

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3
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5 CHIEF ADMINISTRATIVE OFFICER
6 OF THE OCCUPATIONAL SAFETY AND
7 HEALTH ADMINISTRATION, DIVISION
8 OF INDUSTRIAL RELATIONS OF THE
9 DEPARTMENT OF BUSINESS AND
10 INDUSTRY,

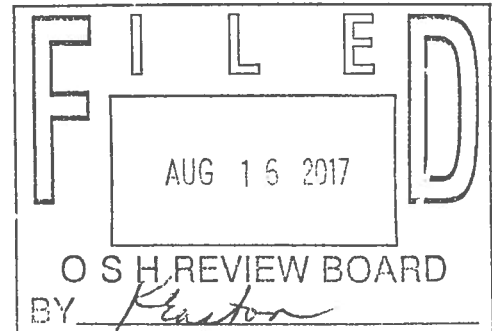
Docket No. LV 17-1872

Complainant,

vs.

11 ACCELERATED CONSTRUCTION, INC.,

Respondent.



12
13
14 **DECISION**

15 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
16 **REVIEW BOARD** at a hearing commenced July 12, 2017, in furtherance of
17 notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel
18 appearing on behalf of the Complainant, **Chief Administrative Officer of**
19 **the Occupational Safety and Health Administration, Division of**
20 **Industrial Relations** (OSHA). MR. BRIAN V. WATKINS, ESQ., appearing on
21 behalf of Respondent, **Panelized Structures.**

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

24 The complaint filed by the OSHA sets forth allegations of violation
25 of Nevada Revised Statutes as referenced in Exhibit "A", attached
26 thereto.

27 Citation 1, Item 1, charges a violation of 29 CFR 1926.451(b)(1)
28 which provides in pertinent part:

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1 "Scaffold platform construction." Each platform on
2 all working levels of scaffolds shall be fully
3 planked or decked between the front uprights and
4 the guardrail supports.

5 Complainant alleged:

6 On September 27, 2016, an inspection was initiated
7 with Accelerated Construction, at the jobsite
8 located at 3720 North Durango Drive in Las Vegas.
9 On the south side of the building, three employees
10 were observed working from a two tiered, 14'6",
11 tubular welded frame scaffold (make unknown) on two
12 different platforms. The platforms employees were
13 working from were not fully planked or decked. The
14 top tier had 2 of the 3 planks and the lower tier
15 had 1 of 3 planks. The employees were exposed to
16 potential serious injuries in the event of a fall.

17 The citation was classified as Serious. The proposed penalty was
18 in the amount of \$1,200.00.

19 Citation 1, Item 2, charges a violation of 29 CFR 1926.451(f)(3)
20 which provides in pertinent part:

21 Scaffolds and scaffold components shall be
22 inspected for visible defects by a competent person
23 before each work shift, and after any occurrence
24 which could affect a scaffold's structural
25 integrity.

26 Complainant alleged:

27 On September 27, 2016, an inspection was initiated
28 with Accelerated Construction, at the jobsite
located at 3720 North Durango Drive in Las Vegas.
It was determined that there was no competent
person on site to inspect the scaffold prior to the
work shift. On the south side of the building,
three employees were observed working from a two
tiered, 14'6", tubular welded frame scaffold (make:
unknown) which was not fully planked. The
employees were exposed to potential serious
injuries related to the employer failing to ensure
the scaffold was inspected prior to the work shift.

The citation was classified as Serious. The proposed penalty was
in the amount of \$1,200.00.

Citation 1, Item 3, charges a violation of 29 CFR 1926.451(g)(1)

1 which provides in pertinent part:

2 Each employee on a scaffold more than 10 feet (3.1
3 m) above a lower level shall be protected from
4 falling to that lower level. Paragraphs (g)(1)(i)
5 through (vii) of this section establish the types
6 of fall protection to be provided to the employees
7 on each type of scaffold. Paragraph (g)(2) of this
8 section addresses fall protection for scaffold
9 erectors and dismantlers. Note to paragraph
10 (g)(1): The fall protection requirements for
11 employees installing suspension scaffold support
12 systems on floors, roofs, and other elevated
13 surfaces are set forth in subpart M of this part.

14 Complainant alleged:

15 On September 27, 2016, an inspection was initiated
16 with Accelerated Construction, at the jobsite
17 located at 3720 North Durango Drive in Las Vegas.
18 On the south side of the building, an employee was
19 observed working from the upper tier of a two
20 tiered tubular welded frame scaffold (make:
21 unknown) at a height of approximately 14'6" without
22 any means of fall protection. The employee was
23 exposed to potential serious injuries in the event
24 of a fall at a height greater than 10 feet.

