counsel presented witness testimony and documentary evidence through Certified Safety and Health Officer (CSHO) Mr. Jeff Snell. Mr. Snell testified he conducted a "referral inspection" at the respondent construction site located in Las Vegas, Nevada at South Durango Drive and West Agate Avenue. He identified Mr. Angel Valdovinos as foreman of Harber Company, Inc., dba Mountain Cascade of Nevada, the respondent herein. Mr. Snell conducted an opening conference with foreman Valdovinos and the company general superintendent Mr. Tim Soucie. CSHO Snell referenced his inspection report stipulated in evidence at Exhibit 1, pages 12 through 14 and the inspection narrative, pages 15 to 17. He testified as to his findings during the inspection.

During the "walk around," CSHO Snell observed two employees working

in a trench. He reported one employee was using a compactor the other holding an underground utility marking tape out of the way. There was no shoring in the trench, but he observed the trench to be sloped. The north end of the trench where the employees were working was 6 feet deep. The 24 inch diameter sewer line had already been laid in that area. The trench was 9 feet deep at the bottom of the sewer line. The width of the trench at the top was approximately 13 feet. The trench crossed over an existing culvert. The area soil had been previously dug up to install the culvert, the sewer line being replaced, 2 natural gas lines, and a water main. The trench slope was ". . . too steep, and did not meet the ratio for type B soil of 1:1."

CSHO Snell reported at Exhibit 1, page 16 the respondent general superintendent Tim Soucie, informed him he was using hydraulic shoring in the trench until reaching the area above the culvert. He testified Mr. Soucie advised they were:

> ". . .sloping . . . because of the culvert and adjacent wash . . . the shoring would not hold up due to the fill above the culvert being type 2, so they had to slope the trench . . . (they) could not go any wider with the trench due to a high pressure natural gas line to the east of the trench and the road, the water main, and another gas line to west of the trench . . . .."

During employee interviews Mr. Snell was informed the respondent was using shoring up until the day before the inspection. They stopped utilizing the shoring because the soils were so loose and falling around the shoring. Mr. Snell testified and reported that the OSHA excavation definitions could also apply to the trench as a "confined space," however there were vertical standards covering excavations and therefore determined 29 CFR 1926.652 applicable.

CSHO Snell identified the photographs at Exhibit 1 in evidence, and

testified picture 44 demonstrated the trench he measured ranged from 9 feet to 6 feet in depth. He referenced photographic Exhibit 1, page 116 depicting a confirmed respondent employee standing on the trench floor. He testified photographs at Exhibit 1, pages 117 and 118 depicted him taking measurements of the trench, the latter at the shallower end. At Exhibit 1, page 123 he identified the photograph as demonstrating a measurement of the top width of the trench. He testified it was "just shy" of 13 feet and referenced photographic Exhibit 1, page 125 to support his findings.

On cross-examination Mr. Snell testified the employer classified the soil as "Type 2, Class B soil." Mr. Snell later confirmed from calculations that a slope of 1:1 was required. He explained the standard prevents classifying "previously disturbed" soil to any better consistency than "B." Based upon the employer's classification of that Type B soil, the depth of work observed and the measurements taken, Mr. Snell recommended a citation for violation of 29 CFR 1926.652(a)(1). He cited the violative conditions in the alternative. CSHO Snell explained the purpose for the alternative citation of 29 CFR 1926.652(b)(2) was to provide data for correction options including "sloping" configurations and the employer determinations permitted under the standard through the appendices at A and B. He testified the citations included options for compliance. He referenced Exhibit 1 commencing at page 55 as recognized supporting references for compliance.

