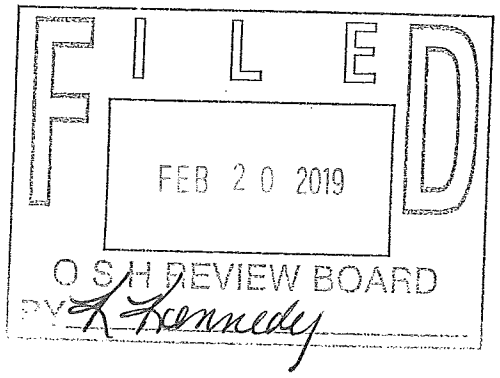


NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

* * * * *

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION OF THE DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA,

Complainant,

vs.

PIER CONSTRUCTION & DEVELOPMENT, LLC,

Respondent,

_____/

Docket No. LV 18-1948

DECISION OF THE BOARD

This matter came on for hearing before the Nevada Occupational Safety and Health Review Board (OSHA) on October 10, 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 of the Division of Industrial Relations (State). Mr. Eric Zimbelman, Esq., appeared on behalf of the respondent, Pier Construction & Development, LLC, (Pier).

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
29 CFR 1926.501(b)(4)(i): Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail system erected around such holes.

At the Spur Apartment multifamily residential construction jobsite located at 985 Wigwam Pkwy, Henderson, NV 89014, Pier Construction and Development, LLC, the Controlling Employer, did not ensure that employees on a walking/working surface were protected from falling through holes more that 6 feet above lower levels. Employees of subcontractors were drilling holes at depths up to 7 feet with a diameter of 2 feet. The holes were drilled to accommodate concrete footings to act as a structural member for columns that will support covered parking structures.

The subscontractors utilized pallets as their hole covers and the pallets contained numerous gaps that measured between 2 and 6 inches in least dimension. At least 7 employees of various subscontractors were exposed to falls of 6 feet 6 inches to 7 feet in at least 54 instances throughout the jobsite and were exposed to serious physical injuries.

On 1/11/2018, an employee of a subcontractor fell approximately 6 feet 6 inches into a hole and sustained minor injuries. The employee was not protected from falling through a hole as required by standard.

In addition, according to the complaint, the State proposed a fine of $2,160, giving due consideration to the probability, severity and extent of the violation. The employer's history of previous violations, and the employer's size and good faith were also factors. Tr., pp., 104, 109-111.

At the outset of the hearing, the State offered for admission into evidence the State's exhibit 1 packet stamped 1 through 186 pages. The respondent, Pier, through legal counsel offered its packet of exhibits consisting of an exhibit bate stamped PCD 0001 through PCD 0459. The respondent also offered a CD of the area of the work site where the injured worker fell into a hole that was driven for a carport support as part of the apartment house complex. Then, during the course of the hearing, Pier offered a photograph for admission into evidence. Tr., p., 6;3-5. Each of these exhibits were admitted into evidence without objection.

Counsel for both parties waived opening statements. Chairman Ingersoll asked the State to proceed with its case in chief through Ms. Ortiz.

I. Summary of the Case

It is undisputed that this case invokes the multi-employer work site where an employee of an employer other than the general contractor and respondent, Pier Construction & Development, LLC,

fell into a hole drilled by a sub-subcontractor, where the hole was either partially covered or completely uncovered by the pallet that was intended to cover the hole and protect against such incidents. There is no dispute, however, that the pallet was not lagged to the ground, to hold the pallet cover in place over the hole.

The fall, itself, was not the basis for the citation under 29 CFR § 1926.501(b)(4)(1), which provides that, "...each employee on walking/working surfaces shall be protected from falling through holes...more than six feet...above lower levels, by personal fall arrest systems, covers or guardrail systems erected around such holes." Covers were the chosen method of protection. Pallets may constitute a "cover" under the Regulations. The citation was issued because conditions surrounding the fall were symptomatic of conditions of the pallets and the holes that were drilled throughout the work site.

Pier acknowledged that it had a general duty to provide a safe environment at the work site, even for those employees who were employed by others. The problem, however, for Pier when it came to hole protection by cover was that Pier believed the main function of the pallets was simply to provide a warning of the presence of a hole in the ground. Pier claimed it discharged its duty to provide a safe environment by frequent inspections of the work site. Insofar as the inspections of the holes drilled into the ground on the job are concerned, Pier's inspections were misinformed. Believing that the pallets were there only to warn, Pier did not inspect to check to see if the pallets were sturdy enough to prevent an employee from crashing through the pallet into the hole if an employee inadvertently stepped on the pallet. Similarly, Pier did not inspect to see if the pallets were securely lagged over the hole. The pallets were intended, by regulation, to protect against an actual fall, as well as to warn of impending danger.

Because of Pier's misinformed view of the role of the pallets in protecting against a fall, Pier also approved a job hazard analysis for hole protection that did not require pallets to be lagged and did not include any requirement concerning the condition of the pallets, themselves. The result was that photographs revealed a work environment in plain site that was replete with pallets in a deteriorated condition. The citation was, therefore, issued to Pier, under the multi-employer doctrine, which the Board, as elucidated further, below, upholds.

II. GENERAL 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, supra* 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, supra,* at 1307, 29 U.S.C. § 654(a)(2). In this case, the special duty imposed upon Pier is found at 29 CFR § 1926.501(b)(4)(i), quoted above.

As this case involves hole "covers," it necessarily implicates 29 CFR § 1926.502(h)(2) which states: "Covers for holes in floors, roofs, and other walking/working surfaces shall meet the following requirements: ... (2) All other covers shall be capable of supporting, without failure, at least twice the weight of employees, equipment, and materials that may be imposed on the cover at any one time."

Note the use of the word "shall" in the regulation. The terms and conditions are mandatory. The "cover" must be strong enough to prevent a man from crashing through the cover into the hole that it is protecting. Note, also, the use of the term "imposed." It is broad enough to connote protection for an employee who slipped and fell on the pallet, or inadvertently stepped on the pallet. The horizon of the regulation is broader than providing a walking surface or safe road way for employees. Why else, in other words, would there be a strength requirement of twice the weight of a man that happened to come upon the cover over the hole? Similarly, why else would the term "imposed" be used if the regulation was not intended to be broad enough to protect inadvertent encounters with a hole?

29 CFR § 1926.502(h)(3) and (4) are also invoked by the circumstances of this case. They state: "(3) All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees[, and] (4) All covers shall be color coded or they shall be marked with the word 'HOLE' or 'COVER' to provide warning of the hazard." These regulations are mandatory, also, employing the word "shall" as they do. They, therefore, create a sense of permanency to the protection to be provided by the cover. The cover is to be installed to remain in place. The protection is not so illusory or transitory that it can be lost by the whiff of a breeze.

