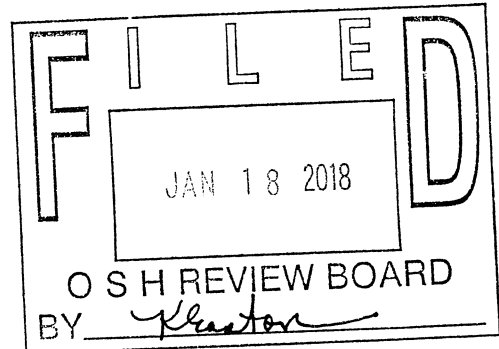


1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

4 CHIEF ADMINISTRATIVE OFFICER OF
5 THE OCCUPATIONAL SAFETY AND
6 HEALTH ADMINISTRATION OF THE
7 DIVISION OF INDUSTRIAL RELATIONS
8 OF THE DEPARTMENT OF BUSINESS
9 AND INDUSTRY, STATE OF NEVADA,

Docket No. RNO 17-1881



8 vs. Complainant,
9 PELICAN, LLC,
10 Respondent,
11 _____/

12 **DECISION**

13 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
14 **REVIEW BOARD** at a hearing commenced November 8, 2017, in furtherance of
15 notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel
16 appearing on behalf of the Complainant, **Chief Administrative Officer of**
17 **the Occupational Safety and Health Administration, Division of**
18 **Industrial Relations** (OSHA). MR. RICHARD CAMPBELL, ESQ., appearing on
19 behalf of Respondent, **Pelican, LLC.**

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

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

25 Citation 1, Item 1, charges a violation of 29 CFR 1926.404(b)(1)(i)
26 which provides in pertinent part:

27 General. The employer shall use either ground
28 fault circuit interrupters as specified in
paragraph (b)(1)(ii) of this section or an assured
equipment grounding conductor program as specified

1 in paragraph (b) (1) (iii) of this section to protect
2 employees on construction sites. These
3 requirements are in addition to any other
4 requirements for equipment grounding conductors.

5 Complainant alleged:

6 Located at the site, the Employer did not use
7 ground fault circuit interrupters nor did it have
8 an assured equipment grounding conductor program.
9 Instead, cords were plugged into a 4-plex outlet in
10 the laundry room. Employees used the cords to power
11 tools.

12 The citation was classified as Serious. The proposed penalty was
13 in the amount of \$1,500.00.

14 Citation 1, Item 2, charges a violation of 29 CFR
15 1926.405(a) (2) (ii) (I) which provides in pertinent part:

16 Flexible cords and cables shall be protected from
17 damage. Sharp corners and projections shall be
18 avoided. Flexible cords and cables may pass through
19 doorways or other pinch points, if protection is
20 provided to avoid damage.

21 Complainant alleged:

22 Located at the jobsite, flexible cords running
23 across a driveway and used to power tools were
24 exposed to continual vehicular traffic, but were
25 not protected from damage.

26 The citation was classified as Serious. The proposed penalty was
27 in the amount of \$1,500.00.

28 Counsel stipulated to the admission of evidence at complainant
Exhibits 1 through 4 and respondent Exhibit A.

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

NVOSHES Certified Safety and Health Officer (CSHO), Robert A.
Gillings, testified with regard to the citations, violations and
inspection report at Exhibits 1 through 4. On November 2, 2016 an

1 inspection was commenced at the Bella Lago Apartments located in Carson
2 City, Nevada. The property manager, Mr. Isreal Tellez, referred CSHO
3 Gillings to Mr. Ben Farahi who he identified as the owner of the Bella
4 Lago Apartments and Pelican LLC. Mr. Tellez reported he was not in
5 charge of safety on the site. Safety responsibility was placed upon any
6 contractors to control their own areas. Mr. Farahi informed CSHO
7 Gillings that Pelican, LLC was the jobsite general contractor for the
8 construction of the 64,000 sq. ft. apartment buildings and reported that
9 subcontractors were in charge of their own safety.

10 CSHO Gillings identified ADL, Inc. as a subcontractor on the site,
11 and Mr. Frank Perez the company general foreman. Gillings testified he
12 observed and photographed flexible electrical extension cords used to
13 power tools running across a driveway. The cords were exposed to
14 regular vehicular traffic and not protected from damage. He identified
15 Exhibit 3 and testified Mr. Jaimi Gundinez-Malciendo, a framing employee
16 of ADL, reported ". . . the power cords have always been plugged inside
17 the laundry room and across the road." He obtained similar interview
18 statements confirming the power cords extended across the driveway from
19 ADL crew leader, Mr. Edward Aceyedo who reported "As far as I know the
20 power comes from the laundry room." ADL foreman Luis E. Perez reported
21 at page 77 of Exhibit 3 in his interview statement that "We have been
22 on this job for a month. . . . We have had electrical cords running from
23 the apartments across the parking lot to the job site for a month."

