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NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

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Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, State of Nevada,

Complainant,

vs.

Reno Forklift, Inc.,

Respondent.

Docket No. RNO 17-1896

DECISION OF THE BOARD

This matter came on for hearing before the Nevada Occupational Safety and Health Review Board (OSHA) on August 8, 2018, after notice was duly given according to law. Ms. Salli Ortiz, Esq., appeared on behalf of the complainant, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (State). Mr. Bruce R. Mundy, Esq., appeared on behalf of the respondent, Reno Forklift, Inc. (Reno Forklift).

Jurisdiction is not contested and is conferred by NRS 618.315. The State's complaint sets forth the allegations which, the State claims, constitute violations of the Nevada Revised Statutes as referenced in Exhibit "A," attached to the complaint. There, it is alleged:

> Citation 1, Item 1: Serious
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> 29 CFR 1910.147(c)(4)(i): Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.
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> A. The employer did not utilize their procedures to control potentially hazardous energy, which stated "Apply or Affix Lock and Tag (or other device) so that equipment is held in 'safe' or 'off' positions." The two employees from Reno Forklift de-energized the conveyor but did not affix a lock or tag before they started working on the machine and removed the guards. As a result, employees were exposed to unexpected energization of the conveyor system.

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B. The employer did not utilize their procedures to control potentially hazardous energy, which stated, "Before performing service or maintenance on equipment or machinery where energy or motion could release and cause injury, the energy sources must be isolated and locked out." The employer allowed the practice of running the conveyor systems while servicing and maintenance was being performed. As a result, employees were exposed to an unguarded sprocket and chain, and an employee's right middle finger was amputated after it was caught in the sprocket and chain of the conveyor.

C. The employer did not utilize their procedures to control potentially hazardous energy, which stated, "Before performing service or maintenance on equipment or machinery where energy or motion could release and cause injury, the energy sources must be isolated and locked out." The employer allowed the practice of running the conveyor system while servicing and maintenance was being performed. As a result, employees were exposed to unguarded rotating rollers.

D. The employer did not develop, document, and utilize a written procedure for each piece or type of equipment (*e.g.,* conveyors) as described in their program. A form entitled "LOTO Written Procedures (template)" was in their program but was not completed for conveyors.

At the outset of the hearing, the parties, through legal counsel, stipulated to the admission into evidence of complainant's Exhibits 1 through 3, consisting of a total of 72 pages and respondent's Exhibit A, consisting of portions of 29 CFR § 1910.147. During the course of the hearing, the complainant offered for admission into evidence Exhibit 4, consisting of a complete copy of 29 CFR § 1910.147. This exhibit was also admitted into evidence without objection.

Counsel for the complainant waived opening statement. Counsel for respondent did not. The bottom line of his opening statement was that no policy or procedure could have prevented this accident from happening and, therefore, there is no plausible basis for charging Reno Forklift with a violation and assessing a penalty. Tr., p. 10;9-10.

I. Summary of the Case

The State alleges that Reno Forklift's injured employee was not testing but was investigating the defective conveyor belt when the incident occurred. While the conveyor belt was running, the injured worker, Ed Wilson, reached out from beneath the conveyor belt and caught his hand on an unguarded sprocket, resulting in a partial amputation of one finger. At no time did the injured worker and his co-worker, Tim Coffman, ever lockout or tagout the

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conveyor belt[1], either before or after they had removed the guard rail to the conveyor belt, or while Mr. Wilson was lying underneath the equipment, trying to hear the location of the thumping noise which precipitated the call from TAGG Logistics (TAGG), in the first place, to come and repair the conveyor belt. Mr. Wilson had his lockout and tagout equipment with him. However, it never left his bag. He was completely exposed to the operating machinery in a zone of hazard. Tr., 47;16-20, 102;18-2, 132;5.

Reno Forklift's policies stated that it would draft safety procedures addressed to each piece of equipment but the drafting was incomplete. Reno Forklift had not drafted procedures addressed to specific equipment or groups of equipment, though its own policies said they would be drafted. This combination of factors and others elaborated upon below constituted the nucleus of facts giving rise to the four citations, claims A through D of the complaint.

The respondent, Reno Forklift, contends that the injured worker, Mr. Wilson, was not investigating, but testing the conveyor belt when he was lying under the conveyor belt, listening for the thumping in order to locate where the thumping noise originated. Because he was testing and not investigating, Reno Forklift claims that Mr. Wilson's activities were excepted by 29 CFR § 1910.147(f), from the requirements of 29 CFR § 1910.147(c)(4)(i), because to test, the equipment must be kept running and testing is an essential step in the repair process.

According to Reno Forklift, for testing purposes, employees may be in the zone of hazard while the equipment is running.[2] Tr., 132;1-5. Reno Forklift also claimed that 29 CFR § 1910.147(c)(4)(i) was inapplicable by reason of the exception engrafted to the regulation, itself. The safety procedures and precautions of 29 CFR § 1910.147(c)(4)(i) need not be developed if all of the eight elements of the Exception are present.