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

27 Citation 1, Item 4, charges a violation of 29 CFR 1926.454(a) which
28 provides in pertinent part:

29 The employer shall have each employee who performs
30 work while on a scaffold trained by a person
31 qualified in the subject matter to recognize the
32 hazards associated with the type of scaffold being
33 used and to understand the procedures to control or
34 minimize those hazards.

35 Complainant alleged:

36 On September 27, 2016, an inspection was initiated
37 with Accelerated Construction, at the jobsite
38 located at 3720 North Durango Drive in Las Vegas.
39 Three employees were observed working from a
40 scaffold. It was determined that employees were
41 not trained in work with scaffolding. Employees
42 were exposed to potential serious injuries while
43 working from the scaffold without training
44 necessary to recognize hazards associated with
45 scaffolds.

1 The citation was classified as Serious. The proposed penalty was
2 in the amount of \$1,200.00.

3 Counsel for the complainant and respondent stipulated to the
4 admission of evidence at complainant Exhibits 1 and 2 and respondent
5 exhibits Tabs 1 through 6.

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

9 NVOSHES Compliance Supervisor, Mr. Jamal Sayegh testified with
10 regard to the citations, violations and inspection report conducted by
11 NVOSHES. The actual Compliance Safety and Health Officer (CSHO) who
12 conducted the inspection, Mr. Mark Nester, was not present at the
13 hearing. Mr. Sayegh referenced complainant Exhibits 1 and 2 stipulated
14 in evidence and testified with reference to the reportings. A referral
15 inspection commenced at approximately 9:55 a.m. on September 27, 2016
16 at a construction site located at 3720 North Durango Drive in Las Vegas,
17 Nevada. Contact was made with Mr. Ryan Sheets, the superintendent of
18 the respondent, Accelerated Construction, Inc. (Accelerated).

19 CSHO Nester reported he observed an employee working from a top
20 tier of a tubular welded scaffold without any means of fall protection.
21 He further reported two additional employees working on the middle level
22 of the scaffold attempting to climb the cross-bracing to reach the upper
23 level. Superintendent Sheets was requested, and agreed, to remove the
24 employees from the scaffolding. Mr. Sayegh identified photographs in
25 evidence at Exhibit 1, pages 84-103. Mr. Sayegh referenced the reported
26 observations of CSHO Nester as confirmed in the photographs in Exhibit
27 1 at pages 84, 86, 87 and 88, to demonstrate the scaffold was not fully
28 planked, noting there were two planks per platform on the top tier. One

1 employee was depicted working from the top tier of the scaffold. The
2 middle tier had only one plank per platform. Two employees were observed
3 working on the middle tier of the scaffold. Each platform measured
4 approximately 36" in width; each plank measured approximately 9" in
5 width. The CSHO report and photographic exhibits supported the
6 **applicability** of the cited standard at Citation 1, Item 1, 29 CFR
7 1926.451(b)(1) which required scaffold platforms be fully planked or
8 decked.

9 Mr. Sayegh testified from the Exhibit 1 inspection narrative at
10 page 14 that the employer did not ensure that the scaffold was inspected
11 by a **competent person** before use. Mr. Fredrico Mondragon, identified
12 himself as "working for Accelerated Construction" in his interview
13 statement, at Exhibit 1, page 19; and further stated there were no other
14 contractors on the site. No credentials or training support were
15 provided by or on behalf of Mr. Mondragon, nor the respondent or any
16 other individuals to establish a qualified **competent person** had been or
17 was on the site to inspect the scaffolding prior to the workshift. Mr.
18 Sayegh testified the cited violation at Item 2 under 29 CFR
19 1926.451(f)(3) was appropriate because scaffolds and scaffold components
20 are to be inspected for visible defects by a competent person before
21 each workshift.

22 Mr. Sayegh again referenced the photographs in Exhibit 1 at page
23 95 and CSHO Nester's reporting of having observed and photographed an
24 employee working from the top tier of the scaffold without any means of
25 fall protection. The top tier of the scaffold was measured at
26 approximately 14'6"; there were no guardrails or personal fall arrest
27 systems depicted or utilized. The employee was exposed to potential
28 serious injury in the event of a fall. The photographs and CSHO

1 reporting supported recommendation for a violation at Citation 1, Item
2 3 under 29 CFR 1926.451(g)(1) which requires that each employee on a
3 scaffold more than 10 feet above a lower level shall be protected from
4 falling to that level.