These regulations also prescribe a warning or notice giving function for the "cover." It is not enough that the cover exists. It must also be marked to give warning to the work force to stay away from the hole in the first place and to refrain from removing the cover so that it provides the measure of protection it is intended to supply. There could be no other reading of the meaning of these two regulations.

Then, this case involves a multi-employer work site. Twenty-four subcontractors of various kinds were deployed on this apartment house construction project. *See*, Tr., pp., 179;18-22, 180;1-4. The multi-employer work site doctrine is necessarily invoked.

> OSHA multi-employer citation policy describes four classes of employers that may be cited: exposing, creating, correcting, and controlling. A "controlling" employer is an employer that could reasonably be expected to prevent or detect and abate the violative conditions by reason of its control over the work site 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, including the degree of its supervisory capacity, its constructive or actual knowledge of, or expertise with respect to, the violative condition, the cause of the violation, the visibility of the violation and the length of the time it persisted, and what the controlling employer knows about a subcontractor's safety programs. It does not depend on whether the controlling employer has the manpower or expertise to abate the hazard itself. *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 6 OSH Cases 1077 (8th Cir. 1977). *See,* e.g., *Summit Contractors, Inc.*, 20 OSH Cases 1118 (Rev. Com'n. J. 2002), *Homes by Bill Simms, Inc.*, 18 OSH Cases 2158 (Rev. Com'n J. 2000). Occupational Safety and Health Law, 3rd Ed., Dale & Schudtz.
>
> In construction industry cases, several courts have, to one degree or another, held that general contractors or certain higher level subcontractors may in some circumstances be cited under Section 5(a)(2) even if the exposed employees are not theirs. *Secretary of Labor v. Trinity Indus.*, 504 F.3d 297 (3d Cir., 2007); *Universal Constr. Co. v. OSHRC,* 182 F.3d 726, 728-31, 18 OSH Cases 1769 (10th Cir. 1999) ....

Occupational Safety and Health Law has long recognized the inability of an employer to avoid employee OSHA safety protections by contract or agreement. *Frohlick Crane Services, Inc. v. Occupational Safety and Health Review Commission,* 521 F.2d 628 (1975). The U.S. Department of Labor Instruction under the Occupational Safety and Health Administration has issued guidance on the multi-employer citation policy. In addition to the case law and treatise commentary above referenced, the guidance on determination of a controlling employer recognizes the realistic principles often practiced by the construction industry. The OSHA enforcement guidance provides:

> ... Control can be established by contract or in the absence of explicit contractual provisions, by the exercise of control and practice....
>
> Control Established By Contract. To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers. U.S. Dep't. of Labor, Multi-employer Citation Policy.

To prevail, the State has the initial burden of proving by a *prima facie* case that a standard has been transgressed. A *prima facie* case is shown under OSHA by proof, "(1) that the regulation applies; (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." *ConTram, 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. *ConTram, supra* at 1307, 1308. "Constructive knowledge is established by proof that the employer failed to implement an adequate safety program, 'with a rational being that - in absence of such programs - the misconduct was reasonably foreseeable." *ConTram, supra* at 1308.

As for the knowledge requirement, itself, which, it must be shown, the responding employer acquired or possessed, the State need not show that the employer, respondent, knew or understood that the conditions themselves were hazardous or violative of a statute, rule or regulation. The knowledge that must be shown is that of the hazardous condition or, in other words, the facts on the ground, not that the condition violates OSHA. *See, Brennan v. OSHRC*, 511 F.2d 1139, 1143 (9th Cir., 1975)(the Secretary need only show that the "...employer had knowledge of the condition alleged to be a violation."). *See also, Shaw Constr., Inc.* (OSHR C Docket No. 3324D, 1978 CCH OSHP 22524 6 BNA OSHC 1341 ("The 'knowledge' of which 29 U.S.C. § 666(j) speaks is knowledge of the condition constituting the violation.").

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 amount no defense and may remain silent during the course of the proceedings.

Here, Pier Construction & Development, LLC, was the general contractor on this multi-residential apartment house project. Tr., pp., 15;21-25, 23;6-8, 23-25, 94;13-20. There were around 24 sub-contractors working at various times on the job-site. Tr., pp., 179;18-22, 180;1-4.

REB Construction Company, Inc., and Steel Partners, LLC, Exhibit 1, p. 11, were the pertinent sub-contractors to the alleged violation. Steel Partners was under sub-contract to Pier to construct the carports to the apartment houses. Tr., pp., 23;6-8, 94;13-20. REB was under sub-contract to Steel Partners to drill the holes, Tr., p., 96;10-11, in excess of six feet into the ground and at least two feet wide, Tr., pp., 20;19-25, 27;18-25, 28;1-3, for the footings to hold the structural support for the covered carport parking. Tr., pp., 23;23-25. Pending the placement of the structural

support for the covered carports, wooden pallets were used to cover the holes. The project called for approximately 100 holes to be drilled to support the carports. Tr., p., 24;1-12. At the time of the incident that precipitated the violation and charging complaint, at least 60 holes had been drilled around the job-site. *Ibid.* At the time of the incident on January 11, 2018 which precipitated the complaint, Tr., pp., 16;2-3, 12-16, 57;16-20, REB was drilling at the rate of 13 holes a day. Tr., p., 28;8-9. The project itself was spread over 13 acres and included at least 20 buildings under various stages of construction. Tr., p., 202;15-20.

These facts necessarily invoked application of the multi-employer work-site doctrine. Confronted by the obvious, Pier conceded the point. Sean Burke, the respondent's general superintendent, oversaw all of Pier's projects in the field. Tr., p., 235;19-21. He testified that Pier was the controlling employer, *see*, Tr., pp., 248;24-26, 249;3-4, on this job. Pier's legal counsel also conceded the point during the course of the hearing. *See*, Tr., p., 260;16-17. Mr. Burke also conceded that Pier had a duty to exert some authority over the project, by routinely inspecting and being aware of the condition of the premises. *See*, Tr., p., 242;13-16.

Since Pier concedes the application of the multi-employer work place doctrine to this matter, the State is left to show a *prima facie* case that 29 CFR § 1926.501(b)(4)(i) was violated, that the Pier either knew or should have known of the conditions resulting in the incident which precipitated the citation, a violation of 29 CFR § 1926.501(b)(4)(i), and that Pier had the capacity to do something about the prevailing conditions which precipitated the injured worker's fall into a 6 foot 6 inch hole, drilled for footings throughout the construction site.

The facts readily reveal that these criterion were met by the State, supporting the issuance of the citation to Pier, the respondent.