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[1]As explained in greater detail, *infra*, tagout and lockout procedures and equipment are intended to keep machinery or equipment from being energized (started) while employees are servicing or maintaining equipment in order to guard against injury to employees by the operating equipment/machinery. *See*, 29 CFR § 1910(a)(3)(i).

[2]At the outset, Reno Forklift is on tenuous grounds. NRS 618.385(1) provides: " An employer shall not ... [r]equire, permit, or suffer any employee to go or be in any employment or place of employment which is not safe and healthful." Reno Forklift's theory of the case runs headlong into the bar of NRS 618.385(1).

Further, Reno Forklift took the position that it should not be punished because the injury was the product of a stupid move by the injured worker which Reno Forklift labeled a "brain fart." As a result, Reno Forklift claims that no safety precautions would have prevented the incident. Tr., 10;9-10, 61;5-7, 127;10-13. Therefore, the citation should not be affirmed.

The Board, however, as elucidated below, finds each of Reno Forklift's defenses wanting. The injured worker was investigating the conveyor belt, not testing it and, therefore, while the lockout and tagout requirements of 29 CFR § 1910.147(c)(4)(i) applied, they were never deployed. This was a clear violation. Additionally, Reno Forklift was not capable of proving all eight elements of the Exception that is attached to 29 CFR § 1910.147(c)(4)(i). This Exception afforded Reno Forklift no safe harbor from the Regulation.

The Board also finds that it was undisputed, no lockout and tagout procedures were ever deployed, that the lockout and tagout equipment never left Mr. Wilson's equipment bag and that Reno Forklift had not written any safety procedures for the conveyor belt, despite statements in its policies that they would be drafted. Further, Reno Forklift failed to produce sufficient proof of the rogue employee defense, while defending on the grounds that Mr. Wilson's stupidity was the direct and proximate cause of his injury.

Thus, the Board affirms all four counts of the State's complaint, claims A through D, the classification of the offense as "serious," and the assessment of a $4,000 penalty.

II. Statement of The Pertinent Statutory and Regulatory Scheme.

The Court in *ComTran Group, Inc. v. U.S. Dep't. of Labor,* 722 F.3d 1304 (11th Cir., 2013) detailed the general statutory and regulatory scheme for resolving OSHA complaints. The Court explained:

> Passed by Congress in 1970, OSHA sought to assure that "'every working man and women in the Nation [had] safe and healthful working conditions.'" *See, Reich v. Trinity Indus., Inc.,* 16 F.3d 1149, 1151 (11th Cir., 1994) (quoting 29 U.S.C. § 651(b)). The Act "granted employees a new set of important rights and [intended] that they play a vital role in achieving safe and healthful conditions at the workplace." *Marshall v. Daniel Constr. Co., Inc.,* 563 F.2d 707, 711–12 (5th Cir., 1977). [footnote one omitted]. *ComTran, supra* at 1306.

Nevertheless, "[i]t has been long-established that OSHA does not impose absolute (or strict) liability on employers for harmful workplace conditions; instead, it focuses liability where

harm can, in fact, be prevented." *Ibid,* citing amongst other cases, *Brennan v. Occupational Safety & Health Review Comm'n*, 502 F.2d 946, 951 (3rd Cir., 1974). The Ninth Circuit holds further that there must be some connection between the employer and the alleged violation to prevent the imposition of a regime of strict liability. *Brennan v. Occupational Safety & Health Review Comm'n*, 511 F.2d 1139, 1145 (9th Cir., 1975). "Thus, while courts have emphasized the importance of proper instruction and adequate supervision in safety-related matters, 'they have consistently refused to require measures beyond those which are reasonable and feasible.'" *ComTran, supra* at 1306.

Under OSHA, employers are obligated to comply with the "general duty" imposed upon employers to make the workplace free of all recognized hazards. *ComTran* at 1307, 29 U.S.C. § 654(a)(1). Employers must also observe the "special duty" of compliance with all mandatory health and safety standards. *ComTran* at 1307, 29 U.S.C. § 654(a)(2). In this case, the special duty imposed upon Reno Forklift, is found at 29 CFR § 1910.147(c)(1), which states:

> The employer shall establish a program consisting of energy control procedures, employee training and periodic inspections to ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, startup or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source and rendered inoperative.

Reno Forklift is also required to observe 29 CFR § 1910.147(c)(4)(i), which provides: "Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section."

The activities covered by this section are found in 29 CFR § 1910.147(a)(1)(i), where it states that the standard:

> Covers the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy, could harm employees. This standard establishes minimum performance requirements for the control of such hazardous energy.

Servicing and/or maintenance are defined terms. They include in their definition "[w]orkplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying and maintaining and/or servicing machines or equipment." 29 CFR § 1910.147(b).