24 Mr. Gillings testified he observed use of an electrical plug
25 receptacle without ground fault circuit interrupters (GFCI) to provide
26 electrical power for the equipment being utilized by the subcontractor
27 ADL employees. He testified the cords were plugged into a four-plug
28 receptacle in the laundry room and employees used the cords to power

1 their tools.

2 Mr. Gillings identified photographic exhibits stipulated in
3 evidence at Exhibit 1, pages 49, 49a and 49b to confirm his findings of
4 non-GFCI rated electrical receptacle in the laundry rooms in use to
5 power employee tools. Exhibit 1, pages 50, 50a and 50b depicted the
6 electrical power cords strung across the driveway and access road.

7 CSHO Gillings confirmed actual use of the non-GFCI plug receptacle
8 and electrical cords he observed and photographed by ADL employees. He
9 testified any other individuals with access to the premises would be
10 exposed to same hazards. He confirmed existence of hazardous conditions
11 on the site in violation of Nevada Occupational Safety and Health
12 standards referenced in the Code of Federal Regulations at 29 CFR
13 1926.404(b)(1)(i) and 29 CFR 1926.405(a)(2)(ii)(I).

14 Mr. Gillings testified the recognized OSHA enforcement policy under
15 the multi-employer worksite doctrine applied. Mr. Farahi identified
16 himself as the licensed general contractor for Pelican, LLC; and ADL the
17 subcontractor with employees working on the site. CSHO Gillings
18 recommended issuance of Citation 1, Item 1 and Citation 1, Item 2 to
19 both the general contractor, Pelican, LLC and the subcontractor ADL,
20 Inc.

21 Mr. Gillings identified the violation worksheets at Exhibit 1,
22 pages 16-23. He testified the inspection information reported and
23 documented in evidence supported his recommendation to cite Pelican,
24 LLC. The facts warranted finding Pelican to be a **controlling employer**
25 under the multi-employer worksite enforcement policy. He concluded the
26 evidence established the proof element of **employer knowledge**.

27 CSHO Gillings referenced Exhibit 1, page 18, paragraph 23 and
28 reported his interview entries which provided ". . . Mr. Farahi (Owner)

1 . . . had been on the site every day when the electrical power being
2 used without GFCI protection was **overlooked.**" Mr. Gillings found from
3 his inspection the electrical power had been used without GFCI or
4 assured grounding for approximately one month. Mr. Perez, foreman of
5 ADL Construction, reported he ". . . told Mr. Farahi about his concerns
6 with the electrical power, and asked Mr. Farahi for a generator . . .
7 but Mr. Farahi refused the request and told him to use the existing
8 power from the apartments in the laundry room." CSHO Gillings again
9 referenced Exhibit 1, page 22 of the worksheets, paragraph 23 on the
10 proof element of employer knowledge which provided

11 "Mr. Farahi stated he had been onsite everyday. The
12 flexible cords had been exposed to damage or in
13 plain site for one month. Mr. Farahi told Mr.
14 Alfonso Martinez (Owner of ADL Construction) to use
15 the existing power from the laundry room. The
laundry room is directly across from the jobsite
and the only way for extension cords to reach the
site would be run across the driveway."

16 In continued testimony, Mr. Gillings testified that based upon his
17 findings of the violative conditions, observations and photographs
18 depicting same, the citations were warranted against both the general
19 and subcontractor on the site. Mr. Ben Farahi was the owner of Pelican,
20 LLC managing member and the Bella Lago Apartments. He was the licensed
21 managing member of Pelican, LLC to qualify for the general contractor's
22 license. Mr. Farahi admitted he was on the site daily for 2-3 hours,
23 and had authority to stop any work underway on the job. Mr. Farahi
24 informed him that each subcontractor is responsible for their own safety
25 requirements.

26 On cross-examination Mr. Gillings clarified his written report at
27 Exhibit 1, page 11. He testified Mr. Farahi told him that he had the
28 authority to stop work; but did not say he had authority to correct

1 safety violations. See Transcript, page 22, lines 12-14. Mr. Gillings
2 testified that it was an employee who told him Mr. Farahi had the
3 authority to stop work. Mr. Gillings testified he found the respondent
4 to be a controlling employer under the OSHA multi-employer worksite
5 citation policy. He found there were electrical power cords run across
6 the parking lot in violation of the applicable OSHA standard and Mr.
7 Farahi had the right to stop work on the site. Mr. Gillings testified
8 the multi-employer worksite doctrine enforcement guidance warranted
9 citation of the respondent general contractor as a controlling employer.