III. STATEMENT OF FACTS

The facts are relatively straight forward. Beginning with the overt incident, Tr., pp., 109;20-22, 110;3-7. Robert Keith Wilson was the injured worker who fell into hole, Tr., pp., 127;21-25, 133;7-9, 144;20-24, that was over six feet six inches deep. Exhibit 1, p. 110 (photo), Tr., p., 40;12-16. He was a Nevada Energy worker, who was the foreman of the Nevada Energy crew that was reporting to work at the site on January 11, 2018. Tr., pp., 138;9-11, 136;6-8.

According to Mr. Wilson, when he and his crew arrived at the jobsite, a lot of debris was evident. Pallets were strewn all around the work site, Tr., p., 132;13-18, with materials stacked upon them. There was no indication these pallets were covering holes. Tr., p., 132;19-21. It appeared to Mr. Wilson, there was a rock quarry adjacent the project with a lot of vehicle traffic like belly dumps and dump trucks going back and forth. Mr. Wilson talked to the superintendent, as it did not appear to Mr. Wilson with all these hazards present, that they were ready for his crew. There was a short briefing. The superintendent gave Mr. Wilson no information about job hazards on the site. Tr., p., 142;11-13. He identified nothing for Mr. Wilson. Tr., p., 142;14-15. He, Mr. Wilson, thought that they should pull out and come back another day. Tr., p., 129;9-18.

Mr. Wilson relented, choosing to stay on the job and stating that if conditions proved to be too unsafe, "we" will pull out of the job. Tr., p., 130;15-17. He then began to discuss how they were going to do the job with his lead lineman, Mr. Demes, and how he, Mr. Wilson, was going to back up the Nevada Energy truck to the box they had to pull into the job. As Mr. Wilson was talking, Tr., pp., 132;24-25, 133;1-4, he was also backing up, when, suddenly, Mr. Wilson vanished as he fell into the hole. Tr., p., 133;3-4.

After the fall, Mr. Wilson could not extricate himself from his predicament. His head linesman, Mr. Demes, had to drop a five/six foot ladder down so that Mr. Wilson could climb out of the hole. Because his shoulder was messed up, he needed Mr. Demes' assistance to pull him completely out of the hole. Tr., p., 133;7-11. Mr. Wilson was quite concerned about the hole caving in on him, Tr., p., 145;4-7, for good reason because when in the hole, rocks and "stuff" were coming down on Mr. Wilson, in his own words. *Ibid.*

Mr. Wilson testified that the hole was uncovered. Tr., p., 133;12. He said, there was a pallet a couple of feet away from the hole. Tr., p., 133;14. The pallet was not marked with the word, hole." Tr., p., 133;18. There was no other warning sign, either. The only time he saw the hole was after he fell into the hole. Tr., p., 133;17-21. There was a backhoe or some other piece of equipment parked within 20 feet of the hole. Tr., p., 138;18-19.

According to Mr. Ramses, he and Mr. Wilson restaged the event after the fall. Mr. Ramses claims that according to Mr. Wilson, the hole was partially covered, not completely uncovered,

contrary to Mr. Wilson's testimony on direct examination. Tr., p., 183;6-13. It is uncontroverted, however, that the hole was unsecured as the hole cover was not lagged down. Tr., pp., 132;21, 133;13, 15, 182;4-7.

The condition of the work site is also directly pertinent. According to the multiple photos contained in the State's exhibit package, *see*, photos, State exhibit 1, pp., 81-169, the description of the work site provided by Mr. Wilson and the witnesses that follow is corroborated. There is no question, the pallets were of various sizes, deteriorating, dilapidated, contained, themselves, holes and broken slats and were situated with garbage and other material heaped on top. It is also true, the pallets were more often than not unmarked. Tr., pp., 39;5-7, 94;3-8. Some pallets were placed upside down on the holes in an unsafe position. Tr., pp., 168, 169. *See,* State exhibit 1, photo at p. 117.

The pallets, in sum, were in a general state of disrepair. There being up to 60 holes drilled and scattered throughout the work site, at the time of the incident, the condition of the pallets were openly and notoriously evident and in plain site to see. One could not mistake the condition of the pallets and their placement throughout the work site. They constituted, concededly, a hazardous working condition. Tr., p., 194;1-6 (Fehner testimony).

In addition, the testimony of the witnesses, below, reinforces the condition of the premises depicted by the photographs. Their testimony reveals that the respondent, Pier, was fully aware of, (a) its status as a controlling employer under the multi-employer work site doctrine, (b) that Pier was fully aware of the conditions in the work site as it pertained to the pallets, and (c) that Pier and its sub-contractors inspected and monitored the work site for pallet conformance, filtered or informed by the erroneous understanding that the function of the pallets was limited to that of warning the employees of the presence of a hole. Viewing the work site through this erroneous filter, Pier and its consorts were not looking for the right attributes of a pallet, when inspecting them for compliance with the pertinent regulations governing the placement of pallets. They were looking for the wrong things, in the right places and, thus, systemically failing to correctly monitor and inspect the pallets.

///

///

This systemic failure to comprehend the role of the pallet on the job is undisputed. The result was an exacerbation of the hazardous condition created by the holes drilled throughout the work place in derogation of Pier's duty to provide a safe and hazard free workplace.

This view originated from the top with Sean Burke, Pier's general superintendent, and emanated from there. In addition to his testimony, already described, Mr. Burke admitted he had seen and was aware of the job hazard analysis (JHA), provided by Steel Partners for the covers on the holes drilled to construct the car ports on the car project. He admitted that the JHA mentioned nothing about lagging the covers over the holes or marking them, either. Tr., p., 245;1-6. *See also,* the JHA, State's exhibit, p. 182. It is quoted in the margin, below.[1] Thus, he was unconcerned about the conditions of the covers and whether they had, themselves, 5 to 7 inch holes or gaps in the covers because they were not "walking surfaces" and did not, in his opinion, have to be constructed strong enough or installed secure enough to prevent someone from landing on the cover, and crashing into the hole. Tr., p., 247;6-11. This, in turn, informed the nature or detail of inspections given the use of covers on the project. Tr., pp., 244;20-25, 243;1. For Mr. Burke, the chief superintendent on the project, the inspection of holes can be done from a distance. He did not feel that there was any need to get on his hands and knees, up close and personal, to see if the hole was covered. Inspection, therefore, to see if cover was bolted or secured over the hole was unnecessary. Tr., p., 247;1-5.

It is also clear that Pier, through its chief superintendent over the job, had knowledge of the JHA provided by Steel Partners for covers, that the JHA did not require lagging of covers, or the marking of covers, that no one would be requiring the covers to be lagged and marked and that, therefore, no one would be checking to see if the covers were lagged or marked because there was nothing in the JHA to require that to be the case. In fact, Mr. Burke conceded the point that holes were not immediately securely covered with a lagged cover after the hole had been drilled. Tr., pp., 243;17-25, 244;1-2.

---

[1] *Hazard Controls:*

...