5 CSHO Nester reported requesting scaffold training records for all
6 employees working from the scaffold on the site. Two requests were
7 sent, one on September 27th and another on October 4th. No training
8 records were provided by the employer. Mr. Sayegh referenced the
9 requirements of 29 CFR 1926.454(a) which provides the employer shall
10 have each employee who performs work while on a scaffold trained by a
11 person qualified in the subject matter to recognize hazards associated
12 with the type of scaffold being used and demonstrate an understanding
13 of the procedures to control and minimize those hazards. Citation 1,
14 Item 4, was recommended for issuance accordingly.

15 Mr. Sayegh referenced the reported interview statements at Exhibit
16 1 noting particularly the statement of Mr. Ryan Sheets at page 17. Mr.
17 Sheets identified himself as the superintendent of the jobsite, had no
18 training beyond an OSHA 30 and no specialized scaffold training. Mr.
19 Fredrico Mondragon provided a statement at Exhibit 1, page 19, which
20 provided the scaffolding was unsafe because not tied off to the
21 building. He admitted fall protection is required for scaffolding above
22 10 feet. In a follow up interview Mr. Mondragon reported the ". . .
23 scaffolding guys . . ." were getting paid directly through Accelerated
24 (the respondent herein). Mr. Mondragon further reported he does not
25 have a business or a contractor's license; and that the respondent
26 Accelerated never requested one from him.

27 At Exhibit 1, page 23, Mr. Joe Maturino identified himself as the
28 respondent foreman on the jobsite. He stated the scaffolding crew was

1 supposed to finish the scaffolding so they "work off the lift today."
2 He reported he did not see the two guys on the scaffold "I should have
3 checked . . . two guys on the lift and two guys on the roof" He
4 further reported "I did not work on the scaffold at all . . . there were
5 three guys working on the scaffold" Mr. Maturino further
6 reported at Exhibit 1, page 24 of his statement that "The guy in the
7 white (from photo) was working for about 1 hour. He was installing
8 chicken wire." He further identified "The guy that built the scaffold
9 was our competent person . . . Fredrico (Mondragon)"

10 Mr. Sayegh continued testimony in response to direct examination
11 and identified photographic exhibits and reported testimony on the
12 elements required to prove violations under each of the cited
13 violations. He testified at Citation 1, Item 1, that 29 CFR
14 1926.451(b)(1) was applicable based upon the insufficient planking
15 depicted in the photographic exhibits which clearly established the
16 violations. The inspector observed and reported the condition of the
17 planking corroborated through the photographs. Mr. Sayegh testified the
18 employees depicted in the photographs were exposed to the hazards as
19 reported and observed. He further referenced the element of employer
20 knowledge based upon the interviews with the co-superintendent at page
21 30, where Mr. Ryan Sheets stated

22 "Scaffold was set up just yesterday. Our crew set
23 it up. The guy on top has been on the scaffold top
24 tier for about 1 hour. The scaffold guys started
25 about 7-8:00 a.m."

26 Mr. Sayegh further referenced Exhibit 1, page 30 the statement from
27 foreman Joe Maturino who stated:

28 "There were 3 guys working on the scaffold. The
guy in white (from photo) was working for about 1
hour. He was installing chicken wire."

1 Further, from Exhibit 1, page 30, Fredrico Mondragon identified by
2 the employer as a the competent person stated:

3 ". . . they build the second level. I only got on
4 site after you (OSHA) showed up. Tuesday they
assembled the second tier of scaffold without me."

5 Mr. Sayegh further testified with regard to the element of employee
6 exposure. There was actual exposure by individuals working off the
7 scaffolding at the jobsite under the control of the cited respondent
8 employer in plain view which was proof of violations. He continued
9 similar testimony on the exposure element with regard to Citation 1,
10 Item 3, and testified the photographs demonstrated employees working
11 without any means of fall protection. At item 4 there was no evidence
12 of training provided by respondent nor any documentation to establish
13 a competent person inspected the scaffolding at Citation 1, Item 2.

14 On cross-examination, Mr. Sayegh responded to questions regarding
15 the penalty calculations and considerations for reductions to the
16 respondent employer. Mr. Sayegh testified the violations were abated
17 the same day and admitted respondent should have been given some
18 credits. He testified there is ". . . no requirement that quick fix
19 credits be given; . . . and . . . the safety plan not reviewed, because
20 it was not within the scope of the referred complaint, . . . so . . .
21 no good faith reductions could be given under the structured enforcement
22 policies . . ."

