

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH

2 REVIEW BOARD

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

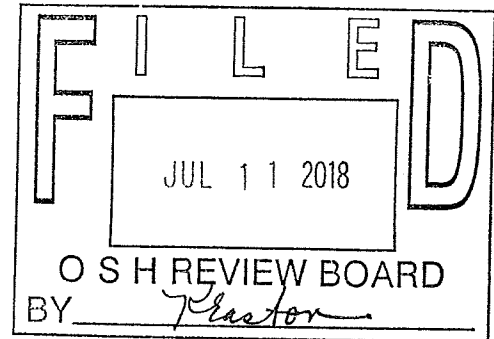
Docket No. LV 17-1900

9 Complainant,

10 vs.

11 XTREME MANUFACTURING,

12 Respondent.



13 **DECISION**

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**  
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 14<sup>th</sup> day of March  
16 2018, in furtherance of notice duly provided according to law, MS. SALLI  
17 ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**  
18 **Administrative Officer of the Occupational Safety and Health**  
19 **Administration, Division of Industrial Relations (OSHA);** and MR. TIM  
20 ROWE, ESQ., appearing on behalf of Respondent, **Xtreme Manufacturing.**

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

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

26 Citation 1, Item 1, charged a violation of NRS 618.375(1) commonly  
27 known as the General Duty Clause, which provides in pertinent part:

28 Duties of employers. Every employer shall furnish  
employment and a place of employment which are free  
from recognized hazards that are causing or are  
likely to cause death or serious physical harm to

1 his or her employees.

2 The complainant alleged that:

3 On March 9, 2017, there were steel storage racks  
4 that were not anchored to the ground. The employer  
5 did not furnish a place of employment free from  
6 recognized hazards that are causing or are likely  
7 to cause death or serious physical harm to his or  
8 her employees when the employees accessed the  
9 approximate 20 steel storage racks daily in order  
10 to access boxes, pallets and parts using a  
11 forklift. This exposed employees to crushing  
12 injuries like broken bones, paralysis, or death  
13 should the rack system get hit by the forklift and  
14 cause the shelves and parts to strike the  
15 employees. 1. There was one steel storage rack  
16 located in the south central part of the shop. 2.  
17 There were approximately nineteen steel storage  
18 racks located on the outside of the shop against  
19 the north side of the wall on the north side of the  
20 property.

21 Reference ANSI MH 16.1 Specification for Design  
22 Testing, and Utilization of Industrial Steel  
23 Storage Racks. Section 1.4.7 Column Based Plates  
24 and Anchors. The bottom of all columns shall be  
25 furnished with column base plates, as specified in  
26 Section 7.2. All rack columns shall be anchored to  
27 the floor with anchor bolts capable of resisting  
28 the forces caused by the horizontal and vertical  
loads on the rack.

ONE FEASIBLE MEANS OF ABATEMENT WOULD BE TO FOLLOW  
ANSI MH 16.1 PARAGRAPH 1.4.7 (ANCHORING DOWN RACK).

XTREME MANUFACTURING, LLC, WAS PREVIOUSLY CITED FOR  
A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH  
STANDARD OR ITS EQUIVALENT STANDARD, NRS  
618.375(1), ANSI MH 16.1 SECTION 1.4.7, WHICH WAS  
CONTAINED IN OSHA INSPECTION NUMBER 1101628,  
CITATION NUMBER 1, ITEM NUMBER 1, AND WAS AFFIRMED  
AS A FINAL ORDER ON AUGUST 26, 2016.

The citation was classified as "Repeat Serious." The proposed  
penalty for the alleged violation is in the amount of \$8,000.00.

Citation 2, Item 1, charged a violation of 29 CFR 1910.1200(f)(6),  
which provides in pertinent part:

Workplace labeling. Except as provided in  
paragraphs (f)(7) and (f)(8) of this section, the  
employer shall ensure that each container of  
hazardous chemicals in the workplace is labeled,

1 tagged or marked with either: the information  
2 specified under paragraphs (f)(1)(i) through (v) of  
3 this section for labels on shipped containers; or,  
4 product identifier and words, pictures, symbols, or  
5 combination thereof, which provide at least general  
6 information regarding the hazards of the chemicals,  
7 and which, in conjunction with the other  
8 information immediately available to employees  
9 under the hazard communication program, will  
10 provide employees with the specific information  
11 regarding the physical and health hazard of the  
12 hazardous chemical.

13 The complainant alleged that:

14 On March 9, 2017, at the Xtreme Manufacturing LLC's  
15 shop, there were two hazardous chemical containers  
16 in the workplace, which were not labeled, tagged or  
17 marked. The containers did not have the  
18 information specified under paragraphs (f)(1)(i)  
19 through (v) of the section for labels on shipped  
20 containers or product identifier and words,  
21 pictures, symbols or combination thereof, which  
22 provide at least general information regarding the  
23 hazards of the chemicals. The Wilkins Anti-  
24 fog/Anti-Static Lens Cleaner was used to clean the  
25 lenses and face shields of the equipment being used  
26 at the shop.