To prevail, the State has the initial burden of proving a *prima facie* case that a standard has been transgressed. A *prima facie* case is shown under OSHA by proof, "(1) that the regulation applied; (2) that it was violated; (3) an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the act's requirements." *ComTran, supra* at 1307.

Employer knowledge can be shown upon proof that a supervisor had either actual or constructive knowledge of the violation. In such case, knowledge is generally imputed to the employer. *ComTran, supra* at 1307, 1308. Constructive knowledge is established by proof that the employer failed to implement an adequate safety program, "with the rational being that - in the absence of such a program - the misconduct was reasonably foreseeable." *ComTran, supra* at 1308.

Only if the State makes out a *prima facie* case must the employer come forward and assert an affirmative defense or defenses. Absent proof of a *prima facie* case, a respondent employer need mount no defense to avoid being sanctioned as charged.

In this case Reno Forklift defends primarily on the grounds that 29 CFR § 1910.147(c)(4)(i) is irrelevant because Mr. Wilson was testing, not inspecting, the conveyor belt when the injury occurred. Therefore, Mr. Wilson's conduct came within the Exception engrafted to 29 CFR § 1910.147(c)(4)(i), itself, and the exception of 29 CFR § 1910.147(f), relieving Reno Forklift of the force and effect of 29 CFR §§ 1910.147(c)(1) and (c)(4)(i).

Reno Forklift also relies upon the unpreventable or unforeseeable employee misconduct defense by reason of Mr. Wilson's brain fart, in the face of which an employer is defenseless. To raise this defense, however, Reno Forklift must show that it: (1) created a work rule to prevent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover non compliance; and (4) enforced the rule against employees when violations were discovered. *See, New York State Electric & Gas, Corp.,* 88 F.3d 98, 106 (2nd Cir., 1996), *ComTran, supra* at 1308.

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III. FINDINGS OF FACT

The facts of the case are relatively simple and straight forward. The incident took place on January 10, 2017, when an employee of Reno Forklift, had part of his finger partially amputated by an unguarded sprocket when responding to a call to Reno Forklift, from TAGG to repair a TAGG conveyor belt. Tr., 19;4-5. TAGG was, therefore, the host company or site, Tr., p. 19;4-5, as it was the location of the conveyor belt that was apparently in need of repair. Tr., 19;6-7, 12;7.

Reno Forklift dispatched two employees in response to the call, Ed Wilson, and Tim Coffman. Tr., pp. 32;24, 33;1-4. Mr. Wilson was a storage systems technician. Tr., 16;9-15. He had worked on conveyor systems for the past year and a half. Tr., 95;9-11. Mr. Coffman was new to Reno Forklift. He had never worked on a conveyor belt before, Tr., 18;12-14, had never been trained on lockout/tagout procedures[3] (LOTO), *Ibid.*, and was experiencing on the job training, with this dispatch. Tr., 18;12-14, 58;1-3.

When Mr. Wilson and Mr. Coffman arrived at the site, they met "Mark," who told them there was a "thumping" noise in the conveyor. Mark is Mark McKenna, Operations manager for TAGG Logistics. Tr., 19;16-17. According to Mr. Wilson, he told Mark that they would have to shut the section down and evaluate it. "Evaluate" was Mr. Wilson's words. Tr., 92;12-15.

By virtue of his experience in relation to his untrained co-worker, Mr. Wilson was the supervisor on this call. Tr., 60;4-8, 108;5-9 (Mr. Wilson was the lead). Mr. Wilson was the injured worker, also, whose partially amputated finger precipitated the State's investigation on

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[3]Lockout and tagout are defined terms. Lockout is the placement of a device on an energy isolating device, to ensure that the energy to the equipment or machinery being worked on does not become energized and cause injury to the unsuspecting worker. Tagout refers to the placement on the machinery of that which is essentially a notice that the machinery is being worked on and must not be energized, or started up, until the tagout device is removed, which is not to occur until the work is finished. *See*, 29 CFR § 1910.147(b). In this case, there is no dispute that the conveyor belt had the ability to be locked out and tagged out (*i.e.*, turned off and shut down). Tr., 104;5-7. The question in this case is, as indicated, whether Wilson and Coffman were required to lockout and/or tagout the conveyor belt under the circumstances, because the evidence is overwhelmingly that they failed to lockout or tagout the conveyor belt when it was operational or could have been operational.

January 11, 2017, of the incident, Tr., 13;6, and ultimate issuance of citations in this case. Tr., 33;1-4.

Turning to the incident, according to Mr. Wilson, he approached the conveyor with Tim Coffman, moved people away from the conveyor belt and found the on-off switch to the conveyor. The on-off switch proved to be located right next to where the incident happened. Mr. Wilson shut down the conveyor belt, Tr., 92;19, and made sure, he claims, it was shut off before "we" started looking at things. Tr., 92;19-20. Mr. Wilson recalls telling someone that this is going to be "down" until we finish our work. Tr., 92;12-15.