10 Counsel questioned CSHO Gillings on the types of controlling
11 employers defined under the citation policy Exhibit 1, pages 52-57. He
12 referenced the definition of a controlling employer at page 53 E; and
13 at subparagraph 3, the listed factors including "reasonable care" for
14 an employer to be classified as controlling. Mr. Gillings testified the
15 facts obtained from his investigation demonstrated respondent to be
16 "controlling" under the guidance and definitions. He found controlling
17 employers have a presence or an ability to correct violative conditions.
18 Counsel referenced the contractual conditions allocating
19 responsibilities between the parties at Exhibit 1, page 54. He
20 questioned Mr. Gillings knowledge of the contractual agreement between
21 respondent as general contractor and ADL as subcontractor. Counsel
22 asked whether the respondent had a specific right under the contract to
23 control safety. Mr. Gillings responded that he did not review the
24 contract.

25 On continued cross-examination, counsel referenced Exhibit 1, page
26 14 and asked whether CSHO Gillings cited Pelican LLC because he viewed
27 them as a controlling employer. Mr. Gillings responded affirmatively.
28 Counsel asked whether the sole basis of the citation was Mr. Farahi's

1 statement that he had the right to stop work. Mr. Gillings answered
2 yes.

3 On redirect examination Mr. Gillings testified in response to
4 complainant counsel question of whether it was **not true** that he cited
5 respondent **solely** based upon the determination of controlling employer.
6 Mr. Gillings answered "correct." Counsel asked - you cited for other
7 reasons too? The response was "yes." Counsel identified Exhibit 2,
8 page 82, as hand written work notes of questions raised during a follow
9 up telephone interview with Mr. Farahi. Mr. Gillings testified Mr.
10 Farahi previously identified his role on the construction site as
11 general contractor. Mr. Gillings noted his question as to whether Mr.
12 Farahi were to see unsafe work practices he could correct the
13 violations. Mr. Farahi responded "yes." (Transcript page 32, line 22)
14 When asked whether Mr. Farahi conducted safety inspections on the site,
15 Mr. Gillings testified he (Mr. Farahi) responded affirmatively, ". . .
16 everyday looking for violations" Counsel asked Mr. Gillings
17 whether OSHA requires "reasonable care" as a consideration at multi-
18 employer sites; to which he responded "yes." Mr. Gillings confirmed
19 that Exhibit 1, page 53 provides a list of factors for determining
20 evidence of reasonable care and controlling employer.

21 On re-cross examination, counsel referenced Exhibit 3, page 82 and
22 asked if CSHO Gillings explained during the phone conference with Mr.
23 Farahi what unsafe work practices were. Mr. Gillings responded "not
24 specifically." Mr. Gillings testified that during the phone call he did
25 not use the word "unsafe;" but discussed the violative conditions under
26 both citations and believed Mr. Farahi understood from his knowledge
27 during the discussion that the electrical issues cited were unsafe
28 conditions.

1 On rebuttal examination, counsel asked Mr. Gillings whether he
2 could find unsafe conditions that do not result in an OSHA violation.
3 Mr. Gillings responded "correct." Counsel asked whether it was
4 necessary, for issuance of OSHA citations, that the respondent knew
5 there were multi plugs in a non-GFCI power outlet and exposed extension
6 cords extended over a parking lot to be violations of the OSHA standard.
7 Mr. Gillings responded "no." Mr. Gillings explained that OSHA needs
8 only show employer knowledge of unsafe conditions.

9 The complainant presented witness testimony from Mr. Jake La France
10 identified as a CSHO/safety supervisor with NVOSHES. Mr. La France
11 testified he reviewed the Gillings inspection reports and concluded they
12 established the proof element of **employer knowledge**. He testified the
13 subcontractor ADL foreman reported Mr. Farahi was on the site every day
14 when power cords were plugged into the power outlet without GFCI
15 protection and extended across the parking and driveway area. Mr. La
16 France testified the evidence was sufficient to establish employer
17 knowledge. Mr. La France referenced Exhibit 1, commencing at page 20 and
18 explained the hazards and potential injuries expected from the
19 documented dangerous conditions to include serious injury or death from
20 electrical shock. He testified:

21 ". . . that if you run over the extension cord with
22 vehicles it can damage the cord . . . approximately
23 15 employees of subcontractor ADL were exposed to
24 the hazardous condition . . . they used the cords
25 to plug in their tools because Mr. Farahi would not
pay for the rental of a generator . . . and he
(Farahi) was on the job site daily for a month and
told ADL owner, Mr. Alfonso Martinez, to use
extension cords to reach across the parking lot."