27 The violation was classified as "Other than Serious." No penalty  
28 was proposed.

29 The parties stipulated to the admission of evidence identified as  
30 complainant's Exhibits 1 through 3 and respondent's Exhibits A, B, C.  
31 Counsel further stipulated that respondent no longer contests Citation  
32 2, Item 1, and the notice of contest withdrawn.

#### 33 FACTS

34 A referral inspection was conducted on March 9, 2017 by NVOSHA  
35 based upon various complaints which were found to be invalid except for  
36 the two which ultimately became the basis of Citation 1, Item 1, and  
37 Citation 2, Item 1 as referenced.

38 The essential facts providing the basis for Citation 1, Item 1 are  
undisputed. Respondent employees were operating a forklift inside and

1 outside a warehouse facility work site in Henderson, Nevada. The  
2 forklift was utilized daily to access boxes, pallets and parts located  
3 on steel storage racks. The inside rack was approximately nine feet  
4 eight inches (9' 8") high; the outside racks ranged from 10'3" to 10'4"  
5 in height. The shelving racks were not anchored or bolted to the  
6 concrete floor. The inspector reported hazard exposure to the employees  
7 due to the potential of a forklift striking the unsecured storage  
8 shelving racks causing a tip or collapse, resulting in probable serious  
9 injury or death to employees in the work area. The CSHO recommended a  
10 citation for violation of NRS 618.375(1) commonly known as the **General**  
11 **Duty Clause**.

12 The inspector also found the respondent employer had been  
13 previously cited six months prior for the same violative conduct. A  
14 citation was issued by OSHA inspection number 1101628, Citation 1, Item  
15 1, and affirmed as a Final Order on August 26, 2016. The citation  
16 resulted in confirmation of the violation through a settlement agreement  
17 for abatement of the hazard exposure by anchoring the metal shelving  
18 racks to the floor.

19 The inspector reported that after the settlement and abatement, the  
20 respondent moved the shelving to the present location in the facility  
21 due to the need for power company access to electrical equipment below  
22 the flooring. When the shelving was moved it was not again bolted to  
23 the floor in compliance with the settlement agreement.

24 Based upon the undisputed facts, the inspector recommended  
25 citation for the violation classification as both **Serious** and **Repeat**.  
26 The NVOSHES complaint alleged the respondent violated **NRS 618.375**  
27 **commonly known as the general duty clause**. The citation was based upon  
28 the current inspection for lack of bolting to the floor, and violation

1 of the previous settlement agreement which required abatement of the  
2 admitted hazardous conditions.

3 The respondent defense was based on a legal issue for failure to  
4 meet the burden of proof of a **recognized hazard** by preponderant  
5 evidence. Respondent contends there was no evidence of **employee**  
6 **exposure** to a "**recognized hazard**" which is a required proof element  
7 under the general duty clause, therefore no violation of NRS 618.375 can  
8 be lawfully confirmed.

9 Respondent offered evidence and testimony that NVOSHES presented  
10 no proof of a **recognized hazard**, and relied primarily on an ANSI  
11 standard (American National Standards Institute) which is an industry  
12 consensus guidance recommendation, but not a legal basis for issuance  
13 of a citation.

14 Respondent presented documentary and testimonial evidence from a  
15 professional engineer that no **recognized hazard** existed at the subject  
16 worksite. There is no codified **specific standard** under CFR (Code of  
17 Federal Regulations) requiring anchoring of shelving racks to the floor;  
18 and the ANSI guidance relied upon by NVOSHA applied to **only** metal  
19 shelving racks at a **6 to 1 ratio or greater** that presented the risk of  
20 tipping. Professional engineer, Mr. David Glabe, provided an opinion  
21 report and testimony that the shelving racks on the premises did not  
22 reach more than a 2.6 to 1 ratio therefore not within the ANSI guidance  
23 even should it be considered applicable.

24 The NVOSHA CSHO Eric Aros who conducted the inspection is no longer  
25 employed by the Division and therefore the principal witness testimony  
26 was provided through NVOSHES supervisor, Mr. Jamal Sayegh. Documentary  
27 exhibits were stipulated in evidence by both parties at complainants  
28 Exhibits 1-3 and respondent Exhibits A, B, C.

1 Citation 2, Item 1 was subject of a stipulation by counsel for  
2 withdrawal from contest. Accordingly no defense was provided and the  
3 citation deemed admitted.