CSHO Snell testified he utilized the employers equipment to take the measurements as he did not have a tape with him at the site. He confirmed his width measurements at the top of the trench, and testified he did not actually measure the bottom width. He utilized the top width

measurement and referenced the employer data and his observations to establish the bottom width for sloping protection requirements. Mr. Snell further testified he was not informed by the employer, who allowed use of its measuring rods, of any defect or damage to the equipment. Mr. Snell testified he personally observed the employee working in the trench he measured at over five (5) feet deep without cave-in protection in violation of the cited standard. He confirmed his reportings, including the interview statements at Exhibit 1, pages 19 through 20 and particularly the violation worksheets at pages 21 through 68.

Complainant presented witness testimony from compliance NVOSHES supervisor, Mr. Nicholas LaFronz. He identified Exhibit 1, page 36 as the violation worksheet and testified on the citation charging allegations in the alternative. He testified "both (standards) apply . . . but that 29 CFR 1926.652(a)(1) alone would give an appearance the employer had nothing in place . . . However they in fact did have equipment at the site, so . . . believed 1926.652(b)(2) more clearly ". . . covered what they did and showed why not enough . . ." for compliance. He explained both standards referenced excavation protection from cave-ins and adequate protective systems for an undisputed depth of over five (5) feet and Type B soil; however, the options permitted in 29 CFR 1926.652(b)(2) provided direction and explanation on the design, details for sloping protection.

Mr. LaFronz reviewed the CSHO findings and the worksheet information on the elements required to prove a violation by NVOSHA particularly at Exhibit 1, pages 36 through 40. He testified **employee exposure** was established based upon the personal observations of the CSHO and photographs in evidence. The citation was **applicable** to the **violative condition** observed by Mr. Snell which reflected no shoring or

required sloping ratio in the trench area measured at well over five (5) feet deep.

Mr. LaFronz testified that Exhibit 1, page 39 established **employer knowledge**, based upon employer general superintendent Mr. Tim Soucie's presence at the worksite and his reports in evidence. Mr. Soucie admitted the soil was "too loose" in the area for the shoring to "stand up" which caused him to switch to sloping. He testified and referenced at Exhibit 1, page 39, that Mr. Soucie informed they could not go any wider with the trench because of the high pressure gas line to the east and a water main and gas line to the west. He noted Exhibit 1, pages 46 through 49 confirmed Mr. Soucie completed and signed four (4) consecutively dated inspection "box" forms for "Type B soil" and "sloping required of 1:1." Mr. Soucie also completed on the same four (4) forms, and reported to Mr. Snell the trench's dimensions listed as ". . . 8 feet deep, top width 14 feet and bottom width 42 inches . . .." Mr. LaFronz testified " . . . it was agreed the soil was Type B, and the excavation dimensions were admitted so the trench should have been sloped 1:1; but that's not what the CSHO found during the inspection . . .." Mr. LaFronz testified, the report at Exhibit 1, page 40 provides ". . . To meet a 1:1 ratio using these dimensions, the **minimum top width** should have been approximately 19.5 feet . . .." The measurements taken and confirmed by Mr. Snell, the admitted reports completed by Mr. Soucie, and the photographic exhibits both placed the top width at approximately thirteen (13) feet to fourteen (14) feet.

Mr. LaFronz further testified to support the classification of serious, the proposed penalty and referenced the Exhibit 1 worksheets.

Respondent presented witness testimony from Mr. Tim Soucie. He identified himself as the general superintendent for the respondent on

the day of the inspection. Mr. Soucie testified he stopped using shoring at the particular location because a high pressure gas line and water main were in the way as reported by the CSHO. He testified the equipment utilized by the CSHO to measure the top width was not reliable because "rods" are often broken at the bottom or otherwise damaged. He further testified the CSHO had no idea how wide the bottom of the trench was. Mr. Soucie testified it was ". . . about 48 inches . . ." He testified the company used a "penatrometer" which measures sensitivity strength of the soil. He testified he was cited for a violation under two sections of 29 CFR 1910.652 as both (a)(1) and (b)(2) and questioned how that could be done.