2. Train workers to be careful of the multiple holes, and that others are very likely to step into the hole.
3. Cover Hole with new 4x4 new Pallet over Hole.

Mr. Burke admitted that the subcontract contained language requiring the subcontractor to post appropriate danger or other warning signs and required the subcontractor to take all necessary precautions for the safety of and shall provide protection to prevent damage, injury or loss to any employer or person on the project's site. Tr., pp. 239;21-25, 240;1-2. He dismissed any application of these provisions to Pier, itself. Mr. Burke erroneously stated that these provisions were intended to transfer responsibility to the subcontractor, telling the subcontractor to pay attention to safety. Tr., pp., 238;25, 239;1, 13-15.

John Fehner was the Pier Construction primary project superintendent. Tr., p., 191;12. He was with Pier for 4 years. Tr., p., 191;14. He claims he was out on the jobsite, 80% of his time. Tr., p., 195;5-8. The size of the project and the number of buildings complicated his ability to inspect and monitor the jobsite. Tr., p., 202;15-20. Mr. Fehner admits that holes can present a hazard on project jobsite. Tr., p., 194;1-3. The presence of holes throughout a jobsite, therefore, requires that protection against falls must be provided. Tr., pp., 194;4-6, 222;17-23.

When asked about hole cover protection, he admitted he had also read the Steel Partners' JHA. Parroting his boss, Sean Burke, he, Mr. Fehner, stated that he did not see in the JHA where it said, pallets were to be secured. He did not, therefore, require it. Tr., p., 223;16-20. He did not ask Steel Partners if they were securing with lag bolts, the covers. *Ibid.* Also, parroting his boss, he did not think it was necessary as the pallets were not walking surfaces. Thus, he was unconcerned about the conditions of the pallets. That is, when walking around inspecting operations, he did not check on the condition of the pallets. Tr., p., 225;9-16. In his view, the function of the pallets was to indicate a potential hazard. Tr., p., 229;7-10.

Mr. Fehner never asked Steel Partners if they were securing the pallets. Tr., p., 222;8-10. Furthermore, he would not have asked about or considered the condition or markings of the pallets prior to the incident of January 11, 2018, because he knew that the Steel Partner's JHA did not say anything about spraying a warning on the hole or caution that a hole is present. When the site was inspected on January 17, 2018, by the OSHA investigator, William Gardner, the OSHA compliance officer, Tr., p., 14;8-14, the pallets ranged in size from 40 inches wide to 48 inches long and 48 inches wide to 48 inches long, and of the 56 pallets over holes, OSHA counted 44 unmarked pallets.

Tr., pp., 73;23-25, 74;1-2, 39;5-7. Similarly, the JHA did not require the pallets to be of uniform size or condition. Tr., p., 221;7-15, 16-18. *See also*, Tr., pp., 73;23-25, 74;1-2.

It is not surprising, therefore, that the photographs admitted into evidence reveal pallets were scattered throughout the site, in various stages of deterioration and differing sizes due to the fact that the JHA did not call out the condition of the pallets, Pier knew the contents of the JHA and Pier followed it without regard for the regulations by which Pier Construction was cited for failing to provide for the safety of workers on the site. *See*, State's photos, Exhibit 1, pp., 106, 123, 138. The upshot, here, is that it really did not make that much difference if Mr. Fehner and Mr. Rangel inspected the work site, daily. Being informed of the use and requirements of covers to the holes by the JHA and by Mr. Burke's and Mr. Fehner's view that the role of the covers was simply to warn, these inspectors were looking for none of the right things in all of the wrong places when inspecting the jobsite.

Worse, Pier proceeded on this basis even though Pier was aware that the work site presented a hazardous condition. Mr. Fehner admits that the number of holes on the project presented a general hazard confronting workers. He testified that if you dig a hole, that is an obvious hazard, and that having holes throughout a work site of a multi-employer work site, a general hazard exists. Tr., p., 222;17-23.

Corroborating the absence of markings and the general disrepair of the pallets prior to the incident, multiple photographs were taken of Mr. Fehner spray painting and marking the pallets on January 17, 2018, at the request of Mr. Gardner, when he came to inspect and investigate the referral after Mr. Wilson fell. *See*, Tr., pp., 35;18-20, 39;12-15, referencing the photograph at 105 of the State's exhibits. *See also,* State's exhibit at 106, Mr. Fehner painting the word "hole" on a pallet. Tr., p.. 39;12-15. *See also,* Tr., p., 46;1-3, wherein Mr. Gardner asked Mr. Fehner to paint the word hole on a pallet, once again. *See*, photo, State's exhibit, p., 133. According to Mr. Gardner, Mr. Fehner went over multiple pallets with spray paint when Mr. Gardner showed up at the work site, post the date of the accident. Tr., p., 35;18-20.

Robert Keane was employed by Steel Partners. He was the coordinator for apartment and car port installation. Tr., p., 148;12-14. As the carport foreman, Tr., p., 24-19, he scheduled the drilling

of the carport holes through REB, Tr., p., 25;4-10. In his opinion, also, the purpose of the hole covers was to provide a warning of the presence of a hole. Tr., pp., 155;25, 156;1. According to Mr. Gardner, Keane told him that he, Mr. Keane, instructed the employees to lag (secure) the covers, after the incident, not before. Tr., p., 87;1-4.

Mr. Keane also described the process for drilling the holes and erecting the supports and foundation for the carports. He said, we, meaning Steel Partners, would provide the cover, which was a pallet. Then, REB would drill the hole, cover it, and as soon as Steel Partners was finished either cleaning or erecting the column, then we'd either secure the pallet or erect the column. Thus, pending the clean up of the area by Steel Partners, and before the foundation was built, the cover would not be secured until Steel Partners returned to the drill site, cleaned the area and then, secured the cover. The process, therefore, itself, did not require the hole to be covered by a secured pallet immediately after the hole was drilled. The process contemplated an unsecured cover for the hole. Tr., pp., 149;13-17, 154;7-13 (we will leave the pallets loose), 154;25, 155;1-2, Tr., p., 32;18.

According to Mr. Keane, also, the pallets were not secured in the area where the incident occurred because Steel Partners were not finished with its work, there. Tr., p., 153;15-25. This stands to reason because, according to Mr. Keane, pallets, when initially placed, were not lagged down by REB after REB drills the holes. Tr., p., 25;13-15. When Mr. Keane was told by phone of the overt incident, on January 11, 2018, he stopped all Steel Partners work and ordered that the holes be made secure. Obviously, holes at the time were, therefore, unsecured. Tr., p., 150;21-24.