23 Mr. Sayegh testified on the **serious** classification for each of the
24 violations. He described the serious injuries that would reasonably be
25 expected to result from fall through a defectively planked scaffold, and
26 the lack of tie-off protection for fall hazard. He further reviewed
27 Exhibit 1, page 28, and testified on the determinations made with regard
28 to penalty calculations for severity, gravity and probability.

1 Mr. Sayegh explained the **multi-employer worksite citation policy**
2 of Nevada OSHES. He testified that based upon the investigative facts,
3 evidence and documentation provided, the respondent was in **control of**
4 **the worksite** and could have been appropriately classified as a **creating,**
5 **exposing, and controlling employer.** However NVOSHES based its citations
6 on only the respondent being a **controlling employer.**

7 On redirect examination, Mr. Sayegh testified that the employer
8 knew or should have known with the exercise of reasonable diligence that
9 the safety violations were existent and occurring. Supervisor Maturino
10 was on the site and observed employees working off the scaffolding.
11 Superintendent Ryan Sheets was on the site and working with his crews
12 in the general area on various sides of the building.

13 Respondent presented witness testimony and referred to the
14 documentary evidence at Exhibit 1. Mr. Ryan Sheets, the company
15 superintendent, testified ". . . my crew did not set up the scaffold
16" He further testified that Mr. Mondragon was not an employee of
17 respondent but rather an independent contractor. He denied portions of
18 his witness statement but admitted it was signed in the presence of the
19 CSHO on the day of inspection. He testified the provisions were ". . .
20 not consistent with anything I would have said" Mr. Sheets also
21 testified the CSHO and he drove up to the site at the same time, that
22 he only supervised four guys in his crew, and he was working only on the
23 south side of the building doing demolition while erecting work was
24 occurring on the west side. Mr. Sheets admitted the scaffolding was not
25 assembled correctly ". . . that's why we took it down to do it right
26"

27 On cross-examination, Mr. Sheets testified that Mr. Mondragon "was
28 a sub on site . . . not an employee of respondent" He further

1 testified that ". . . some of Mondragon's workers disappeared when the
2 CSHO arrived on the site" Mr. Sheets admitted under direct
3 examination to the question ". . . were you aware as the general
4 contractor . . . you have liability for violations on your site" He
5 responded "yes, but not . . . if . . . someone goes **rogue** and I call
6 him down"

7 Respondent presented witness testimony from Mr. Carl Sheets,
8 president of respondent. He testified Mr. Mondragon was not an employee
9 of the respondent company. He was once employed a couple of years ago,
10 but not on the payroll at the time of inspection. Mr. Sheets further
11 testified he has never had an OSHA violation previously. In reference
12 to questions directed from the Exhibit 1 reports, Mr. Sheets testified
13 he told OSHA we ". . . have no scaffolding company" He also
14 referenced the photographic evidence depicting scaffold erection and
15 planking occurring from a boom lift. He testified the photograph was
16 not taken by the CSHO but he sent it to CSHO Nester three or four times.

17 On cross-examination Mr. Sheets testified his company is primarily
18 a general contractor, never hires unlicensed subcontractors, and that
19 Mr. Mondragon worked for a subcontractor company identified as "Select."
20 He had no knowledge of his (Mondragon's) lack of licensure. He
21 testified that Select was paid directly and he expected Mr. Mondragon
22 and his workers were compensated by his subcontractor Select. He
23 further testified that he has no written contract or purchase order with
24 Select; and reconfirmed Select was the company actually hired to do the
25 scaffold erection rather than Mr. Mondragon who he did not hire.

26 At the conclusion of evidence and testimony, counsel presented
27 closing argument.

28 Complainant asserted the elements to prove a violation under the

1 multi-employer worksite citation policy were established under the
2 burden of proof based upon the number of employers present on the site;
3 and Accelerated in control. Counsel argued in reference to page 121 of
4 Exhibit 1, that NVOSHA made every attempt to initially determine whether
5 there were any subcontractors on the site. They were repeatedly told
6 there were no subcontractors therefore there was no way to know for whom
7 the various employees worked, other than the respondent general
8 contractor. Mr. Mondragon informed OSHA that his employer was the
9 respondent. Counsel argued that while there are some conflicting
10 statements throughout this case, it does not change the respondent's
11 liability as the controlling employer on a multi-employer worksite.
12 There is no question Mr. Maturino, the respondent foreman, was in
13 control of the worksite. Mr. Maturino admitted in his statement that
14 he saw three people working on the scaffold which established the proof
15 element of employer knowledge.