Mr. Wilson testified, he then took off the chain guard and wiggled the chain to see if it was too tight or if that was the problem. Mr. Wilson determined that it was not too tight. Tr., 92;16-25. At this time, according to Mr. Wilson, Tim was standing next to the on-off switch. Tr., 93;1-2. Mr. Wilson had his lockout/tagout in his bag. Tr., 93;2-3. His lockout/tagout equipment, however, never left his bag. The chain guard was removed and the chain wiggled by Mr. Wilson with no lockout or tagout deployed. Tr., 19;16-17, 28;6-7, 44;23-24, 53;1, 92;16-25.

While the chain guard was still removed from the belt, Mr. Wilson told Tim to start up the equipment. Tr., 94;23-24, 98;4-9, 16-22. He said, they both backed away, at this moment while the equipment was first running with the chain guard removed. Tr., 93;7-10. They could not hear any thumping noise, however, from where they were standing, and so, Mr. Wilson surmised that the thumping must be coming from the rollers, below. Tr., 93;12-13.

The equipment was then shut down while Mr. Wilson removed the belly pan in order to see if anything was stuck on the rollers. Tr., 93;16-17. Nothing was discovered there and Mr. Wilson, thus, decided to slide himself under the conveyor belt. When lying underneath the conveyor, Mr. Wilson told Tim Coffman to start the conveyor belt so that he could listen for the noise or thumping. Tr., 93;19-20. Watching and listening for noises are what Mr. Wilson was doing from beneath the conveyor belt. *Ibid.*

The chain guard was still removed, while the conveyor belt was re-energized, or turned on by Mr. Coffman while Mr. Wilson was laying underneath the conveyor belt. His lockout/tagout equipment was still in his bag. Tr., 98;17-18. The person operating the switch to

.energize the equipment was not Mr. Wilson, the person listening for the thumping noise, but Mr. Coffman, the inexperienced co-worker of Mr. Wilson. Tr., 93;10-22.

While the conveyor belt was still running, Mr. Wilson reached up with his hand, caught it in the unguarded, rotating sprocket and lost part of his finger. Tr., 93;16-22, 94;1-3. He, then, told Mr. Coffman to turn off the machinery. Tr., 93;21-23. Mr. Wilson actually claimed, he told Mr. Coffman to turn off the machinery before he started to reach up with his hand, but "...as I reached up, I got my finger caught before he [Mr. Coffman] actually got it off." Tr., 94;1-3.

From the beginning of this series of events, starting with when Mr. Wilson jiggled the conveyor belt and took off the chain guard, to the last, when Mr. Wilson suffered the partial amputation, at no point was the system ever locked out or tagged out. Tr., 100;1-14. *See also,* Tr., 115;23 (didn't use lock out procedures to start out the job). The lockout and tagout equipment remained in Mr. Wilson's bag, precisely where it didn't belong. Counsel for Reno Forklift admits as much. Tr., 126;13-15. Moreover, Mr. Wilson, the person actively working on the equipment, was not the person in control of the energization of the equipment. The person in command of the on-off switch was Mr. Coffman, and this was the first time Mr. Coffman ever worked on a conveyor belt. Tr., 58;1-3.

It is also clear from Mr. Wilson's testimony, he was doing no more than looking and listening when the equipment was running and he suffered the partial amputation. That is, at the moment he was laying beneath the conveyor belt, before trying to get out from under it, he was not touching, probing, or otherwise maneuvering the machinery. Furthermore, while Mr. Wilson was located underneath the conveyor system with a belly pan or guard off and the equipment running when the partial amputation took place, Tr., 21;20-22, Mr. Wilson was exposed to hazardous and extremely unsafe conditions. Reno Forklift, by and through counsel, concedes the point that Mr. Wilson had placed himself in the "...realm of a hazardous area...." Tr., 47;19-20. *See also*, Tr., 102;18-21 (inherently hazardous).

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The employees Reno Forklift sent to TAGG were not properly trained. As indicated, this incident was Mr. Coffman's first exposure to work on a conveyor belt. Tr., 58;1-3. He was learning on the job. There is no evidence that he had received any training on conveyor belts or lockout/tagout procedures before arriving at TAGG. Tr., 18;12-14.

As for Mr. Wilson, he claims he worked on conveyors for the past year and a half, as of the date of the incident. Tr., 95;9-11. The last training he had received from Reno Forklift, however, dates back to April 15, 2016. When interviewed by OSHA staff, Mr. Wilson stated that he received hands on lockout/tagout procedure training but never received written procedures on lockout/tagout from his employer, Tr., 37;5-8. He never had seen a copy of the lockout/tagout program in writing. Tr., 17;3-4. Mr. Wilson also admitted when testifying that Reno Forklift should provide better training for different hazards and that he had never seen a policy from Reno Forklift telling him how he should conduct a job when testing an energized piece of equipment. Tr., 101;16-20, 102;1-3.