Ramses Rangel was the assistant superintendent for Pier. Tr., p., 170;5. Mr. Rangel states he was responsible for supervision of the entirety of the work design for all 24 trades. Tr., p., 180;1-4. Mr. Rangel claimed he inspected the job-site daily. Tr., p., 107;21-23. He testified that he requested a job hazard analysis from Steel Partners. Tr., p., 170;1-2. According to Mr. Rangel, it was standard for the general contractor to have general control over the work site. Tr., p., 190;1-6. He also stated, he had authority at the jobsite to require sub-contractors on site correct issues. Tr., p., 189;25, 190;1-3.

///

///

He described his "inspection" of hole coverings. He explained, monitoring the hole from afar, as long as he could see that the covering encompassed the entire hole, that satisfied his duty of inspection. He did not check for the condition of the pallet, nor did he check to see if the pallet was bolted or lagged to the ground. He was unconcerned about 5 ½ inch to 7 inch holes in the pallets, because "they were not big enough to fall through." Tr., p., 173;21-24. Mere "cover" was enough for him. Tr., p., 173;12-17. This form of inspection or degree of inquiry into the condition of the cover for the 100 holes to be dug throughout the project at depths of 7-8 feet, two feet wide, at least, Tr., p., 20;19-25, was sufficient for the person on behalf of Pier, whose duties included job safety, direction to subs and basically to look over daily activities on the jobsite. Tr., p., 170;17-21.

It took the incident involving Robert Wilson to change the attitude of Pier towards the pallets. Mr. Rangel states that after the incident, we started to look more closely at these holes because the incident was so dramatic. Tr., p., 172;19-21. They were, therefore, a dollar late and a day too short. Before the incident, according to Rangel, the holes were not immediately secured by lagged covers. Tr., p., 19;9-13.

Dwayne Powell was employed by REB. Tr., p., 95;24. He was an operator, foreman on the job. Tr., p., 96;3. Describing the process for hole drilling, REB would set the drill rig on a determined location where they were laid out by Steel Partners. REB would then drill the hole, placing the spoils (tailings from the hole drilling) off to the side, cover the hole and then move on to the next hole to drill. When the drilled hole was covered, the cover was not lagged to the ground and secured. According to Powell, REB was not supposed to secure the pallets.

According to Mr. Powell, also, prior to the incident of January 11, 2018, the pallets placed over the holes were not marked "hole." Marking the pallets placed over the hole with the word "hole" painted on the pallets did not occur until after the January 11, 2018, incident. Before that, no bolts or markings were used on the pallets from January 3, 2018, when the job began, to January 11, 2018, when the incident occurred. Tr., pp., 32;1-8, 9, 6;13-17, 21-25. Powell said that he was on the jobsite on January 11, 2018, and did not see the covers lagged down. Tr., p., 31;8-11.

///

///

From the foregoing, it is uncontroverted that Pier, as the general contractor, knew and acknowledged that it was a controlling employer under the multi-employer work site doctrine. Pier was comfortable with that status, acknowledging that it had a responsibility to make the work site safe for employees. The work site, itself, was, in fact, a multi-employer work site, with at least 24 employers on the job.

There were, at the time of the incident when Mr. Wilson fell into a hole that was deeper than six and a half feet, and two feet wide, similar holes scattered throughout the work site. There were up to 60 such holes already drilled, with 100 such holes in total to be drilled.

Pier was aware of Steel Partner's job hazard analysis (JHA), for the drilled holes and the use of the pallets. Pier followed the JHA. While inspecting the holes on the jobsite, Pier's inspection was informed by the JHA and its erroneous view that the function of the pallets covering the holes was simply to warn. The pallets were not used to protect against a fall into the hole, in the first place by providing a measure of protection, due to the lagging of the cover (pallet) over the hole and by insuring that the pallet was strong enough to prevent weight twice that of a person, from breaking through the cover over the hole. The inspections were, therefore, incomplete. Informed by this erroneous view of the role of the pallets, their inspecting the site were not checking for the right attributes of a pallet, including strength of the cover, and whether it was securely mounted to the ground. This amounted to a systemic failure to comprehend the role of the pallet on the job that is uncontroverted.

The systemic failure, known to Pier, also included the process by which the holes were drilled. It is beyond dispute, after the holes were drilled, the cover for the hole was not secured, prior to the accident, until Steel Partners eventually returned to the drill site, to clean away the tailings from the drilling and then, to secure the cover, pending Steel Partners' return to the site to pour the footings and install the carport structure. Until the incident, the cover existed at the vagaries of the conditions on the ground and could, and frequently would be damaged or moved from the hole. Tr., pp., 96;3-6, 21-25, 151;20-21. Tr., p. 29;3-5, 24-25.

The upshot was an admitted hazardous work site, due to the 60 holes strewn about the work site with covers in various states of disrepair and frequently unsecured over the hole. The upshot,

further, was that this circumstance was the direct and proximate cause of the precipitating incident. Mr. Wilson fell into a hole, that was unsecured by a cover. The cover was not secured because of the view that a cover was there to warn and not provide direct protection from falling in a hole. It was unsecured, also, because the system in place did not require REB, the driller, to secure the hole immediately after drilling. Under the system in place, the cover would not be secured, if at all, until Steel Partners came back to clean up the tailings around the hole.

Given the general dilapidated condition of the covers, even if the hole was covered, there was no attempt to provide a cover that would hold someone twice Mr. Wilson's weight as required by 29 CFR § 1926.502(h)(2)-(4). Since the view of the role of a pallet was that of a warning function, the strength of the cover for the hole was not even given a passing thought. This view of the function of a cover emanated from the top of Pier Construction. Tr., p., 247;6-11, 18-22. No pressure emanating from Pier existed, therefore, to impose upon the work site, the correct use and function of the covers for the 60 odd holes scattered throughout the work site. Had there been, it would not have been for naught. Mr. Rangel testified it was standard for the general contractor to have general control over the work site. Tr., p. 190; 1-6. He also admitted, he had authority at the jobsite to require sub-contractors on site correct issues. Tr., p.189;25, 190;1-3. Pier had general authority over the work site and the capacity to control and remedy the conditions, there.

These are the uncontroverted facts to which the multi-employer work place doctrine and the pertinent regulations for the use of pallets on the jobsite apply. They reveal, the citation issued by the State to Pier should be sustained.

IV. ANALYSIS

Aside from the fact that Pier concedes through its legal counsel and general superintendent, that it was the controlling employer on this multi-employer construction work site, it is patent that the multi-employer work site applies to Pier in this case. The apartment house project involved 24 sub-contractors, Pier was the general contractor, and its general superintendent admitted that it had control of the work site and had a general duty to provide for the health and safety for all the employees on the site. Pier believed it had a duty to exert some authority over the project by routinely inspecting and being aware of the condition of the premises. *See*, Tr., p., 242;13-16.

Equally important, Pier's jobsite superintendent, Mr. Rangel, believed that he had general supervisory authority over the entire work site and could require sub-contractors to take corrective action. Tr., p., 189;25, 190;1-3.