4 Complainant counsel waived opening statement other than to  
5 represent the essence of the matter before the Board to involve steel  
6 racking and anchoring shelving material to the ground.

7 Respondent counsel provided a brief opening statement identifying  
8 the respondent's position denying the alleged violation of the general  
9 duty clause. Counsel asserted the citation is based upon a particular  
10 ANSI standard that applies to commercial steel racking. He referenced  
11 the respondent defense to be the ANSI standard relied upon in the case  
12 is not applicable and can't be used as a rule of law because it is  
13 essentially just a guideline. Counsel asserted that when the Board  
14 analyzes the engineering principles behind steel racking and the purpose  
15 of anchors, it quickly becomes apparent that there was no hazard created  
16 from the subject racks.

#### 17 DISCUSSION

18 Counsel for the Chief Administrative Officer presented testimony  
19 and documentary evidence with regard to the alleged violations. Mr.  
20 Jamal Sayegh identified himself as a Certified Safety and Health Officer  
21 (CSHO) and currently a compliance supervisor. The inspection was  
22 conducted by a former CSHO no longer employed with Nevada OSHA, Mr. Eric  
23 Aros. Mr. Sayegh testified he was the reviewing supervisor at the time  
24 of the inspection and the principal qualified witness to testify on the  
25 violations.

26 Mr. Sayegh identified and referenced complainant Exhibits 1 through  
27 3, specific reportings and photographic evidence during the course of  
28 his testimony. Noting Citation 1, Item 1, the general duty clause

1 violation, Mr. Sayegh identified the inspection narrative, report,  
2 violation work sheets and photographs. He referenced CSHO Aros notes  
3 from the narrative describing the work site conditions, particularly  
4 observations during the "walkaround" portion. Mr. Sayegh referenced  
5 Exhibit 1, page 12 of the narrative report reflecting the observations  
6 of CSHO Aros. The report provided:

7 ". . . I observed multiple steel storage racks that  
8 were not anchored to the ground beneath them.  
9 Items had been placed on the racks and removed from  
10 the racks utilizing a forklift. There were three  
11 sets of steel storage racks on the outside of the  
12 shop on the north wall of the north side of the  
13 facility. All three sets of racks were three racks  
14 high. From west to east, the first set of racks  
15 was six racks wide. The next set of racks was nine  
16 racks wide. The last set of racks was four racks  
17 wide. Mr. Fisher showed me where the steel storage  
18 racks were previous anchored. The approximate  
19 height from the ground to the top of the top rack  
20 ranged from 10.3 to 10.4 feet.

21 According to Mr. Fisher, the steel storage racks  
22 had not been anchored for approximately three  
23 weeks. He said that the location where the storage  
24 racks were before was underneath power lines and  
25 that the power company asked them to move the  
26 location of the storage racks to keep them away  
27 from the power lines. Mr. Fisher said that they  
28 were previously anchored when they were underneath  
of the power lines.

There was a single storage rack inside of the shop  
that was not anchored either. Mr. Fisher said that  
there was no need to anchor that rack because of  
the height, which he said was approximately ten  
feet tall. He said that anything over twelve feet  
needs to be anchored. He said that it had been  
moved one and a half to two weeks ago. The  
approximate height of the single rack inside the  
shop was 9.8 feet (as measured from the ground to  
the top of the top rack).

Brandon Main, President of Xtreme Manufacturing,  
LLC told me that they were waiting on permits from  
the City of Henderson before they anchored the  
racks at the new location that they had been moved  
to.

Mr. Lewis told me that the steel storage rack in  
the shop had been moved to that location about one

1 and a half to two weeks ago. He said that the  
2 original location of the steel storage rack was  
3 about fifteen feet away from its present location  
4 and it was not anchored at its previous location.  
5 He said that he had put the boxes of wire on the  
6 middle shelf with the forklift. He said it took  
7 him about a minute to complete. He said that each  
8 box weighed about 30 lbs. for a total of 1,000 lbs.  
9 He said that he directs work and that he can give  
10 verbal discipline and Eric will be the one who  
11 writes up the employees.

12 Mr. Brown said that he accesses the racks a couple  
13 of times per week and that he thinks that the steel  
14 storage racks have been there one or two months.  
15 He said that he will get pallets, parts and steel  
16 from the racks. He continued on saying that it may  
17 take a few minutes to access the racks."

18 Mr. Sayegh further testified as to the hazardous conditions,  
19 employee exposure, and the potential for serious injury or death which  
20 could result in the workplace through operation of forklifts moving  
21 materials on or from the metal racks not anchored to the ground.