26 Mr. La France testified that the factors as reported and
27 photographic exhibits subject of his file review were evidence of
28 **employer knowledge**.

1 Mr. La France testified on the classification of **serious** and
2 described the elements and statutory references in Nevada Revised
3 Statutes to reach the conclusion. He testified the enforcement policy
4 guidelines do not permit any lesser classification due to identified
5 serious injury or even death that could result from exposure to the
6 recognized existent hazards. He testified on the reported finding of
7 "severity" and explained it was rated "high" because of the potential
8 for death or permanent disability. Mr. La France explained CSHO
9 findings for the "probability" rating factor of "greater" as based upon
10 the likelihood of an accident happening due to the number of employees
11 exposed over an approximate one month duration. He described the
12 computer system ratings for findings of "gravity."

13 On redirect examination counsel referenced Exhibit 1, page 18 where
14 it was reported ". . . Mr. Farahi was onsite every day . . . and said
15 . . . the electrical power being used without GFCI protection was
16 overlooked" The report also reflected use of the plugs in the
17 receptacle without a GFCI protection over a one month duration. Counsel
18 asked whether the interpretation was that was Mr. Farahi did not "**know**"
19 about GFCI. Mr. La France testified he interpreted the word "overlook"
20 to mean Mr. Farahi just overlooked there weren't any (GFCI). He
21 explained that if Mr. Farahi **knew** there were none and permitted the plug
22 use then the citation could have been classified as a "willful
23 violation."

24 On cross-examination Mr. La France testified Pelican had authority
25 to stop work, because respondent is a general contractor which means he
26 has that type authority. He further testified Mr. Farahi was onsite
27 daily and in charge of work based upon the reportings by subcontractor
28 ADL and employees interviewed; and from the rights recognized for a

1 general contractor.

2 On re-cross examination Mr. La France testified he did not know
3 whether Mr. Farahi actually knew cords were plugged into a non-GFCI
4 rated outlet, but the evidence shows Mr. Farahi directed and authorized
5 use of the outlets which were in fact non-GFCI.

6 Complainant rested and respondent presented witness testimony of
7 Mr. Ben Farahi as the managing member of respondent Pelican, LLC and
8 owner of Bella Lago Apartments. He identified respondent Exhibit A as
9 the contract between Pelican LLC as general contractor and ADL
10 Construction, Inc., the subcontractor on the subject site. He testified
11 in furtherance to counsel questions at Exhibit 1, page 18, paragraph 23
12 on "employer knowledge." Mr. Farahi testified that he only discussed
13 where to get power or whether a generator was needed and informed where
14 power was located on the site. He testified no one ever told him the
15 cords were plugged into a non-GFCI outlet and didn't specifically
16 discuss the outlet was non-GFCI, and did not know until after the
17 citation.

18 Mr. Farahi testified he did not know it was an OSHA violation for
19 unprotected electrical extension cords plugged into a power outlet to
20 be laid across the parking lot. He testified that no ADL employees told
21 him they had any "concern" or needed to run extension cords across the
22 driveway. He referenced Exhibit A and testified that he expected the
23 ADL subcontractor to fully adhere to the safety requirements. Mr.
24 Farahi testified the contractor is responsible for all safety equipment.
25 He also testified that he did not have the ability to direct or schedule
26 work sequences of the subcontractor ADL and never directed ADL to
27 correct any safety issues. When asked if he had any ability to correct
28 or direct work or safety issues Mr. Farahi testified that he did not

1 under the contract, but as owner he could tell them about any safety
2 issues noted. With reference to Exhibit A(i), page 5 Mr. Farahi
3 testified if there were any violations, the prime contractor may stop
4 work for any violations of jobsite requirements. At Exhibit 1, page 6,
5 Mr. Farahi testified he remembers a telephone conversation with CSHO
6 Gillings but not the dates nor substance of the discussion. He
7 testified Exhibit 1, page 6, shows one question without any response
8 listed as to whether he was in charge of safety. Mr. Farahi denied he
9 was asked a question as to whether he was in charge of safety. Exhibit
10 3, page 82 Mr. Farahi testified the general contractor and owner are
11 responsible to correct if they see unsafe practices. He did not recall
12 any discussions with CSHO Gillings finding "unsafe work practices." In
13 response to a question as to whether the CSHO talked to him after the
14 inspection about non-GFCI outlets and what he did, Mr. Farahi testified
15 he stopped the contractor (from using) and made sure not it would happen
16 again. Mr. Farahi testified he never said he "knew" about the non-GFCI
17 use and/or overlooked it. He testified ADL never told him of safety
18 concerns over the electrical issues.