16 Counsel referenced the photographs in evidence and asserted they
17 clearly depict men in company green shirts worn by respondent employees,
18 onsite at the same time as three men were up on the scaffold without
19 fall protection. The objective evidence from the photographs, together
20 with the measurements taken and materials at the site, support the
21 violative conditions for complainant's burden of proof. Counsel argued
22 the multi-employer worksite doctrine does not require any evidence of
23 constructive employer knowledge because Mr. Maturino was actually
24 present; so employer knowledge was actual and direct without any
25 requirement to impute or establish same constructively. ". . . Mr.
26 Maturino was in charge of the respondent worksite and the workers were
27 working on the scaffold" Counsel further asserted there is no
28 requirement the employer be provided any "quick fix" credit as it is

1 discretionary under the NVOSHES enforcement plan.

2 Respondent presented closing argument. Counsel asserted that CSHO
3 Nester was not present at the hearing, and his reported writings and
4 actions demonstrate a lack of credibility. ". . . They were conflicting
5 . . . he was not in attendance at the hearing and Ryan Sheets testified
6 that some of the reportings were just plain false" Counsel
7 argued ". . . you can't use employer knowledge of the respondent for a
8 recognized specialized work of scaffold building and assembly" He
9 asserted that because work was ". . . underway around all sides of
10 the building the CSHO couldn't see the total of what was going
11 on" Counsel further argued the subcontracted individuals on the
12 site were engaged in erecting or disassembling scaffolding when the CSHO
13 arrived and therefore exempted from the requirements which apply to only
14 **working** on the scaffolding. He asserted that had the CSHO arrived later
15 the scaffolding work would have been completed. Counsel challenged the
16 proof element as to employer knowledge, actual or constructive, and
17 asserted that ". . . all happened very quickly and the evidence shows
18 only the building of scaffolding . . . (A)ll the violations were abated
19 within 24 hours . . . the testimony showed scaffolding was taken down
20 by the very next day"

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

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

27 All facts forming the basis of a complaint must be
28 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD

1 ¶16,958 (1973).

2 Preponderance of the evidence means evidence that
3 enables a trier of fact to determine that the
4 existence of the contested fact is more probable
5 than the nonexistence of the contested fact. NRS
6 233B, Sec. 2. *Nassiri v. Chiropractic Physicians'*
7 *Board of Nevada*, 130 Nev. Adv. Op. No. 27, 327 P.3d
8 487 (2014)

9 A "serious" violation is established in accordance with NRS
10 618.625(2) which provides in pertinent part:

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

20 To establish a prima facie case, the Secretary
21 (Chief Administrative Officer) must prove the
22 **existence of a violation**, the **exposure of
23 employees**, the reasonableness of the abatement
24 period, and the **appropriateness** of the penalty.
25 *Bechtel Corporation*, 2 OSHC 1336, 1974-1975 OSHD
26 ¶18,906 (1974); *Crescent Wharf & Warehouse Co.*, 1
27 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).
28 (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

1 access to a hazard. See *Anning-Johnson Co.*,
2 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

- 3 3. Proof by a preponderance of substantial
4 evidence of a recognized defense.