Thus, Pier had the power on this job to control conditions and force corrective action at the work site. Pier also had the opportunity, as both Mr. Rangel and Mr. Fehner, another superintendent, claimed that they were frequently on the work site, inspecting the job, and thus, should have, if not would have, been aware of job conditions. Tr., pp., 194;13-17, 23-25, 195;1-3, 5-8. Further, both claimed, they had weekly sub-contractor meetings at which time problems could be addressed and resolved. Tr., p., 180;12-21.

Without question the multi-employer work site applies to Pier. Thus, Pier could be cited for health and safety violations for the conduct of those not Pier's employees. *See, Universal Constr. Co. v. OSHA, supra* at 728-731. The question, then, for the State is whether the facts of the case establish a *prima facie* case that 29 CFR § 1926.501(b)(4)(i) was violated, that the Pier either knew or should have known of the conditions resulting in the incident which precipitated the citation, a violation of 29 CFR § 1926.501(b)(4)(i), and that Pier had the capacity to do something about the prevailing conditions which precipitated the injured worker's fall into a 6 foot 6 inch hole, drilled for footings throughout the construction site.

Taking these in order, to establish a *prima facie* case, the facts must reveal that "...[(1) 29 CFR § 1926.501(b)(4)(i)] applies; (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. In a word, a *prima facie* case has been made out by the State on the uncontroverted facts before the Board.

Patently, 29 CFR § 1926.501(b)(4)(i) applies. It is quoted, above. The language need not be repeated. Suffice it to state, the regulation is intended to protect each employee on the work site from falling through holes in the working surface of the jobsite. That is precisely what occurred here. The precipitating event occurred when Mr. Wilson fell into a hole more than six feet wide and two feet wide, that was either partially, or entirely uncovered, and where the cover was unlagged. This event describes precisely that which the regulation was intended to prevent from occurring.

The regulation, moreover, was clearly violated. The hole was left exposed, causing Mr. Wilson to fall into this six foot plus hole, with rocks and stuff falling onto him, when he was in the hole. He was injured. He needed help getting out of the hole, due to the injuries suffered as a result of the fall.

There is, however, more. The regulation includes the word "cover" as a means for providing protection from a fall. The term "cover" is defined, as indicated, above. The "cover" is to be lagged to the ground to keep it over the hole. It is also supposed to be of sufficient strength, to hold twice the weight of employees, equipment and materials that might be imposed on the cover. 29 CFR § 1926.502(i)(2) and (3). The evidence is clear, these requirements were never given a passing thought by Pier, REB or Steel Partners. *See*, Rangel testimony, Tr., p., 173;12-17, 21-24. According to Mr. Burke, the Pier general superintendent, the warning function was all that was served by the pallet requirement. He could inspect a pallet from a distance because the condition of the pallet was of no moment. Tr., p., 247;1-11.

The time lag between drilling and securely covering the hole was institutional. Given the warning function, only, of the pallets, it was not a bother to Pier, Steel Partners and REB, that there was a time lag from when the hole was drilled to when, if ever, the cover would be securely placed on the hole and lagged to the ground.

These defalcations directly led to the fall by Mr. Wilson. He encountered the hole, when the cover was not lagged and during the time period in the system for drilling holes that the hole would be left unsecured until Steel Partners came back and removed the tailings from the drilling of the hole. Mr. Wilson was the product of this institutional gap in the covering of the hole.

These facts satisfy the requirements of the second and third element of a *prima facie* case. That leaves the question of knowledge. Clearly, Pier knew what was happening on the jobsite. First, it sanctioned it, leaving the JHA intact, even though Pier knew that it was lacking by failing to address the securing of covers, as well as to address the strength and condition of the cover over the hole. Also, Pier argues it routinely inspected the jobsite. The problem for Pier was the inspection was filtered by the unduly limited view of the function served by the cover, patently disregarding that cover was to protect against a fall into a hole by being strong enough to keep an employee from

crashing into a hole. The supervisors shared the same view about the function of the cover as the general supervisor and vice versa. The photographs in evidence reveal the patent visibility of the holes and their condition. Without a doubt, the knowledge requirement is satisfied. Thus, a *prima facie* case is also established on the uncontroverted facts.

This leaves, then, the question of whether Pier either knew or should have known of the conditions resulting in the incident which precipitated the citation, a violation of 29 CFR § 1926.501(b)(4)(i), and that Pier had the capacity to do something about the prevailing conditions which precipitated the injured worker's fall into a 6 foot 6 inch hole, drilled for footings throughout the construction site. The answer to these last two issues is subsumed in the discussion set out above. The simple fact of the matter is that both the prevailing conditions of the holes scattered throughout the jobsite, and the specific incident involving Mr. Wilson are the direct and proximate result of Pier's narrow view of the cover regulations, in particular, the strength and secure requirements for the pallets required by 29 CFR §§ 1926.502(i)(2) and (3). By focusing on the notice or warning function of the covers, Pier read out of the regulations the requirement that the holes be protected by cover that is secure and strong enough to hold twice the weight of the employee to keep the employee out of the hole in the first place if inadvertently imposed upon the hole.

This myopic view of the regulations allowed for a gap[2] in time between drilling and when the cover was placed securely over the hole. Mr. Wilson was the victim of both defalcations. He fell in the hole during the gap in time between drilling the hole and Steel Partner's return to remove the tailings and to secure the cover. The cover was not secured when Mr. Wilson fell into the hole. Thus, Mr. Wilson was not protected from falling through the hole, as 29 CFR § 1926.501(b)(4)(i) requires. As this situation was endemic throughout the entire jobsite, Pier was guilty again by failing to observe 29 CFR §1926.501(b)(4)(i).

///

---

[2]The gap in time issue is further systemically exacerbated in that according to the subcontract Pier had with Steel Partners, Steel Partners could take up to 8 hours to correct a hazard identified by Pier. A lot of trouble could take place in that number of hours. Tr., p. 248;17-20.

The Board concludes as a matter of fact and law, that the State's citation under 29 CFR § 1926.501(b)(4)(i) has been proven by the State. The citation is sustained.

This leaves, finally, the sanction to be imposed.

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).

Pier Construction amounted no serious challenge to the classification of the offense as "serious." It would be hard pressed to mount such a challenge, given the admission by its key personnel that the presence of drilled holes, at least 60 in number, located throughout the project constituted a hazardous condition, if not monitored correctly. Tr., pp., 194;1-6, 222;17-23. Given the inadequate view of the standard, thoroughly explored, above, for the use of covers to protect employees from falling in these holes around the project, the holes were not being adequately managed and, thus, a hazardous condition existed at the jobsite. 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. LaFronz testified that the violation was labeled serious because of the substantial probability that death or serious physical harm could occur. Tr., p., 109;6-7. Given that Pier tacitly admits that the situation was hazardous, it 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).