19 On cross-examination as to whether he denied responsibility for
20 worker safety on the jobsite, Mr. Farahi responded not actual
21 responsibility but an interest to be sure for safety. He testified that
22 safety at the site is the primary responsibility of the subcontractor,
23 and that he directed ADL to use the existing power sources at the site
24 but was not aware that cords were run over daily by vehicles. Counsel
25 questioned whether Mr. Farahi believed he could "contract away" safety
26 responsibilities to which he responded he didn't know, but could make
27 them (subcontractors) responsible for safety. When asked, referencing
28 Exhibit A, page 3, paragraph iv, if he had the ability to give the

1 subcontractor instructions on what to do, Mr. Farahi answered absolutely
2 not, but if it's a safety violation issue he of course expected a
3 subcontractor to do what he tells them. When asked "do you have some
4 control over the workplace?" Mr. Farahi responded ". . . of course, as
5 owners and general contractor I have some control over the worksite .
6 . . ."

7 On redirect examination Mr. Farahi testified he did not tell the
8 subcontractor what to do on a day-to-day basis, but expected them to get
9 the job done under the time requirements. When asked if he ever told
10 the subcontractors to wear hard hats or how to plug in the cords, Mr.
11 Farahi responded "no, unless I knew something was not safe."

12 At the conclusion of evidence and testimony, counsel presented
13 closing arguments.

14 Complainant asserted the elements to prove a violation under the
15 multi-employer worksite citation policy were established through the
16 required burden of proof based upon the facts in evidence. Counsel
17 argued the case seems to be one based on misunderstanding. ". . . Mr.
18 Farahi is not required to **know of actual violations** but of **conditions**
19 **existent** that . . . do not comply with . . . safety requirements under
20 OSHA standards . . . Further Mr. Farahi thinks he can avoid
21 responsibility of worksite safety by contract which is wrong . . . under
22 multi-employer citation policy every employer is responsible . . ."

23 Counsel argued "In this case there is a lower standard of
24 reasonable care for a general contractor and/or a controlling employer,
25 and we are not trying to hold Pelican to the same standard of care that
26 we held ADL to." Mr. Farahi told ADL to use receptacles and extension
27 cords for power access and source at the worksite. Mr. Farahi did daily
28 safety checks at the site. However he is now saying it was for

1 apartment resident safety and not worker safety on the site. Counsel
2 argued the multi-employer worksite doctrine places responsibility on the
3 general contractor Pelican, LLC; now Mr. Farahi does not recall
4 conversations on his authority over the worksite or that he didn't say
5 certain things that were reported during the inspection or subject of
6 witness testimony. The evidence demonstrated the respondent knew of the
7 hazardous conditions. Mr. Farahi testified he knows what a GFCI is.
8 Unprotected extension cords were clearly laid across the driveway. He
9 directed ADL to do it and he knew they were run over by vehicles for
10 approximately a month. He merely said today that he didn't know it was
11 a violation or could be dangerous.

12 Counsel argued OSHA met the burden of proof with regard to the
13 existence of violative conditions, the applicability of the cited
14 standards, exposure of employees to the hazardous conditions at the
15 worksite and employer knowledge. Mr. Farahi and Pelican, LLC knew about
16 all this - he just now claims he didn't have "understanding of the
17 effects."

18 Respondent counsel presented closing argument. He noted
19 subcontractor ADL was already cited for both the GFCI and extension
20 cords on the driveway. Mr. Farahi was not the **controlling employer** as
21 a general contractor or owner and even if so, ". . . not responsible as
22 controlling under the facts in evidence" Counsel argued Exhibit
23 1, page 53 is a good check list of what's needed for the finding of a
24 violation under the multi-employer worksite doctrine as a "controlling
25 employer." There were no violative facts ever brought to Mr. Farahi's
26 attention. He was not a "controlling employer" under the facts in
27 evidence so there was no proof of a violation. ". . . Mr. Farahi's
28 **control** did not rise to the proof level required under the multi-

1 employer enforcement doctrine rather it was just general. . . ."