22 Mr. Sayegh further testified as to the previous violation admitted  
23 by respondent and referenced Exhibit 2 to establish the prior violation  
24 upon which the **repeat** classification was based and enhancement of the  
25 proposed penalty under established NVOSHA enforcement policies. He  
26 identified the racks through the pictorial exhibits at Exhibit 1,  
27 including 62A and 63A. He identified photographic Exhibit 1, page 66 to  
28 confirm the racks were not anchored, explaining there were no bolts in  
the rack holes in the concrete floor. He further testified as to  
pictorial Exhibit 1, pages 68, 69 and 70, regarding different angles and  
at page 77 reported measurement of the height showing approximately  
10'4". Mr. Sayegh testified under direct examination that the racks,  
the rack height, and material storage were in "**plain view**" demonstrating  
that the shelves were not anchored to the floor.

On continuing examination Mr. Sayegh testified as to Exhibit 2,



1 page 97, identifying a copy of the settlement agreement for the previous  
2 violation for lack of anchoring storage racks subject of prior citation  
3 and admission of same becoming a final order on August 26, 2016. Mr.  
4 Sayegh testified the work sheet confirmed the previous citation was  
5 issued six months previous and testified it established a "heightened  
6 awareness" for the violative conditions to support employer knowledge.

7 Mr. Sayegh testified with regard to Exhibit 2, page 124 referencing  
8 the American National Standards Institute (ANSI) at 1.4.7, page 127, to  
9 **recognize** the hazardous conditions at the workplace due to a failure of  
10 anchoring the racking material to the ground. He explained the ANSI  
11 standard is a "consensus standard" developed by the industry for  
12 reference and guidance for recognition of hazards differentiating same  
13 from those codified by congress in the CFR references as to specific  
14 controlling standards.

15 Mr. Sayegh explained the allegations of the citation in the  
16 complaint and identified ANSI MH 16.1 Paragraph 1.4.7 as referenced.  
17 He noted the reference of ANSI MH 16.1 specification for design testing  
18 and utilization of industrial steel racks. Section 1.4.7, column face  
19 plates and anchors, and requiring the bottom of all columns shall be  
20 furnished with column base plates as specified in section 7.2. He  
21 further noted by reference to the exhibits that all the rack columns  
22 shall be anchored to the floor with anchor bolts capable of resisting  
23 the forces caused by the horizontal and vertical loads on the rack.

24 Respondent counsel conducted cross-examination. Mr. Sayegh  
25 testified he did not have a professional engineering degree nor ever  
26 studied forces or loads for designing storage racks. Further having  
27 read the ANSI standard on storage racks and the data contained in the  
28 referenced ANSI standard, he admitted ANSI is only guidance for

1 reference, particularly under general duty clause violations.

2 Counsel for respondent presented witness testimony from Mr. David  
3 Glabe who identified himself as a consulting engineer and qualified  
4 expert witness in construction engineering, training and OSHA design.  
5 He testified that he writes ANSI standards for scaffolding and explained  
6 that storage rack loads for engineering are very similar applications.  
7 He identified his report prepared at Exhibit A in evidence. He  
8 testified there was no hazard present under the work site conditions and  
9 referenced his report at Exhibit A. He testified the ANSI standard  
10 referenced in the report from Glabe Consulting Services at Exhibit A,  
11 pages 1 through 7. He identified page 2 noting his opinions providing  
12 "Opinion #1. The lack of storage rack/ground anchors did not create a  
13 hazard that was likely to cause death or serious physical harm to  
14 employees." He referenced his second opinion that respondent complied  
15 with the applicable OSHA and ANSI storage rack regulations and  
16 standards. Mr. Glabe testified the ANSI standard only recommends  
17 anchorage to the floor if there is a ratio of 6 to 1. He further  
18 testified that storage height to depth ratio at the respondent work site  
19 is approximately only 2.6, so the ANSI standard requirement for  
20 anchoring is not applicable therefore there is no recognized hazard.  
21 He testified the racks were "... stable therefore no hazard based upon  
22 the calculations and there were no other calculations, information or  
23 showing of hazardous conditions to the employees under the general duty  
24 cause." He concluded that there is "no hazard therefore no violation  
25 ..."

26 On direct, redirect and cross-examination Mr. Glabe testified  
27 "... anchoring racks is a good idea, but has nothing to do with  
28 remaining standing up if hit by a forklift so there is no engineering

1 basis to support the existence of a 'hazard' under the general duty  
2 clause." He referenced page 44 of the ANSI exhibit identified as  
3 respondent's Exhibit C. Mr. Glabe further testified that the racking  
4 was ". . . safer without anchors because if hit . . . it would tend to  
5 move the racks out of the way and lessen the impact . . ."

6 On cross-examination, Mr. Glabe responded to counsel questions  
7 including the definition of ANSI. He testified it's a society made up  
8 of various trades with safety background which works to develop  
9 **consensus standards** for industry guidance.