5 OSHA's **multi-employer citation policy** describes
6 four classes of employers that may be cited:
7 exposing, creating, correcting, and **controlling**.
8 A "**controlling**" employer is an employer that could
9 **reasonably be expected to prevent or detect and**
10 **abate the violative condition by reason of its**
11 **control over the worksite or its supervisory**
12 **capacity**. The reasonable efforts that a controlling
13 employer must make to prevent or detect and abate
14 violative conditions depend on multiple factors,
15 including the **degree of its supervisory capacity**,
16 its constructive or actual **knowledge of**, or
17 expertise with respect to, the **violative condition**,
18 the cause of the violation, the **visibility of the**
19 **violation** and length of time it persisted, and what
20 the **controlling employer knows about a**
21 **subcontractor's safety programs**. It does not
22 **depend on whether the controlling employer has the**
23 **manpower or expertise to abate the hazard itself**.
24 *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998);
25 *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 6
26 OSH Cases 1077 (8th Cir. 1977). See *Blount Int'l*
27 *Ltd.*, 15 OSH Cases at 1899-1900; *Sasser Elec. &*
28 *Mfg. Co.*, 11 OSH Cases 2133 (Rev. Comm'n 1984);
Grossman Steel & Aluminum Corp., 4 OSH Cases 1185
(Rev. Comm'n 1976) *Marshall v. Knutson*, 566 F.2d at
601. *McDevitt Street Bovis*, 19 OSH Cases 1108 (Rev.
Comm'n 2000); *David Weekley Homes*, 19 OSH Cases at
1119-20; *Centex-Rooney*, 16 OSH Cases at 2130. *R.P.*
Carbone Constr. Co. v. OSHRC, 166 F.3d 815, 18 OSH
Cases 1551 (6th Cir. 1998). *Blount Int'l Ltd.*, 15
OSH Cases 1897 (Rev. Comm'n 1992) (citing *Red*
Lobster Inns of Am., Inc., 8 OSH Cases 1762 (Rev.
Comm'n 1980)). *IBP Inc.*, 144 F.3d at 867, 18 OSH
Cases 1353. *United States v. MYR Grp. Inc.*, 361
F.3d 364, 20 OSH Cases 1614 (7th Cir. 2004); *cf.*
Reich v. Simpson, Gumpertz & Heger, Inc., 3 F.3d 1,
16 OSH Cases 131 (1st Cir., 1993) (same holding
based on 29 CFR §1910.12). See, e.g. *Summit*
Contractors Inc., 20 OSH Cases 1118 (Rev. Comm'n J.
2002), *Homes by Bill Simms, Inc.*, 18 OSH Cases 2158
(Rev. Comm'n J. 2000). Occupational Safety and
Health Law, 3rd Ed., Dale & Schudtz. (emphasis
added)

27 In construction industry cases, several courts
28 have, to one degree or another, held that **general**
contractors or certain higher level subcontractors
may in some circumstances be cited under Section

1 5(a)(2) **even if the exposed employees are not**
2 **theirs.** *Secretary of Labor v. Trinity Indus.*, 504
3 F.3d 297 (3d Cir. 2007); *Universal Constr. Co. v.*
4 *OSHRC*, 182 F.3d 726, 728-31, 18 OSH Cases 1769 (10th
5 Cir. 1999); *United States v. Pitt-Des Moines Inc.*,
6 168 F.3d 976, 18 OSH Cases 1609 (7th Cir. 1999);
7 *R.P. Carbone Const., Co. v. OSHRC*, 166 F.3d 815, 18
8 OSH Cases 1551 (6th Cir. 1998); *New England Tel. &*
9 *Tel. Co. v. Secretary of Labor*, 589 F.2d 81, 81-82
10 (1st Cir. 1978); *Equip. Leasing Inc. v. Secretary of*
11 *Labor*, 577 F.2d 534, 6 OSH Cases 1699 (9th Cir.
12 1978); *Marshall v. Knutson Constr. Co.*, 566 F.3d
13 596, 6 OSH Cases 1077 (8th Cir. 1977); *Brennan v.*
14 *OSHRC (Underhill Constr. Corp.)*, 513 F.3d 1032,
15 1038, 2 OSH Cases 1641 (2d Cir. 1975).
16 Occupational Safety and Health Law, 3rd Ed., Dale &
17 Schudtz. (emphasis added)

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

24 . . . **Control can be established by contract or, in**
25 **the absence of explicit contractual provisions, by**
26 **the exercise of control in practice**

27 To be a **controlling employer**, the employer must
28 itself be **able to prevent or correct a violation or**
29 **to require another employer to prevent or correct**
30 **the violation.** One source of this ability is
31 explicit contract authority. This can take the
32 form of a specific contract right to require
33 another employer to adhere to safety and health
34 requirements and to correct violations the
35 controlling employer discovers. U.S. Dept. Of
36 Labor, Multi-Employer Citation Policy (emphasis
37 added)

38 Occupational safety and health law has long
39 recognized the **inability of an employer to avoid**
40 **employee OSHA safety protection by contract or**
41 **agreement.** *Frohlick Crane Service, Inc. v.*
42 *Occupational Safety and Health Review Commission*,
43 521 F.2d 628 (1975).

44 The testimony of record reflects merely a purported verbal

1 agreement between the respondent and a subcontractor company identified
2 only as "Select." However even if a separate subcontractual employment
3 status could be found, both employer's would still be liable to citation
4 for the same violation under the **multi-employer doctrine** which applies
5 to **controlling, creating, exposing, or correcting employers**.