On cross-examination Mr. Soucie testified he never mentioned the potential defective condition of the measuring equipment to CSHO Snell at the time of the inspection. He further testified the measuring rod was "not accurate" when he let the CSHO use it; and further testified he doesn't rely on the use of ". . . rods because they bend or are broken; just not very accurate . . . but not way off . . .."

Mr. Soucie identified complainant's photograph at Exhibit 1, page 41A as depicting the measuring rod utilized. He testified the slope in the trench was ". . . 1:1 . . . despite what the CSHO found . . .." Mr. Soucie agreed the soil was Type B and the appropriate slope ratio required under the standard was indeed 1:1. He testified that he disagreed with the CSHO inspection findings.

At the conclusion of the respondent's case, the Board requested additional testimony from Mr. LaFronz on the trench excavation measurement calculations. Mr. LaFronz testified that respondent's own Exhibits A-1 and A-4 admitted the bottom width of the trench was 42 inches and the top width 14 feet. He explained that the mathematical

calculations clearly demonstrate, based on respondent's own numbers, the minimum top width should have been 19.5 feet.

At the conclusion of evidence and testimony, the parties presented closing arguments.

Complainant argued the photographs in evidence showing the measurements made by the CSHO using the respondent's own equipment, measuring rods not a tape, confirmed a violation of the standard cited for failure to provide cave-in protection to employees working in the trench excavation over five (5) feet deep. It was undisputed that shoring was not in place. There was no dispute the soil was Type B, nor depth over five (5) feet as confirmed and included at respondent's Exhibit A in evidence. The CSHO utilized the employer Type B classification and measured the sloping using the undisputed reference requirement of a 1:1 ratio. ". . . (S)o if all agree on the soil type and the 1:1 ratio and reference the respondent's own Exhibit A-4 calculations, the evidence clearly establishes the respondent didn't meet the ratio if you run the numbers . . .."

Counsel referenced Exhibit 1, page 62 stipulated in evidence and asserted it depicted the sloping requirements based upon the measurements listed in the respondent exhibits and agreed upon by the parties. It clearly ". . . shows the lack of compliance . . .." Counsel further argued the CSHO didn't measure the bottom and accepted the respondent measurement data for the 1:1 ratio requirement. No additional bottom measurement was needed under the facts in evidence to establish the excavation was not properly sloped to achieve the required protection under the standards. Counsel argued that the burden of proof was met.

Respondent presented closing argument. Counsel asserted the burden

of proof had not been met due to the lack of accurate measuring to determine the sloping ratio to be non-compliant. Counsel further argued the citation should be dismissed because it was charged in the **alternative** which lacked the **particular** allegations required by OSHA to establish a violation. Counsel asserted the applicable law requires a specific standard be charged to satisfy OSHA particularity requirements in the recognized enforcement process. He argued the citation for violation at Citation 2, Item 1 should be dismissed.

In reviewing the testimony, documents and exhibits including arguments of counsel, the Board must analyze the competent evidence under the burden of proof to establish violations under occupational safety and health law.

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. (See NAC 618.788(1).
>
> All facts forming the basis of a complaint must be proved by a preponderance of the evidence. See *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).
>
> Preponderance of the evidence means evidence that enables a trier of fact to determine that the existence of the contested fact is more probable than the nonexistence of the contested fact. NRS 233B, Sec. 2. *Nassiri v. Chiropractic Physicians' Board of Nevada,* 130 Nev. Adv. Op. No. 27, 327 P.3d 487 (2014)

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

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

> To establish a prima facie case, the Secretary (Chief Administrative Officer) must prove the existence of a violation, the exposure of employees, the reasonableness of the abatement period, and the appropriateness of the penalty. *Bechtel Corporation*, 2 OSHC 1336, 1974-1975 OSHD ¶18,906 (1974); *Crescent Wharf & Warehouse Co.*, 1 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972). (emphasis added)
>
> To prove a violation of a standard, the Secretary must establish (1) the **applicability** of the standard, (2) the existence of **noncomplying conditions**, (3) **employee exposure or access**, and (4) that the **employer knew or with the exercise of reasonable diligence** could have known of the violative condition. See *Belger Cartage Service, Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003). (emphasis added)