10 Respondent presented witness testimony from Mr. Ron Rogers who  
11 identified himself as the safety manager for the respondent. He  
12 testified the previous violation referenced in the complaint to  
13 establish a repeat violation required less expense and time than to  
14 contest. On redirect he testified the only reason the company agreed  
15 to re-anchor, and did in fact do same, was to satisfy OSHA.

16 On cross-examination Mr. Rogers testified that the current  
17 violation is not a correct application of ANSI nor was the previous  
18 citation. He is aware that Federal OSHA enforces rack anchoring the  
19 same as NVOSHA does. He further testified the action under the previous  
20 agreement reflected abatement by anchoring but then the racks were moved  
21 because NV Energy required access to the underground power and the  
22 racking was accordingly not re-anchored after being moved.

23 On closing of the presentation of documentary evidence and witness  
24 testimony, both counsel provided closing arguments.

25 Complainant asserted there is a great deal of disinformation being  
26 presented before the Board. She argued that Citation 1, Item 1 is a  
27 Repeat/Serious violation of the General Duty Clause based upon the  
28 respondent's failure to provide safe employment free of recognized

1 hazards as required by NRS. Counsel asserted the industry consensus  
2 shows that ANSI considers the condition unsafe if racks are not  
3 anchored; but NVOSHA is not "citing ANSI" as a basis of violation, only  
4 the guidance developed for the facts presented. Counsel argued that six  
5 months ago respondent was cited for the same hazard, so the employer was  
6 well aware of NVOSHA position to establish knowledge of the violative  
7 conditions. She argued based upon the testimony of Mr. Rogers the  
8 Federal OSHA cites the same for rack anchoring as to does NVOSHA.

9 Counsel further argued that while she does not challenge the expert  
10 qualifications of Mr. Glabe as an engineer, he had never seen the job  
11 site and therefore cannot make a blanket statement that the job site did  
12 not depict a violative safety condition from the employee hazards as  
13 cited. Counsel concluded that there was a violation of NRS, that  
14 exposure was admitted as well as employer knowledge established.  
15 Counsel asserted the only issue is whether there is a hazard. Counsel  
16 concluded by arguing that OSHA had its burden of proof and that the  
17 Repeat/Serious violation subject of Citation 1, Item 1 should be  
18 confirmed.

19 Respondent counsel presented closing argument by asserting there  
20 was simply no hazard and without such a showing there could be no  
21 violation. Counsel argued that no one from OSHA explained "what the  
22 hazard is . . ." Counsel read the citation allegations from the  
23 complaint and argued there was no evidence that a forklift running into  
24 shelving would result in objects striking and injuring employees.  
25 Counsel asserted the worksite conditions do not depict a "recognized  
26 hazard by the industry . . . despite the ANSI standard because it (the  
27 standard) does not apply. Counsel asserted that yes ANSI is a consensus  
28 but OSHA requires legal proof to show a violation not just non-

1 compliance with an ANSI standard.

2 In considering the testimony, exhibits, and arguments of counsel,  
3 the Board is required to review the evidence and established legal  
4 elements to prove violations under Occupational Safety & Health Law to  
5 confirm a violation by a preponderance of evidence.

6 APPLICABLE LAW

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

10 All facts forming the basis of a complaint must be  
11 proved by a preponderance of the evidence. See  
12 *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD  
13 ¶16,958 (1973).

14 In citing an employer under the **General Duty**  
15 **Clause**, it is specifically necessary to demonstrate  
16 the existence of a **recognized hazard** as mandated by  
17 the statute; whereas citing an employer under a  
18 **specific standard** relies upon a recognition element  
19 based upon codification by Congress and adoption of  
20 certain recognition hazards for particular  
21 industries. To establish a violation of the  
22 General Duty Clause, the **complainant must do more**  
23 **than show the mere presence of a hazard.** The  
24 General Duty Clause, ". . . obligates employers to  
25 **rid their workplaces of recognized hazards . . .**"  
26 *Whitney Aircraft v. Secretary of Labor*, 649 F.2d  
27 96, 100 (2<sup>nd</sup> Cir. 1981). (emphasis added)

28 "The elements of a **general duty clause** violation  
identified by the first court of appeals to  
interpret Section 5(a)(1) have been adopted by both  
the Federal Review Commission and the Courts. In  
*National Realty and Construction Co., Inc. v.*  
*OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973), the court  
listed three elements that OSHA must prove to  
establish a general duty violation; the Review  
Commission extrapolated a fourth element from the  
court's reasoning: (1) a **condition or activity in**  
**the workplace presents a hazard** to an employee; (2)  
the condition or activity is **recognized as a**  
**hazard**; (3) the hazard is causing or is **likely to**  
**cause death or serious physical harm**; and (4) a  
**feasible means exists to eliminate or materially**  
**reduce** the hazard. The four-part test continues to  
be followed by the courts and the Review  
Commission. E.g., *Wiley Organics Inc. v. OSHRC*,  
124 F.3d 201, 17 OSH Cases 2125 (6<sup>th</sup> Cir. 1997);