6 **Employer knowledge** was established through the unrefuted evidence
7 of Mr. Maturino having observed the individuals, as photographed, and
8 in **plain view** while engaged in violative conduct at Citation 1, Items
9 1 and 3. Under principles well recognized in occupational safety and
10 health law **supervisory knowledge** is imputed to the respondent employer.

11 **Employee exposure** was proven both directly and through access to the
12 hazardous conditions as depicted in the photographs. The exposure was
13 unrefuted; the parties merely disputed by whom the depicted employees
14 working on the scaffolding were employed.

15 In Citation 1, Items 2 and 4, violations were established by the
16 preponderant evidence. 29 CFR 1926.451(f)(3) was charged for the lack
17 of a **competent person** on the site to inspect the scaffolding. 29 CFR
18 1926.454 was cited due to no evidence of training for employees observed
19 working from the scaffold. Clearly the elements of violation were
20 established because there was no evidence of a competent person on the
21 site. The respondent witnesses did not testify they were classified as
22 competent persons in scaffolding work, nor could Mr. Mondragon who was
23 either an independent contractor to the respondent or employee of the
24 subcontractor Select, produce any documentation to support any such
25 qualification as a competent person. Further, at Item 4, no training
26 documents were provided by anyone to establish compliance with the
27 applicable standards.

28 The primary defensive position asserted on behalf of respondent was

1 based upon lack of employer knowledge of the violative conditions.
2 However the respondent employer knew, or with the exercise of reasonable
3 diligence could have known of the violative conditions. Further, the
4 violations occurred in **plain view**, and photographed with respondent
5 foreman Maturino present in the pictures.

6 In general, **the actual or constructive knowledge of**
7 **a supervisory employee will be imputed to the**
8 **employer, and thus constitute a prima facie showing**
9 **of employer knowledge.** Where supervisory knowledge
10 can be imputed, OSHA need not also show that there
11 were deficiencies in the employer's safety program.
12 *Halmar Corp.*, 18 OSH Cases 1014, 1016-17 (Rev.
Comm'n 1997), *aff'd on other grounds*, 18 OSH Cases
1359 (2d Cir. 1998). *But see L.R. Willson & Sons*
14 *Inc. v. OSHRC*, 134 F.3d 1235, 1240-41, 18 OSH Cases
1129 (4th Cir. 1998), and cases cited therein at
15 footnote 31. Occupational Safety and Health Law, 2nd
Ed., Rabinowitz at page 87. (emphasis added)

16 ". . . (A) **supervisor's knowledge** of deviations
17 from standards . . . is properly **imputed to the**
18 **respondent employer.** . . ." *Division of Occupational*
19 *Safety and Health vs. Pabco Gypsum*, 105 Nev. 371,
20 775 P.2d 701 (1989). (emphasis added)

21 Actual knowledge is not required for a finding of
22 a serious violation. **Foreseeability and**
23 **preventability** render a violation serious provided
24 that a **reasonably prudent employer**, i.e., one who
25 is safety conscious and possesses the technical
26 expertise normally expected in the industry
27 concerned, would know of the danger. *Candler-*
28 *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). (emphasis added)

29 NVOSHA safety compliance for **all employees** on a **multi-employer**
30 **worksite is** deemed to be the responsibility of a **controlling employer**
31 under well established occupational safety and health law.

32 The testimonial, and stipulated documentary evidence established
33 the subject worksite was appropriately classified a **multi-employer**

1 **worksite.** The respondent bore the responsibility of worksite safety for
2 **any employees** on the job site, whether those of an unlicensed
3 subcontractor, an independent contractor, or employee of another
4 subcontractor. The evidence further established the respondent general
5 contractor was a **controlling employer.** Respondent was in **control** of the
6 overall jobsite operation. This includes safety compliance for the
7 erection, dismantling, rigging and safety of scaffolding. Through
8 foreman Maturino, **employer knowledge** is imputed to the respondent.

9 "... liability is imposed ... on a contractor who
10 creates a hazard **or who has control over the**
11 **condition on a multi-employer worksite ...**". See,
12 *Brennan v. OSHRC (Underhill Construction Corp.)*,
13 513 F.2d 1032 (2nd Cir. 1975). The commission and
14 courts have recognized that protection from hazard
exposure to employees is the responsibility of the
employer and confirmed that "... policy is best
effectuated by placing responsibility for hazards
on those who create them."