2 The extent of responsibility of a "controlling employer" is less
3 than expected for a "creating or exposing employer" under the citation
4 policy. "You can't expect or require the same level of duty . . ."
5 Counsel argued that NRS 618.625 specifically requires employer
6 knowledge, and the enforcement guidance includes the level needed to
7 confirm an OSHA violation. The Board has no authority to enforce the
8 level of duty upon the respondent general contractor and/or owner as a
9 **controlling employer** to support a finding of violation for liability.
10 NRS makes employer knowledge very definite. The multi-employer worksite
11 doctrine defines the levels of duty. They do not support a finding of
12 violation by the respondent.

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

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

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

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

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

28 . . . a **serious violation** exists in a place of
employment if there is a substantial probability

1 that death or serious physical harm could result
2 from a condition which exists or from one or more
3 practices, means, methods, operations or processes
4 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)

5 To **establish a prima facie case**, the Secretary
6 (Chief Administrative Officer) must prove the
7 **existence of a violation**, the **exposure of**
8 **employees**, the reasonableness of the abatement
9 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)

10 To **prove a violation** of a standard, the Secretary
11 must establish (1) the **applicability** of the
12 standard, (2) the existence of **noncomplying**
13 **conditions**, (3) **employee exposure or access**, and
14 (4) that the **employer knew or with the exercise of**
15 **reasonable diligence** could have known of the
16 violative condition. See *Belger Cartage Service,*
17 *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)

18 A respondent may rebut allegations by showing:

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

26 OSHA's **multi-employer citation policy** describes
27 four classes of employers that may be cited:
28 exposing, creating, correcting, and **controlling**.
A "**controlling**" employer is an employer that could
reasonably be expected to prevent or detect and
abate the violative condition by reason of its
control over the worksite or its supervisory
capacity. The **reasonable efforts** that a **controlling**
employer must make to prevent or detect and abate
violative conditions depend on multiple factors,

1 including the degree of its supervisory capacity,
2 its **constructive or actual knowledge of**, or
3 expertise with respect to, the **violative condition**,
4 the cause of the violation, the **visibility of the**
5 **violation and length of time it persisted**, and what
6 the controlling employer knows about a
7 subcontractor's safety programs. **It does not**
8 **depend on whether the controlling employer has the**
9 **manpower or expertise to abate the hazard itself.**
10 *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998);
11 *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 6
12 OSH Cases 1077 (8th Cir. 1977). See *Blount Int'l*
13 *Ltd.*, 15 OSH Cases at 1899-1900; *Sasser Elec. &*
14 *Mfg. Co.*, 11 OSH Cases 2133 (Rev. Comm'n 1984);
15 *Grossman Steel & Aluminum Corp.*, 4 OSH Cases 1185
16 (Rev. Comm'n 1976) *Marshall v. Knutson*, 566 F.2d at
17 601. *McDevitt Street Bovis*, 19 OSH Cases 1108 (Rev.
18 Comm'n 2000); *David Weekley Homes*, 19 OSH Cases at
19 1119-20; *Centex-Rooney*, 16 OSH Cases at 2130. *R.P.*
20 *Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 18 OSH
21 Cases 1551 (6th Cir. 1998). *Blount Int'l Ltd.*, 15
22 OSH Cases 1897 (Rev. Comm'n 1992) (citing *Red*
23 *Lobster Inns of Am., Inc.*, 8 OSH Cases 1762 (Rev.
24 Comm'n 1980)). *IBP Inc.*, 144 F.3d at 867, 18 OSH
25 Cases 1353. *United States v. MYR Grp. Inc.*, 361
26 F.3d 364, 20 OSH Cases 1614 (7th Cir. 2004); cf.
27 *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1,
28 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)

19 In construction industry cases, several courts
20 have, to one degree or another, held that **general**
21 **contractors** or certain higher level subcontractors
22 may in some circumstances be cited under Section
23 5(a)(2) **even if the exposed employees are not**
24 **theirs.** *Secretary of Labor v. Trinity Indus.*, 504
25 F.3d 297 (3d Cir. 2007); *Universal Constr. Co. v.*
26 *OSHRC*, 182 F.3d 726, 728-31, 18 OSH Cases 1769 (10th
27 Cir. 1999); *United States v. Pitt-Des Moines Inc.*,
28 168 F.3d 976, 18 OSH Cases 1609 (7th Cir. 1999);
R.P. Carbone Const., Co. v. OSHRC, 166 F.3d 815, 18
OSH Cases 1551 (6th Cir. 1998); *New England Tel. &*
Tel. Co. v. Secretary of Labor, 589 F.2d 81, 81-82
(1st Cit. 1978); *Equip. Leasing Inc. v. Secretary of*
Labor, 577 F.2d 534, 6 OSH Cases 1699 (9th Cir.
1978); *Marshall v. Knutson Constr. Co.*, 566 F.3d
596, 6 OSH Cases 1077 (8th Cir. 1977); *Brennan v.*
OSHRC (Underhill Constr. Corp.), 513 F.3d 1032,
1038, 2 OSH Cases 1641 (2d Cir. 1975).
Occupational Safety and Health Law, 3rd Ed., Dale &
Schudtz. (emphasis added)