1 Beverly Enters., Inc., 19 OSH Cases 1161, 1168  
2 (Rev. Comm'n 2000); Kokosing Constr. Co., 17 OSH  
3 Cases 1869, 1872 (Rev. Comm'n 1996). The National  
4 Realty, decision itself continues to be routinely  
5 cited as a landmark decision. See, e.g., Kelly  
6 Springfield Tire Co. v. Donovan, 729 F.2d 317, 321,  
7 11 OSH Cases 1889 (5<sup>th</sup> Cir. 1984); Ensign-Bickford  
8 Co. v. OSHRC, 717 F.2d 1419, 11 OSH Cases 1657  
9 (D.C. Cir. 1983); St. Joe Minerals Corp. v. OSHRC,  
10 647 F.2d 840, 845 n.8, 9 OSH Cases 1946 (8<sup>th</sup> Cir.  
11 1981); Pratt & Whitney Aircraft Div. v. Secretary  
12 of Labor, 649 F.2d 96, 9 OSH Cases 1554 (2d Cir.  
13 1981); R.L. Sanders Roofing Co. v. OSHRC, 620 F.2d  
14 97, 8 OSH Cases 1559 (5<sup>th</sup> Cir. 1980); Magma Copper  
15 Co. v. Marshall, 608 F.2d 373, 7 OSH Cases 1893 (9<sup>th</sup>  
16 Cir. 1979); Bethlehem Steel Corp. v. OSHRC, 607  
17 F.2d 871, 7 OSH Cases 1802 (3d Cir. 1979).  
18 Rabinowitz Occupational Safety and Health Law,  
19 2008, 2<sup>nd</sup> Ed., page 91. (emphasis added)

20 When the Secretary has introduced evidence showing  
21 the existence of a hazard in the workplace, the  
22 employer may, of course, defend by showing that it  
23 has taken all necessary precautions to prevent the  
24 occurrence of the violation. Western Mass. Elec.  
25 Co., 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981).  
26 (emphasis added)

27 NRS 618.375(1) commonly known as the General Duty Clause provides  
28 in pertinent part:

29 ". . . Every employer shall:

30 1. Furnish employment and a place of employment  
31 which are **free from recognized hazards that are**  
32 **causing or are likely to cause death or serious**  
33 **physical harm to his employees . . .**" (emphasis  
34 added)

35 A respondent may rebut allegations by showing:

- 36 1. The standard was inapplicable to the situation  
37 at issue;
- 38 2. The situation was in compliance; or lack of  
39 access to a hazard. See, Anning-Johnson Co.,  
40 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

41 NRS 618.625 provides in pertinent part:

42 ". . . a **serious violation** exists in a place of  
43 employment if there is a **substantial probability**  
44 **that death or serious physical harm could result**  
45 **from a condition** which exists, or from one or more

1 practices, means, methods, operations or processes  
2 which have been adopted or are in use in that place  
3 of employment unless the employer did not and could  
4 not, with the exercise of reasonable diligence,  
5 know of the presence of the violation."

6 A "**repeat**" violation is established if based upon a prior violation  
7 of the same standard, a different standard, or general duty clause, if  
8 the present and prior violation is substantially similar.

9 A violation is considered a repeat violation:

10 If, at the time of the alleged repeat violation,  
11 there was a Commission final order against the  
12 employer for a substantially similar violation.  
13 *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (no. 16183,  
14 1979). A prima facie case of substantial  
15 similarity is established by a showing that the  
16 prior and present violations were for failure to  
17 comply with the same standard. *Superior Electric*  
18 *Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597,  
19 1996). *Robert B. Reich, Secretary of Labor, United*  
20 *States Department of Labor v. D.M. Sabia Company*  
21 *and Occupational Safety and Health Review*  
22 *Committee*, 90 F.3d 854 (1996); *Caterpillar, Inc. v.*  
23 *Alexis M. Herman, Secretary of Labor, and*  
24 *Occupational Safety and Health Administration,*  
25 *Respondents and United Auto Workers, Local 974,*  
26 *Intervenors*, 154 F.3d 400 (1998).