A respondent may rebut allegations by showing:

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

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

3. **Proof by a preponderance of substantial evidence of a recognized defense.**

The cited standards charged in the alternative **specifically described the violative conditions** requiring cave-in protection for respondent employees working in the trench installation; **and** the **permitted protective** systems options that could be elected by the employer to effectuate compliance. The **applicable** governing standards were appropriately cited in the alternative at 29 CFR 1926.652(a)(1) and 29 CFR 1926.652(b)(2).

Proof of the **violative conditions** element was clearly established from the preponderant evidence of the jobsite conditions. It was

unrefuted the employees were **working** in a trench **excavation over five (5) feet** deep without shoring. The 1:1 slope was undisputed as the correct design **ratio** to protect the recognized **employee exposure** for cave-in protection. **Employer knowledge** was established based upon the admitted presence of the respondent superintendent and foreman at the jobsite. There was no evidence to the contrary. There was no dispute the trench was **unshored**, the soil classification Type B, and the ratio of the slope required at 1:1.

A prima facie case of violation was established by a preponderance of evidence.

There were two factual issues disputed for the finding of violation. The first is whether the slope ratio was actually 1:1 based upon the complainant calculations from evidence in the record. Respondent offered **no competent evidence of measurement in rebuttal**. The measurements taken by the CSHO in the presence of the respondent supervisory employees, and depicted in the pictorial evidence, confirmed a violation of the sloping requirements for protection of the employees working in the trench. The **respondent's own data** and measuring equipment were utilized to establish the violative conditions. See respondent's Exhibits A-1 through A-6. Inaccuracy of the measuring rod was not asserted at the time of inspection, nor subject of any competent evidence. Respondent presented no evidence of measurements other than those reported at it's A-1 through A-6 exhibits.

The evidence established violation of 29 CFR 1926.652(a)(1). Preponderant evidentiary proof required under recognized occupational safety and health law confirmed the existence of **violative conditions**, **applicability** of the proven cited standard, **exposure of employees**, **employer knowledge and appropriateness of the penalty**.

The calculations to determine the violation did not rest solely upon a need for a field measurement of the bottom of the trench. Reference to Exhibit A, page 40, paragraph 23, addresses the central issue which is then resolved at Exhibit 1, page 62, and the photograph at page 125. The competent and credible explanation of Mr. LaFronz in his testimony supported the basis for calculating the slope ratio. **Further, the respondent's own records at A-1 and A-6** established the listed dimensions of the trench. Using those dimensions admitted by respondent, the minimum top width should have been approximately 19.5 feet. However it was unrefuted that the top width was either "just shy" of 13 feet, or 14 feet as listed by the respondent. To meet a 1:1 ratio, the minimum top width would have to be **19.5 feet** as opposed to the respondent admitted evidence at "**14 feet.**"

The measuring rod depicted in the photographs demonstrated the violative condition of the trench in **plain view.** To accept respondent arguments of compliance defies **plain view, plain meaning,** and the facts in evidence. The testimony and documentary evidence in the record are confirmed through the mathematical calculations and support findings of violation.

The standards cited were clear and unambiguous. Absent ambiguity a statute's **plain meaning** controls and no further analysis is permitted. *State Farm Mut. Auto. Ins. Co. v. Commissioner of Ins.,* 114 Nev. 535, 540, 958 P.2d 733, 736 (1998). *Leven v. Frey,* 123 Nev. 399, 404, 168 P.3d 712, 716 (2007).

Once the complainant establishes a prima facie case of violation, under occupational safety and health law the burden of proof shifts to the respondent.