///

The State also considered the elements of "gravity," "severity" and "probability." The fine that could have been levied for this service offense was the sum of $6,000. The State reduced it to $2,160. Tr., p., 111;19-25. Pier mounted no challenge to the State's application of these elements for assessing a financial assessment and classification of the offense as serious. Tr., pp., 104;10, 110-112.

V. DECISION OF THE BOARD AND ORDER

Based upon the findings of fact 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 Pier Construction & Development, LLC, violated Nevada Revised Statutes Citation 1, Item 1, 29 CFR § 1926.501(b)(4)(i); 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

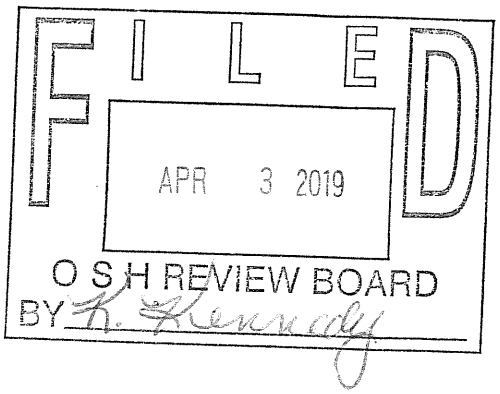
It is also Ordered and Decreed that the proposed penalty in the amount of $2,160 is supported by substantial evidence and constitutes an appropriate level of penalty to be assessed in this case, which the respondent, Pier Construction & Development, LLC, is hereby Ordered to pay forth with; and

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 by the Chairman of the Nevada Occupational Safety and Health Review Board, shall constitute the Final Order of the Board.

DATED this 20th day of February, 2019.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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



NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

* * * * *

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION OF THE DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA,

Complainant,

vs.

PIER CONSTRUCTION & DEVELOPMENT, LLC,

Respondent,

_____/

Docket No. LV 18-1948

AMENDED DECISION OF THE BOARD TO CORRECT CLERICAL ERRORS

This matter came on for hearing before the Nevada Occupational Safety and Health Review Board (OSHA) on October 10, 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 of the Division of Industrial Relations (State). Mr. Eric Zimbelman, Esq., appeared on behalf of the respondent, Pier Construction & Development, LLC, (Pier).

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
29 CFR 1926.501(b)(4)(i): Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail system erected around such holes.

At the Spur Apartment multifamily residential construction jobsite located at 985 Wigwam Pkwy, Henderson, NV 89014, Pier Construction and Development, LLC, the Controlling Employer, did not ensure that employees on a walking/working surface were protected from falling through holes more that 6 feet above lower levels. Employees of subcontractors were drilling holes at depths up to 7 feet with a diameter of 2 feet. The holes were drilled to accommodate concrete footings to act as a structural member for columns that will support covered parking structures.

The subscontractors utilized pallets as their hole covers and the pallets contained numerous gaps that measured between 2 and 6 inches in least dimension. At least 7 employees of various subscontractors were exposed to falls of 6 feet 6 inches to 7 feet in at least 54 instances throughout the jobsite and were exposed to serious physical injuries.

On 1/11/2018, an employee of a subcontractor fell approximately 6 feet 6 inches into a hole and sustained minor injuries. The employee was not protected from falling through a hole as required by standard.

In addition, according to the complaint, the State proposed a fine of $2,160, giving due consideration to the probability, severity and extent of the violation. The employer's history of previous violations, and the employer's size and good faith were also factors. Tr., pp., 104, 109-111.

At the outset of the hearing, the State offered for admission into evidence the State's exhibit 1 packet stamped 1 through 186 pages. The respondent, Pier, through legal counsel offered its packet of exhibits consisting of an exhibit bate stamped PCD 0001 through PCD 0459. The respondent also offered a CD of the area of the work site where the injured worker fell into a hole that was driven for a carport support as part of the apartment house complex. Then, during the course of the hearing, Pier offered a photograph for admission into evidence. Tr., p., 6;3-5. Each of these exhibits were admitted into evidence without objection.

Counsel for both parties waived opening statements. Chairman Ingersoll asked the State to proceed with its case in chief through Ms. Ortiz.

I. Summary of the Case

It is undisputed that this case invokes the multi-employer work site where an employee of an employer other than the general contractor and respondent, Pier Construction & Development, LLC,

fell into a hole drilled by a sub-subcontractor, where the hole was either partially covered or completely uncovered by the pallet that was intended to cover the hole and protect against such incidents. There is no dispute, however, that the pallet was not lagged to the ground, to hold the pallet cover in place over the hole.

The fall, itself, was not the basis for the citation under 29 CFR § 1926.501(b)(4)(1), which provides that, "...each employee on walking/working surfaces shall be protected from falling through holes...more than six feet...above lower levels, by personal fall arrest systems, covers or guardrail systems erected around such holes." Covers were the chosen method of protection. Pallets may constitute a "cover" under the Regulations. The citation was issued because conditions surrounding the fall were symptomatic of conditions of the pallets and the holes that were drilled throughout the work site.

Pier acknowledged that it had a general duty to provide a safe environment at the work site, even for those employees who were employed by others. The problem, however, for Pier when it came to hole protection by cover was that Pier believed the main function of the pallets was simply to provide a warning of the presence of a hole in the ground. Pier claimed it discharged its duty to provide a safe environment by frequent inspections of the work site. Insofar as the inspections of the holes drilled into the ground on the job are concerned, Pier's inspections were misinformed. Believing that the pallets were there only to warn, Pier did not inspect to check to see if the pallets were sturdy enough to prevent an employee from crashing through the pallet into the hole if an employee inadvertently stepped on the pallet. Similarly, Pier did not inspect to see if the pallets were securely lagged over the hole. The pallets were intended, by regulation, to protect against an actual fall, as well as to warn of impending danger.

Because of Pier's misinformed view of the role of the pallets in protecting against a fall, Pier also approved a job hazard analysis for hole protection that did not require pallets to be lagged and did not include any requirement concerning the condition of the pallets, themselves. The result was that photographs revealed a work environment in plain site that was replete with pallets in a deteriorated condition. The citation was, therefore, issued to Pier, under the multi-employer doctrine, which the Board, as elucidated further, below, upholds.

II. GENERAL 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, supra* 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, supra,* at 1307, 29 U.S.C. § 654(a)(2). In this case, the special duty imposed upon Pier is found at 29 CFR § 1926.501(b)(4)(i), quoted above.

As this case involves hole "covers," it necessarily implicates 29 CFR § 1926.502(i)(2) which states: "Covers for holes in floors, roofs, and other walking/working surfaces shall meet the following requirements: ... (2) All other covers shall be capable of supporting, without failure, at least twice the weight of employees, equipment, and materials that may be imposed on the cover at any one time."