27 A repeated violation may be found based on a prior  
28 violation of the same standard, a different  
29 standard, or the **general duty clause**, but the  
30 **present and prior violations must be substantially**  
31 similar. *Caterpillar, Inc.*, 18 OSH Cases 1005,  
32 1006 (Rev. Comm'n 1997), *aff's*, 154 F.3d 400, 18  
33 OSH Cases 1481 (7<sup>th</sup> Cir. 1998); *GEM Indus., Inc.*, 17  
34 OSH Cases 1861, 1866 (Rev. Comm'n 1996). OSHA may  
35 generally establish its prima facie case of  
36 substantial similarity by showing that the prior  
37 and present violations are of the same standard.  
38 The employer may rebut that showing by establishing  
39 that the violations were substantially different.  
40 Where the citations involve different standards,  
41 OSHA must present "sufficient evidence" to  
42 establish the substantial similarity of the  
43 violations. A similar showing must be made if the  
44 citations involve the same standard but the  
45 standard is broadly worded. Repeated violations  
46 are not limited to factually identical occurrences.  
47 Provided that the hazards are similar, minor  
48 differences in the way machines work or in the size  
49 and shape of excavations will usually not lead to

1 a finding of dissimilarity. In general, the key  
2 factor is whether the two violations resulted in  
3 substantially similar hazards. It is not necessary,  
4 however, that the seriousness of the hazard  
involved in the two violations be the same.  
Rabinowitz, Occupational Safety and Health Law, 2<sup>nd</sup>  
Ed. 2008 at pp. 230-231. (emphasis added)

5 The Board in reviewing the facts, documentation, testimony and  
6 other evidence must measure same against the established applicable law  
7 developed under the Occupational Safety & Health Act.

#### 8 ANALYSIS

9 The issue before the Review Board for analysis and decision is  
10 whether the burden of proof was met to establish a violation of NRS  
11 618.275(1) (the General Duty Clause). The respondent asserts the core  
12 element for proof was not met due to a failure to establish the  
13 existence of a "recognized hazard" as mandated by the statute.  
14 Complainant references the ANSI standard as requiring anchorage of  
15 shelving racks to the floor whereas respondent asserts that guidance is  
16 only applicable if the ratio in the guidance were met. The respondent  
17 evidence is the racks at the work site were at a ratio of not more than  
18 2.6, whereas the ANSI does not set guidance for bolting to the ground  
19 until there is a 6 to 1 ratio. However complainant contends that while  
20 ANSI is guidance for the requirement of anchoring racks for safety it  
21 does not negate, as a basis for general duty compliance, elimination of  
22 a plainly recognized hazard. The shelving without attachment to the  
23 ground is subject of tipping with forklifts operating in the work place  
24 areas occupied by employees. Respondent contends the referenced ANSI  
25 cannot be cited for a violation alone whereas complainant asserts that  
26 the safety guidance can be utilized and the courts have accepted that  
27 position.

28 The burden of proof to establish a violation under occupational



1 safety and health law requires different elements of proof to establish  
2 a general duty clause violation from a specific standard. The violation  
3 at Citation 1, Item 1, referenced a serious **repeat** violation of NRS  
4 618.375(1), the General Duty Clause. The respondent **admitted the**  
5 **previous safety violation for the same violation at the same work site,**  
6 **and agreed to abate the admitted recognized hazard.** Complainant met the  
7 burden of proof and satisfied the elements to establish and confirm a  
8 violation by a preponderance of evidence.

9 The photographic exhibits in evidence depict a plainly unsafe  
10 **hazardous** condition at Citation 1, Item 1.

11 Loaded steel shelving in the employee work area is regularly in  
12 potential contact with forklift loading activity inside and outside the  
13 facility. The evidence was unrebutted the shelving was not secured to  
14 the floor. The previous admission of violation **for whatever reason,** is  
15 evidence the respondent recognized the hazard and agreed to abate it.  
16 Now the respondent claims it should not be held to the compliance it  
17 accepted and agreed to because the settlement agreement was based solely  
18 on economic reasons. The recognition of such an obvious hazard,  
19 previously admitted by respondent cannot be disregarded in the subject  
20 work place condition and should be **recognized** by a reasonably prudent  
21 employer.

22 The legal duty of respondent is not to protect against unknown,  
23 unforeseen or extreme events, but rather **recognized hazards** as defined  
24 by or developed under applicable occupational safety and health law.

25 To satisfy the burden of proof for an alleged general duty clause  
26 violation under established Occupational Safety and Health Law, the  
27 division must show **by a preponderance of evidence** that there existed a  
28 **"recognized hazard"** of which the **employer had knowledge** (actual or

1 constructive) in order to **foresee** and, thus, **prevent** injury or harm to  
2 its employees by utilizing **feasible** measures that would reduce the  
3 likelihood of injury.

4 The evidence demonstrates by a preponderance of evidence that the  
5 un rebutted testimony of the employer operations presented a **clear and**  
6 **obvious potential hazard** to employees which is reasonably foreseeable and  
7 requires protection to keep the work place safe from such hazard.  
8 Further, it is reasonable to infer from the evidence that an unsecured  
9 steel shelf coming in potential contact with a forklift constitutes an  
10 **obvious** hazard.