Reno Forklift, itself, acknowledged it had a duty to provide for the safety of its employees when working on machinery, by attempting to draft a Lockout/Tagout Safety Program in an effort to bring itself in compliance with 29 CFR § 1910.147. *See*, Exhibit 1, p. 40, Reno Forklift's regulations for the control of hazardous energy. Reno Forklift's written program states: "Before performing service or maintenance on equipment or machinery where energy or motion could release and cause injury, the energy sources must be isolated and 'locked out.'" *Ibid.* Aside from this pronouncement, however, the details for implementation of this dictate were not drafted. A template for such a program was in evidence, but it was incomplete. *See*, Exhibit 1, pp. 41-42. Furthermore, Reno Forklift stated in this "Program," that Management will: "Establish written LO/TO procedures for each individual or group of similar machines in place." This was never done. Tr., 58;21-23, 59;1-4. There was no such procedure established for the conveyor belt the subject of the State's complaint.[4]

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[4]To the extent that any of the following conclusions of law and legal analysis amount to findings of fact, they are incorporated herein by reference.

IV. The Undisputed Facts Sustain All Four Elements of the State's Complaint

The State's complaint, itself, is quoted above, and does not bear repeating. During the hearing on the complaint, however, witnesses for the State were interrogated concerning the meaning and import of the complaint.[5]

Jake La France, the State District Manager, Tr., 55;8, testified that the gravamen of Subparagraph A of the complaint arose when Mr. Coffman and Mr. Wilson de-energized the machine (the conveyor belt), removed the guards, and Mr. Wilson put his hands on the chain to see if it was too tight, without either tagging out or locking out the "machine," contrary to Reno Forklift's own procedures, Exhibit 1, p. 40, ¶ 4.1.1, and the Federal Regulations. Tr., 57;25, 58;1-6. The gravamen of Subparagraph B of the complaint is the same, except it is directed at the failure to lockout and tagout, while there was undisputedly an unguarded chain to which the employees were exposed. Tr., 58;7-10. The gravamen of Subparagraph C of the complaint is the same, also, except it is directed to the exposure of the employees to unguarded rollers, without a tagout or lockout. Tr., 58;11-12.

Mr. La France also addressed Subparagraph D of the complaint. Its gravamen is directed towards Paragraph 3.1.3 of Reno Forklift's policies. As indicated, it requires the development of LOTO safety procedures for similar pieces of equipment, or individual pieces of equipment. This was never completed. Tr., 58;21-23, 59;1-4, 66;3-8. *See also*, Exhibit 1, pp. 40, 41.

Turning to the Regulations, themselves, they apply "...to the control of energy during servicing and/or maintenance of machines and equipment." 29 CFR § 1910.147(a)(2)(i). 29 CFR § 1910.147(a)(3)(i) requires employers to "...establish a program and utilize procedures for affixing appropriate lockout devices or about tagout devices to energy isolating devices and to otherwise disable machines or equipment to prevent unexpected energization, start up or release of stored energy in order to prevent injury to employees." Then, 29 CFR § 1910.147(c)(1) mandates that, "...employer[s] shall establish a program consisting of energy control procedures, employee training and periodic inspections to ensure that before any employee performs any

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[5]To the extent any of the preceding Findings of Fact amount to conclusions of law, they are incorporated herein by reference.

servicing or maintenance on a machine or equipment where the unexpected energizing, startup or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source and rendered inoperative."

As indicated, *supra*, servicing and maintenance are defined terms. They expressly include the "inspecting" of a machine. 29 CFR § 1910.147(b).

Finally, there is 29 CFR § 1910.147(c)(4)(i), which provides that, "[p]rocedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section." Those activities include the servicing and maintenance, as defined in the Regulations, of machinery and equipment that have energy sources which could, but need not actually have to, suddenly energize and cause injury to the employee servicing or maintaining the equipment. It is the potential to energize and cause injury that turns the screw.

In short, these regulations and Reno Forklift's own procedures require that LOTO safety procedures be created and demand that they then be followed in order to avoid a citation. Applying the undisputed facts outlined above, it is patent that the incident giving rise to partially amputated finger violated both Reno Forklift's own procedures as well as the regulations providing for and requiring lockout/tagout safety precautions to be made. From the very moment that Mr. Wilson and Mr. Coffman first looked at the conveyor belt until they left, they never locked out or tagged out the conveyor belt, even though they worked on the conveyor belt while it was idle to remove the guardrail, the bottom pan, and to touch the chain to see if it was too tight. The conveyor belt was also not locked out or tagged out when Mr. Wilson was lying beneath the running conveyor belt, without the safety guard re-installed, when engaged to listen and look at the operating machinery while he had admittedly placed himself in a zone of hazard.

Further, it is beyond dispute, that Reno Forklift failed to follow its own pronouncement and draft or caused to be drafted LOTO procedures for each individual or group of similar machines as Reno Forklift required of itself. *See*, Exhibit 1, p. 40, ¶ 3.1.3. And, as is required of Reno Forklift by the Regulations, Reno Forklift failed in this regard, also.