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

7 . . . **Control can be established by contract or, in**
8 **the absence of explicit contractual provisions, by**
9 **the exercise of control in practice . . .**

10 To be a **controlling employer**, the employer must
11 itself be **able to prevent or correct a violation or**
12 **to require another employer to prevent or correct**
13 **the violation.** One source of this ability is
14 explicit contract authority. This can take the
15 form of a specific contract right to require
16 another employer to adhere to safety and health
17 requirements and to correct violations the
18 controlling employer discovers. U.S. Dept. Of
19 Labor, Multi-Employer Citation Policy (emphasis
20 added)

21 Occupational safety and health law has long
22 recognized the **inability of an employer to avoid**
23 **employee OSHA safety protection by contract or**
24 **agreement.** *Frohlick Crane Service, Inc. v.*
25 *Occupational Safety and Health Review Commission,*
26 *521 F.2d 628 (1975).*

27 The testimony and documents in evidence include **unrefuted**
28 preponderant evidence to establish violations based upon three of the
four required proof elements recognized under Occupational Safety and
Health Law.

1. The **applicability** of the cited standards was undisputed.

2. The **non-complying conditions** were in plain view, photographed
and un rebutted.

3. Employee hazard **exposure** was established by the un rebutted
reported witness statements of ADL employees at Exhibit 3, pages 77
through 80; and the photographic exhibits in evidence. It was

1 undisputed that Pelican and/or any employees on the site had **access** to
2 the hazard exposure during an approximate one month period while the
3 conditions existed.

4 The only disputed proof element was whether the required burden of
5 proof was met to establish the necessary element of **employer knowledge**.

6 The Board finds substantial and preponderant evidence for all four
7 proof elements, including **employer knowledge** as recognized through
8 extensive reported case law governing safety requirements on **multi-**
9 **employer worksites** in the State of Nevada.

10 The **employer knowledge** proof element was met through preponderant
11 **evidence and testimony** presented by **both** complainant and respondent.
12 The violative conditions were in **plain view**. It was unrefuted the **hazard**
13 **exposure** existed at the job site for an **extended period of time**,
14 approximately one month. Further, it was unrefuted that respondent was
15 the general contractor; and Mr. Farahi the **qualified manager**, as
16 required for a Nevada general contractor license. It was undisputed he
17 was personally present on the jobsite on a regular basis; also the
18 property owner. Mr. Farahi admitted he was routinely on the site
19 providing various aspects of authority, inspection and/or presence for
20 approximately one month prior to the inspection. Further, employee
21 safety responsibility and overall control of construction activities can
22 be reasonably inferred as implicit in the status of a licensed general
23 contractor.

24 The violative conditions were **obvious and in plain sight**; not
25 complex, obscure, undisclosed nor short term. Occupational safety and
26 health law recognizes the principle of **constructive employer knowledge**
27 when violative conditions are in **plain view, blatant or obvious**.

28 Employer will often be found to have **constructive**

1 **knowledge** of violative conditions or practices that
2 are in **plain sight**. Compare *Simplex Time Recorder*
3 *Co. v. Secretary of Labor*, 766 F.2d 575, 589, 12
4 OSH Cases 1401 (D.C. Cir. 1985) (spray booth
5 conditions and practices "readily apparent to
6 anyone who looked"), with *United States Steel*
7 *Corp.*, 12 OSH Cases 1692, 1699 (Rev. Comm'n 1986)
8 (exercise of reasonable diligence would not have
9 disclosed ice block hidden by dirt and in a place
10 where it would not have been expected). (emphasis
11 added)

12 The photographs in evidence clearly depict obvious, blatant and plain
13 view violative conditions. **Exposure**, direct and/or constructively by
14 **access** to the hazardous conditions by employees was unrebutted.