The **respondent** records in evidence at Exhibit A-1 through A-6

listed the bottom width of the trench at 42" and the top width at 14". The simple mathematics demonstrate the slope was insufficient to meet the agreed required 1:1 slope ratio. It was undisputed the soil was Type B and required a 1:1 slope ratio for compliance. Respondent offered no proof to rebut the prima facie case of violation. To the contrary, respondent admitted the depth, bottom width, top width, soil type, and slope requirements which were utilized by NVOSHES to complete the mathematical calculations to prove a violation under the applicable OSHA standards. The undisputed factual conditions governed the sloping ratio. The preponderant evidence demonstrated the top width would have had to be far greater to satisfy the cited standards and protect employees working in a trench at a depth more than 5 feet. The excavation conditions required protection from either shoring or under the mathematically determined sloping ratio. The difference of a top width between approximately 14 feet and 19.5 feet to meet the 1:1 slope ratio was not even close to even give respondent the "benefit of doubt."

The second defensive issue is based upon arguments that **alternative** pleading of a citation is unlawful and lacks **particularity** under fair enforcement procedures.

> Section 9(a) requires that the citation "describe with particularity the **nature of the violation**" and that it refer to the provision of the Act, **standard**, regulation, or order alleged to have been violated. The **purpose of the requirement** is to **apprise the employer** of the **alleged violation** so that **corrective action** can be taken and **so that the employer can decide whether to contest. An insufficiently particular citation may not be vacated unless it adversely affected the employer's ability to defend.** *Del Monte Cor.*, 4 OSH cases 2035 (Rev. Comm'n 1977). *Ringland-Johnson, Inc. V. Dunlop*, 551 F.2d 1117, 1118, 5 OSH Cases 1137 (8th Cir. 1977); *Brabham-Parker Lumber Co.*, 11 OSH Cases 1201, 1202 (Rev. Comm'n 1983); *Louisiana-Pacific Corp.*, 5 OSH Cases 1994 (1977).

The **lack of particularity** defense may be raised in OSHA cases. An employer may challenge the citation itself claiming that it is not specific enough to give the employer **fair notice of a violation** in order to defend. Here the facts and testimony in evidence demonstrate the employer was given ample notice of **the violation** and the **corrective action required** such that it could prepare an adequate defense and made aware of evidentiary and related requirements. The employer was cited in the alternative for the violative conditions. The citations included the particular information required and compliance options. Compliance was easily achievable by simply widening the top width of the trench to permit the actual sloping required to result in a 1:1 ratio.

> The federal review commission has vacated citations because they lack sufficient particularity . . . explaining that due process requires an employer have **knowledge of specific violations.** Without particularity the employer **could not prepare an adequate defense nor be aware of evidentiary standards**. *L.E. Meyers Co.*, 3 O.S.H.SC. 1026 (1975) *Id.* 3 O.S.H.C. at 1027.

Here there was no question the employer was placed on full notice as to the **nature** of the violation. ". . . (A)n insufficiently particular citation may **not** be vacated unless it **adversely** affected an employer's ability to defend . . .." *(Louisiana-Pacific Corp.,* supra at page 15.) There was no competent evidence, documentation, or persuasive argument of **any adversity or inability to defend**. The cited standard at 29 CFR 1926.652(a)(1) described with particularity the nature of the trench violation; and in the alternative 29 CFR 1926.652(b)(2), the methodology and options for correction to satisfy OSHA cave-in protection without use of shoring.

Based upon the testimony, photographic exhibits and documentation in evidence, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND**

HEALTH REVIEW BOARD that a violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, NRS 618.987(2), the "Repeat-Other" classification confirmed, and the penalty in the amount of ONE THOUSAND DOLLARS ($1,000.00) confirmed.

It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as to Citation 2, Item 1, 29 CFR 1926.652(a)(1) the Serious classification confirmed, and the proposed penalty in the amount of ONE THOUSAND TWO HUNDRED DOLLARS ($1,200.00) approved.

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

DATED: This 15th day of August 2017.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JAMES BARNES, CHAIRMAN