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It cannot be gainsaid, then, that the State has established the elements of its complaint, based upon the undisputed facts before the Board. The Board finds that the State has proven a *prima facie* case for the violation of 29 CFR § 1910.147(c)(4)(i), Subparagraphs A through D. The incident relates to the regulations pertinent to employee safety in connection with operating equipment and machinery. The facts are undisputed that the failure to follow Reno Forklift's own policies and the failure of Reno Forklift to have drafted pertinent policies amounted to violations of the pertinent Regulations cited and analyzed above. These failures of omission and commission are the direct and proximate cause of the partial amputation sustained by the injured employee.

Furthermore, by reason of the undisputed facts, the requisite scienter of the employer, Reno Forklift, is established. An employer's knowledge may reasonably be inferred, and the likelihood of injury is reasonably foreseeable, when, as here, the training of employees in pertinent safety measures is indifferent, at best, and when there are gaps in the employer's safety protocol and procedure, as here. The scienter element of a *prima facie* case is clearly also established by the undisputed facts of this case. *Ibid.*

Because the Board finds and concludes that the State proved the *prima facie* case for the elements set out in is complaint, the Board also finds the burden shifts to Reno Forklift to prove it has an affirmative defense or defenses to the State's complaint. Absent an affirmative defense, liability may be assigned to Reno Forklift due to the charges brought by the State. *See, ComTran, supra* at 1307.

In defense of itself, Reno Forklift claims that the regulations cited above are irrelevant to this case for reasons which include, *inter-alia*, that no amount of regulations could have prevented this incident from occurring. Tr., 10;8-10. The incident was the product of a brain fart on the part of Mr. Wilson and there is nothing an employer can do to prevent harm under those circumstances. Reno Forklift also claimed that Mr. Wilson was testing, not inspecting the conveyor belt, and for that reason, the regulations relied upon by the State were also irrelevant because the regulations allow for the testing of equipment while running. Tr., 9;12-16, 10;1-4. Finally, Reno Forklift claims that the circumstances fall within the exception to 29 CFR §

1910.147(c)(4)(i), thereby excusing Reno Forklift for not having completed and failed to have in place the lockout/tagout procedures otherwise required of employers. Tr., 9;12-16. For these reasons, Reno Forklift claims that the State's charges against it should be dismissed.

Considering these affirmative defenses, Mr. Wilson's "brain fart" defense is simply a more colorful restatement of the rogue employee or here, the rogue supervisor defense to an OSHA complaint. The rogue employee or supervisor defense is based upon the premise the misconduct was unpreventable or unforeseeable. *See, New York State Elec. & Gas Corp., supra* at 106-108.

The elements of the defense require the employer, Reno Forklift, to show: "... it (1) created a work rule to revent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover noncompliance; and (4) enforced the rule against employees when violations were discovered." *Id.*, at 106. This defense fails for Reno Forklift as the undisputed facts chronicled, above, show that Reno Forklift did not communicate well its LOTO policy to its employees. Mr. Wilson said, he never saw it. Tr., 17;3-4, 29;17-18, 37;5-8, 90;3-4, 101;16-22, 102;1-3. Mr. Wilson also admitted that he never saw the LOTO written procedure. Tr. 37;6-8. And, the last training he recalled, took place April 15, 2016. Tr., 96;11-13. There was also no follow up to determine if the training had been absorbed and of any value. Tr., 105;4-8. Reno Forklift's approach to training Mr. Wilson was perfunctory at best. Mr. Coffman had received no training. This was his first conveyor job. Tr., 18;12-14, 89;22-25.

There is no evidence, either, that Reno Forklift enforced the LOTO policy, if violated. George Pimpl, the Vice-president of Reno Forklift, said that Mr. Wilson did everything right. It was Mr. Wilson's call as to how to handle it and so, Mr. Pimpl felt, he could not stop the situation from occurring. There was no discipline, in other words, administered. Tr., 108;5-9.

The Board concludes that Reno Forklift cannot rely upon the rogue employee affirmative defense. Based upon the undisputed facts set out in the record before the Board, it is evident from the analysis, above, that Reno Forklift failed in several respects to prove the elements of this affirmative defense.

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Addressing the claim Mr. Wilson was testing, not inspecting when he was lying under the conveyor belt while it was running, it is true that 29 CFR § 1910.147(f)(1) allows for the operation of the machine or equipment with the lockout or tagout devices removed in order "...to test or position the machine, equipment or component thereof,..." if the rest of the conditions following 29 CFR § 1910.147(f), entitled "Additional Requirements" are met. Reno Forklift argues that when Mr. Wilson was laying under the conveyor belt listening and looking, he was "testing" the equipment and, therefore, not servicing or maintaining the equipment, such that it was permissible for Mr. Wilson to operate the conveyor belt, without a lockout or tagout device employed, and it was permissible for him to be in the zone of hazard while the belt was running. Reno Forklift claims the equipment cannot be tested unless it is running, and 29 CFR § 1910.147(f), permits employers to allow the testing of equipment or machinery while it is running and while the employee remains in the zone of hazard. Tr., 8;23-25, 9;1, 9;12-16, 35;13.