15 The primary defensive position asserted on behalf of respondent was
16 based upon lack of **employer knowledge** of the violative conditions. The
17 argument presented was that this respondent general contractor under the
18 facts in evidence did not have the required **level of employer knowledge**
19 to support the cited violations. However there was no competent
20 evidence or case law to support the defensive position; nor certainly
21 any preponderant evidence to rebut the evidence and proof by
22 complainant. The weight of preponderant evidence established the
23 respondent employer knew, **or with the exercise of reasonable diligence**
24 **could have known of the violative conditions**. See NRS 618.625(2), supra
25 ". . . unless the employer did not and could not **with the exercise of**
26 **reasonable diligence** know the presence of the violation." Further, the
27 violations were obvious and occurred in **plain view**.

28 **Actual knowledge** is not required for a finding of
29 serious violation. **Foreseeability** and
30 **preventability** render a violation serious provided
31 that a **reasonably prudent employer**, i.e., one who
32 is safety conscious and possesses the technical
33 expertise normally expected in the industry
34 concerned, would know of the danger. *Candler-*
35 *Rusche, Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723
36 (1976), appeal filed, No. 76-1645 (D.C. Cir. July
37 16, 1976); *Rockwell International*, 2 OSHC 1710,
38 1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d
39 1283 (6th Cir. 1976); *Mountain States Telephone &*

1 *Telegraph Co.*, 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365
2 (1973). (emphasis added)

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

6 The testimonial, and stipulated documentary evidence, established
7 the subject worksite included more than one employer therefore
8 appropriately classified a **multi-employer worksite**. The respondent bore
9 the responsibility of worksite safety for **any employees** on the job site;
10 whether its own or those of a subcontractor, or an independent
11 contractor. The evidence clearly proved the respondent general
12 contractor was a **controlling employer**. The preponderant testimonial and
13 documentary evidence established the respondent was in **control of the**
14 **overall jobsite operation**. This particularly includes safety compliance
15 for the **obvious, blatant, violative conditions** existent at the jobsite.
16 Notably, the qualified employee/owner of the Pelican construction
17 company, was personally on the job site ". . . daily . . . or 2 or 3
18 times a week . . . or every day . . ." - as the preponderant testimony
19 confirmed. Multiple plugs in a non-GFCI rated outlet and unprotected
20 extension cords over a driveway, including a partially paved dirt area,
21 subject of vehicular traffic, were undisputed violative conditions in
22 **plain view** and established by the preponderant evidence.

23 "... liability is imposed ... on a contractor who
24 creates a hazard **or who has control over the**
25 **condition on a multi-employer worksite ...**". See,
 Brennan v. OSHRC (Underhill Construction Corp.),
 513 F.2d 1032 (2nd Cir. 1975).

26 Here, NVOSHES cited both the **creating employer**, subcontractor ADL,
27 who accessed and utilized the electrical power in an unsafe, violative
28 manner; and general contractor **controlling employer** Pelican, who

1 directed, approved or allowed use of electrical power by ADL in an
2 obvious violative manner which existed in plain view for an approximate
3 one month duration.

4 The contract document at Exhibit A between the respondent general
5 contractor, Pelican, LLC and the subcontractor ADL, does not relieve by
6 its terms either the subcontractor or the general contractor of
7 responsibility for safety compliance at the subject site. Regardless of
8 same, the long-standing principle under well established Occupational
9 Safety and Health Law and recognized in Nevada provides an employer
10 cannot avoid employee safety protection by contract. (*Frohlick, supra*
11 at 17)

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

17 Based upon the facts, preponderant evidence and applicable law, the
18 Citation 1, Items 1 and 2 and classifications of **serious** met the burden
19 of proof and must be confirmed.

20 NRS 618.625 provides in pertinent part:

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

26 The Board finds violations as a matter of fact and law at Citation
27 1, Items 1 and 2, confirms the classification of serious as to each, and
28 approves the proposed penalties in the amount of \$1,500.00 for each

1 item, at a total of \$3,000.00.

2 Based upon the above and foregoing, it is the decision of the
3 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that violations of
4 Nevada Revised Statutes be confirmed at Citation 1, Item 1, 29 CFR
5 1926.404(b)(1)(i); and Citation 1, Item 2, 29 CFR 1926.405(a)(2)(ii)(I).
6 The serious classifications are confirmed and the total penalty is
7 approved in the amount of Three Thousand Dollars (\$3,000.00).

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

18 DATED: This 18th day of January, 2018.

19 NEVADA OCCUPATIONAL SAFETY AND HEALTH
20 REVIEW BOARD

21 By /s/
22 JAMES BARNES, CHAIRMAN
23
24
25
26
27
28