15 The standards cited were clear and unambiguous. Absent ambiguity
16 a statute's **plain meaning** controls and no further analysis is permitted.
17 *State Farm Mut. Auto. Ins. Co. v. Commissioner of Ins.*, 114 Nev. 535,
18 540, 958 P.2d 733, 736 (1998). *Leven v. Frey*, 123 Nev. 399, 404, 168
19 P.3d 712, 716 (2007).

20 Based upon the facts, evidence and applicable law, the Citation 1,
21 Items 1 through 4 violations and classifications of **serious** must be
22 confirmed.

23 NRS 618.625 provides in pertinent part:

24 "... a serious violation exists in a place of
25 employment if there is a **substantial probability**
26 **that death or serious physical harm could result**
27 **from a condition** which exists, or from one or more
28 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."

1 In reviewing the citations, the Board finds the cited violative
2 conditions at Items 1 and 3 similar or very closely inter-related giving
3 the appearance of duplicative penalty assessments. Further, the
4 evidence in the record supports this Board's finding that a fair penalty
5 assessment practice is warranted due to insufficient considerations,
6 credits and/or adjustments that might have been rendered under NVOSHES
7 enforcement policies. The goal of the Occupational Safety and Health
8 Act in Nevada is to assure workplace safety. Neither the number of
9 violations nor the amount of monetary penalties necessarily correlate
10 to correction or resolution of unsafe working conditions. Given the
11 evidence and facts of violation, it is appropriate that the violative
12 conditions and classifications be confirmed at Citation 1, Items 1
13 through 4; however adjustments made in the amount of the monetary
14 penalties.

15 The Federal courts recognize the exclusive authority of the
16 Commission (Board) to assess or adjust penalties.

17 If an employer contests the Secretary's proposed
18 penalty, the Review Commission has **exclusive**
19 authority to assess the penalty, the Secretary's
20 penalty is considered merely a proposal. Relying
21 on the language of Section 17(j), the Commission
22 and courts of appeal have consistently held that it
23 is for the Commission to determine, **de novo**, the
24 **appropriateness of the penalty** to be imposed for
25 violation of the Act or an OSHA standard. (Emphasis
26 added)

27 The Review Commission has held that the criteria to
28 be considered cannot always be given equal weight
and that no single factor is controlling in
assessing penalties. . . ." Occupational Safety and
Health Law, 2013, Bloomberg/BNA 3rd Ed., pages 295-
297, citing cases, *U.S. Ladish Malting Co.*, 135
F.3d 484, 18 OSH Cases 1133 (7th Cir. 1998); *Reich*
v. Arcadian Corp., 110 F.3d 1192, 17 OSH Cases 1929
(5th Cir. 1997) (citing 29 U.S.C. §§666(j), 659(a),
659(c)); *Bush & Burchett Inc. V. Reich*, 117 F.3d
932, 939, 17 OSH Cases 1897, 1903 (6th Cir.), cert.
denied, 118 S. Ct. (1997). *Quality Stamping Prods.*

1 Co., 16 OSH Cases 1927 (Rev. Comm'n 1994); Valdak
2 Cor., 17 OSH Cases 1135, 1137-38 & n.5 (Rev. Comm'n
3 1995), aff'd, 73 F.3d 1466, 17 OSH Cases 1492 (8th
4 Cir. 1996) (. . .the Commission noted that "**the Act
places no restrictions on the Commission's
authority to raise or lower penalties within those
limits**"). (emphasis added)

5 The Board finds violations as a matter of fact and law at Citation
6 1, Items 1 through 4, confirms the classification of serious as to each,
7 however the proposed penalty total is reduced \$4,200.00 to \$1,200.00.

8 Based upon the above and foregoing, it is the decision of the
9 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that violations of
10 Nevada Revised Statutes be confirmed at Citation 1, Item 1, 29 CFR
11 19216.451(b)(1); Citation 1, Item 2, 29 CFR 1926.451(f)(3); Citation 1,
12 Item 3, 29 CFR 1926.451(g)(1); and Citation 1, Item 4, 29 CFR
13 1926.454(a). The serious classifications are confirmed and the total
14 penalty is approved in the amount of One Thousand Two Hundred Dollars
15 (\$1,200.00).

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

26 DATED: This 16th day of August, 2017.

27 NEVADA OCCUPATIONAL SAFETY AND HEALTH
28 REVIEW BOARD

By _____/s/
JAMES BARNES, CHAIRMAN