The State contends that Mr. Wilson was "inspecting," not "testing" the conveyor belt at the time he was lying under the conveyor belt, in the zone of hazard, listening and looking at the equipment while it was running. Tr., 77;6-9. Neither the term "testing" nor "inspecting" is defined in the regulations, pertinent, here. It is well settled, however, that when interpreting statutes or regulations, the words employed are to be given their plain and ordinary meaning. *See*, *Barrick Goldstrike Mine v. Peterson,* 116 Nev. 541, 545 (2000); *Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420 (2007). Both the word test and the word inspect are common and ordinary terms whose use in the Regulations, here, are not nuanced. Test includes in its meaning, "A means employed to examine, try or prove,..." Tested includes amongst its meanings, "To administer a test in order to diagnose...." Webster's II New Riverside University Dictionary, Copyright 1984, p. 1198. The word inspect means: "To examine in detail for flaws...." Webster's II New Riverside University Dictionary, Copyright 1984, p. 632.[6]

Having the meanings of the two words laid out side by side, what, then, was Mr. Wilson doing when he was lying, listening and looking at the conveyor belt? Was he testing or

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[6]Webster's is an approved source for determining a word's plain and ordinary meaning. *See, Nelson, supra* at 224, fn. 17.

inspecting? Both terms use the word "examine" to define them. The word "test," however, connotes a more active, than passive role of the testor, especially when the word "try" is included in the meaning. This also stems from the association of the word "diagnose" with "test." On the other hand, the term inspection has a more passive connotation. One can inspect, without probing, pushing, pulling, or otherwise administering.

Applying these meanings for inspecting and testing to Mr. Wilson, the Board concludes he was inspecting, not testing, while passively laying under the conveyor belt listening and watching. He was looking for flaws, an activity squarely within the meaning of an inspection. Reno Forklift is incorrect when it claims it is excused from the requirements of 29 CFR § 1910.147(c)(4)(i), by reason of 29 CFR § 1910.147(f). Mr. Wilson was inspecting, not testing. The Board finds and concludes that the State's complaint withstands the "testing" affirmative defense, based upon the Board's finding and conclusion that Mr. Wilson was inspecting, not testing.

Assuming, *arguendo*, Mr. Wilson was testing instead of inspecting, the Board concludes that Reno Forklift's reliance upon 29 CFR § 1910.147(f) is nevertheless unavailing. 29 CFR § 1910.147(f) applies only if the sequence of actions following 29 CFR § 1910.147(f) are met. They include the requirement that employees be removed from the machine or equipment area according to paragraph (e)(2). 29 CFR § 1910.147(f)(1)(ii). Paragraph (e)(2) in turn states that "...the work area shall be checked to ensure that all employees have been safely positioned or removed." 29 CFR § 1910.147(e)(2)(i). 29 CFR § 1910.147(e)(3) states that, "[e]ach lockout device shall be removed from each energy isolating device by the employee who applied the device."

Applying these regulations, Reno Forklift's claim of defense based upon 29 CFR § 1910.147(f) fails as well. The simple fact of the matter is, Reno Forklift failed to comply with these basic requirements that must be sequentially followed. The lockout and tagout devices were never applied in the first place, though, when Mr. Wilson and Mr. Coffman removed the guard they clearly should have been deployed. Thus, since the lockout and tagout devices were never applied, Reno Forklift could not comply with the requirement that the person who installed

each lockout device, must also be the person to remove it and then, at the end re-install it. 29 CFR § 1910.147(f)1)(v). Tr., 36;3-4, 7. That never happened. Tr., 68;14-21.

Similarly, Mr. Wilson was laying under the conveyor belt in a zone of hazard while the machine was operational. Tr., 47;16-20, 102;18-21, 132;1-5. Mr. Coffman was standing next to the machine. This amounts to a blatant violation of 29 U.S.C. § 1910.147(e)(2), which requires all employees, not just some of the employees, to be removed from the area or safely positioned while the machine is running. Tr., 30;22-25, 78;17-25, 79;6-10. Neither Mr. Wilson nor Mr. Coffman were removed from the area and Reno Forklift concedes that Mr. Wilson, at least, was in the zone of hazard. Hence, even if Mr. Wilson were testing, instead of inspecting, Reno Forklift is not protected by 29 CFR § 1910.147(f), because it failed to satisfy the sequential additional requirements that must be met.

This leaves, finally, Reno Forklift's argument that 29 CFR § 1910.147(c)(4)(i) is inapplicable because Reno Forklift falls within the exception to 29 CFR § 1910.147(c)(4)(i), itself. The exception to 29 CFR § 1910.147(c)(4)(i) merely frees the employer from documenting the required procedure for a particular machine or equipment. It does not excuse, however, abiding by or failing to have a lockout/tagout procedure that must be followed. Not much is gained by this exception, in other words.