11 The courts have long recognized that an **obvious or**  
12 **glaring nature of a hazard** may itself suffice to  
13 provide the basis for a finding of **recognition** in  
14 the **context of a "recognized hazard", a required**  
15 **proof element under the general duty clause.** See,  
16 *Kelly Springfield Tire Co. V. Donovan*, 729 F.2d  
17 317, 321, 11 OSH Cases 1889 (5<sup>th</sup> Cir. 1984).

18 Citations may also be vacated if the employer proves a lack of  
19 "feasibility".

20 A citation may be vacated if the employer proves  
21 that: (1) **the means of compliance prescribed by the**  
22 **applicable standard would have been infeasible**  
23 **under the circumstances** in that either (a) its  
24 implementation would have been technologically or  
25 economically infeasible or (b) necessary work  
26 operations would have been technologically or  
27 economically infeasible after its implementation;  
28 **and (2) either (a) an alternative method of**  
29 **protection was used** or (b) there was no feasible  
30 alternative means of protection. *Beaver Plant*  
31 *Operations Inc.*, 18 OSHC 1972, 1977 (Rev. Comm'n  
32 1999), rev'd on another ground, 223 F.3d 25, 19  
33 OSHC 1053 (1<sup>st</sup> Cir. 2000); *Gregory & Cook, Inc.*, 17  
34 OSHC 1189, 1190 (Rev. Comm'n 1995); *Siebel Modern*  
35 *Mfg. & Welding Corp.*, 15 OSHC 1218, 1228 (1991);  
36 *Mosser Constr. Co.*, 15 OSHC 1408, 1416 (Rev. Comm'n  
37 1991); *Dun-Par Engineered Form Co.*, 12 OSHC 1949  
38 (1986), rev'd on another ground, 843 F.2d 1135, 13  
39 OSHC 1652 (8<sup>th</sup> Cir. 1988). (emphasis added)

40 The Board finds the cited general duty clause referenced to be

1 **applicable** to the facts in evidence. There was no competent evidence or  
2 showing of any lack of feasibility.

3 The violation was appropriately classified as **serious**.

4 NRS 618.625 provides in pertinent part:

5 ". . . a serious violation exists in a place of  
6 employment if there is a **substantial probability**  
7 **that death or serious physical harm could result**  
8 **from a condition** which exists, or from one or more  
9 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."

10 Further the violation was appropriately classified as **repeat** based  
11 upon the undisputed prior violation in evidence.

12 As to the arguments as to a lack of "hazard recognition," the Board  
13 notes previous case law which has confirmed that a standard published  
14 by the American National Standards Institute (ANSI) and guidelines  
15 published accordingly, are compelling evidence of **industry recognition**.  
16 See *Kokosing Construction Co.*, 17 OSH Cases 1869, 1873 (Rev. Comm'n  
17 1996) *Reich v. Arcadian Corp.*, 110 F.3d 1192, 17 OSH Cases 1929 (5<sup>th</sup>  
18 Cir. 1997). Here NVOSHA did not cite ANSI itself for a violation, but  
19 rather guidance relating to the identification of **recognized hazards** in  
20 the workplace.

#### 21 DECISION

22 The Boards finds as a matter of fact and law, that a violation did  
23 occur as to Citation 1, Item 1, NRS 618.375(1). The violation was proved  
24 by a preponderance of evidence in satisfaction of the recognized proof  
25 elements of violation under occupational safety and health law. The  
26 violation was appropriately classified and proven as "Repeat/Serious"  
27 based upon the prior violation and evidence. The proposed penalty was  
28 appropriate in the amount of EIGHT THOUSAND DOLLARS (\$8,000.00).

1 The violation at Citation 2, Item 1, classified as "Other-than-  
2 Serious" referencing 29 CFR 1910.1200(f)(6) was not subject of contest  
3 at the time of hearing. Counsel stipulated at the commencement of the  
4 hearing that the notice of contest as to Citation 2, Item 1 was  
5 withdrawn.

6 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
7 **REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as  
8 to Citation 1, Item 1, NRS 618.375(1). The classification of the  
9 violation as "Repeat/Serious" and the proposed penalty in the total sum  
10 of EIGHT THOUSAND DOLLARS (\$8,000.00) is approved and confirmed.

11 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
12 **REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as  
13 to Citation 2, Item 1, 29 CFR 1926.1200(f)(6). The classification of  
14 "Other-than-Serious" and no penalty proposed was confirmed.

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

25 DATED: This 29th day of June 2018.

26 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
27 REVIEW BOARD

28 By Steve Ingersoll  
STEVE INGERSOLL, CHAIRMAN