Nonetheless, Reno Forklift sought this safe harbor. To fall within this exception, the employer must satisfy all eight elements to the Exception. They include the requirement that Reno Forklift show that the machine is isolated from its energy source and locked out during servicing or maintenance. Reno Forklift must also show that the lockout device was under the exclusive control of the authorized employee performing the servicing or maintenance. *See*, 29 CFR § 1910.1 47(c)(4)(i), Exception, ¶¶ 4 and 6.

The Board finds that from the moment Mr. Wilson and Mr. Coffman started dismantling the equipment, by removing the guard rail, while the machine was turned off, it was never locked out or tagged out. Mr. Wilson's lockout and tagout equipment never left his bag, as he admits. Tr., 16;22-24, 93;2-3, 98;17-19, 100;1-14. The record before the Board could not be more clear on this point. Moreover, the conveyor belt was capable of being tagged or locked out. Tr.,

104;5-7. Impossibility is no defense to the failure to start dismantling the conveyor belt without having first tagged out or locked out the equipment. There is no reason why Mr. Wilson and Mr. Coffman could not and did not lockout or tagout the conveyor belt, when they first started tinkering with this "thumping" machine. The Board, thus, concludes that Reno Forklift's "exception defense" to 29 CFR § 1910.147(4)(c)(i) is to no avail.

The State's complaint alleges that the offenses committed were "Serious." *See*, Complaint, p. 2. It is well settled that "...when a regulation makes the occurrence of an accident with a substantial probability of death or serious physical harm *possible*, the employer has committed a serious violation of the regulation." *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 1069, 1073 (3rd Cir., 1979) (emphasis added). Substantial probability "'refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result,' *Ill. Power Co v. OSHRC*, 632 F. 2d 25, 28 (7th Cir., 1980)...." *Secretary of Labor v. Trinity Industries, Inc.*, 504 F.3d 397, 401 (3rd Cir., 2007).

Reno Forklift never mounted a serious challenge to the classification of the offense as "serious." Reno Forklift would be hard pressed to mount such a challenge in that it admitted during the hearing that working on a piece of equipment that is running is inherently hazardous. Tr., 102;18-21. *See also*, Tr., 47;16-20. A condition that is inherently hazardous clearly smacks of the potential for serious harm or death. The characterization of the situation as inherently hazardous easily surmounts for the State, the burden of showing a condition that might well lead to death or serious injury.

The State, however, also addressed at the hearing, the elements by which a serious violation could be assessed. Mr. La France testified that the violation was labeled serious because of the substantial probability that death or serious physical harm could occur. Tr., 61;19-22. Given that Reno Forklift believes the situation is hazardous, Reno Forklift has little to quibble with or argue about the classification the offense(s) as serious. In reality, there is no room to argue, once that assessment is reached, as the Nevada Revised Statutes dictate a serious classification where serious harm or death is the likely result of the injury. *See*, NRS 618.625(2).

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The State also considered the elements of "gravity," "severity" and "probability." Reno Forklift mounted no challenge to the State's application of these elements for assessing a financial assessment and classification of the offense as serious.

The Board, accordingly, finds substantial support for the classification of the offense as serious. It concludes, as well, that the assessment in the amount of $4,000 is appropriate as the gravity based penalty. Tr., 62, 63.

V. DECISION OF THE BOARD AND ORDER

Based upon the Findings of Fact, Conclusions of Law and the Analysis set out herein and good cause appearing, it is the Decision of the Nevada Occupational Safety and Health Review Board (the Board) that Reno Forklift, Inc., violated Nevada Revised Statutes Citation 1, Item 1, 29 CFR § 1910.147(c)(4)(i), Subparagraphs A, B, C, and D; and therefore,

It is Ordered and Decreed that the classification for the offense, aforementioned, as "Serious" is supported by substantial evidence and constitutes an appropriate classification of the offense; and

It is also Ordered and Decreed that the proposed penalty in the amount of $4,000 is supported by substantial evidence and constitutes an appropriate level of penalty to be assessed in this case, which the respondent, Reno Forklift, Inc., is hereby Ordered to pay; and

It is finally Ordered that counsel for the complainant submit proposed Findings of Fact and Conclusions of Law to the Nevada Occupational Safety and Health Review Board consistent with this Decision and serve copies on opposing counsel within 20 days from date of decision. After five days time for filing any objections, the final Findings of Fact and Conclusions of Law shall be submitted to the Nevada Occupational Safety and Health Review Board by prevailing counsel. Service of the Findings of Fact and Conclusions of Law, signed Chairman of the Nevada Occupational Safety and Health Review Board, shall constitute the Final Order of the Board.

Dated this 29th day of January, 2019.

Nevada Occupational Safety and Health Review Board

By: */s/James Halsey*
James Halsey, Acting Chairman