Note the use of the word "shall" in the regulation. The terms and conditions are mandatory. The "cover" must be strong enough to prevent a man from crashing through the cover into the hole that it is protecting. Note, also, the use of the term "imposed." It is broad enough to connote protection for an employee who slipped and fell on the pallet, or inadvertently stepped on the pallet. The horizon of the regulation is broader than providing a walking surface or safe road way for employees. Why else, in other words, would there be a strength requirement of twice the weight of a man that happened to come upon the cover over the hole? Similarly, why else would the term "imposed" be used if the regulation was not intended to be broad enough to protect inadvertent encounters with a hole?

29 CFR § 1926.502(i)(3) and (4) are also invoked by the circumstances of this case. They state: "(3) All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees[, and] (4) All covers shall be color coded or they shall be marked with the word 'HOLE' or 'COVER' to provide warning of the hazard." These regulations are mandatory, also, employing the word "shall" as they do. They, therefore, create a sense of permanency to the protection to be provided by the cover. The cover is to be installed to remain in place. The protection is not so illusory or transitory that it can be lost by the whiff of a breeze.

These regulations also prescribe a warning or notice giving function for the "cover." It is not enough that the cover exists. It must also be marked to give warning to the work force to stay away from the hole in the first place and to refrain from removing the cover so that it provides the measure of protection it is intended to supply. There could be no other reading of the meaning of these two regulations.

Then, this case involves a multi-employer work site. Twenty-four subcontractors of various kinds were deployed on this apartment house construction project. *See*, Tr., pp., 179;18-22, 180;1-4. The multi-employer work site doctrine is necessarily invoked.

> OSHA multi-employer citation policy describes four classes of employers that may be cited: exposing, creating, correcting, and controlling. A "controlling" employer is an employer that could reasonably be expected to prevent or detect and abate the violative conditions by reason of its control over the work site 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, including the degree of its supervisory capacity, its constructive or actual knowledge of, or expertise with respect to, the violative condition, the cause of the violation, the visibility of the violation and the length of the time it persisted, and what the controlling employer knows about a subcontractor's safety programs. It does not depend on whether the controlling employer has the manpower or expertise to abate the hazard itself. *IBP, Inc. v. Herman*, 144 F.3d 861 (D.C. Cir. 1998); *Marshall v. Knutson Constr. Co.,* 566 F.2d 596, 6 OSH Cases 1077 (8th Cir. 1977). *See,* e.g., *Summit Contractors, Inc.,* 20 OSH Cases 1118 (Rev. Com'n. J. 2002), *Homes by Bill Simms, Inc.,* 18 OSH Cases 2158 (Rev. Com'n J. 2000). Occupational Safety and Health Law, 3rd Ed., Dale & Schudtz.
>
> In construction industry cases, several courts have, to one degree or another, held that general contractors or certain higher level subcontractors may in some circumstances be cited under Section 5(a)(2) even if the exposed employees are not theirs. *Secretary of Labor v. Trinity Indus.*, 504 F.3d 297 (3d Cir., 2007); *Universal Constr. Co. v. OSHRC,* 182 F.3d 726, 728-31, 18 OSH Cases 1769 (10th Cir. 1999) ....

Occupational Safety and Health Law has long recognized the inability of an employer to avoid employee OSHA safety protections by contract or agreement. *Frohlick Crane Services, Inc. v. Occupational Safety and Health Review Commission,* 521 F.2d 628 (1975). The U.S. Department of Labor Instruction under the Occupational Safety and Health Administration has issued guidance on the multi-employer citation policy. In addition to the case law and treatise commentary above referenced, the guidance on determination of a controlling employer recognizes the realistic principles often practiced by the construction industry. The OSHA enforcement guidance provides:

> ... Control can be established by contract or in the absence of explicit contractual provisions, by the exercise of control and practice....
>
> Control Established By Contract. To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers. U.S. Dep't. of Labor, Multi-employer Citation Policy.

To prevail, the State has the initial burden of proving by a *prima facie* case that a standard has been transgressed. A *prima facie* case is shown under OSHA by proof, "(1) that the regulation applies; (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." *ConTram, 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. *ConTram, supra* at 1307, 1308. "Constructive knowledge is established by proof that the employer failed to implement an adequate safety program, 'with a rational being that - in absence of such programs - the misconduct was reasonably foreseeable." *ConTram, supra* at 1308.

As for the knowledge requirement, itself, which, it must be shown, the responding employer acquired or possessed, the State need not show that the employer, respondent, knew or understood that the conditions themselves were hazardous or violative of a statute, rule or regulation. The knowledge that must be shown is that of the hazardous condition or, in other words, the facts on the ground, not that the condition violates OSHA. *See, Brennan v. OSHRC*, 511 F.2d 1139, 1143 (9th Cir., 1975)(the Secretary need only show that the "...employer had knowledge of the condition alleged to be a violation."). *See also, Shaw Constr., Inc.* (OSHR C Docket No. 3324D, 1978 CCH OSHP 22524 6 BNA OSHC 1341 ("The 'knowledge' of which 29 U.S.C. § 666(j) speaks is knowledge of the condition constituting the violation.").

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 amount no defense and may remain silent during the course of the proceedings.

Here, Pier Construction & Development, LLC, was the general contractor on this multi-residential apartment house project. Tr., pp., 15;21-25, 23;6-8, 23-25, 94;13-20. There were around 24 sub-contractors working at various times on the job-site. Tr., pp., 179;18-22, 180;1-4.

REB Construction Company, Inc., and Steel Partners, LLC, Exhibit 1, p. 11, were the pertinent sub-contractors to the alleged violation. Steel Partners was under sub-contract to Pier to construct the carports to the apartment houses. Tr., pp., 23;6-8, 94;13-20. REB was under sub-contract to Steel Partners to drill the holes, Tr., p., 96;10-11, in excess of six feet into the ground and at least two feet wide, Tr., pp., 20;19-25, 27;18-25, 28;1-3, for the footings to hold the structural support for the covered carport parking. Tr., pp., 23;23-25. Pending the placement of the structural

support for the covered carports, wooden pallets were used to cover the holes. The project called for approximately 100 holes to be drilled to support the carports. Tr., p., 24;1-12. At the time of the incident that precipitated the violation and charging complaint, at least 60 holes had been drilled around the job-site. *Ibid.* At the time of the incident on January 11, 2018 which precipitated the complaint, Tr., pp., 16;2-3, 12-16, 57;16-20, REB was drilling at the rate of 13 holes a day. Tr., p., 28;8-9. The project itself was spread over 13 acres and included at least 20 buildings under various stages of construction. Tr., p., 202;15-20.

These facts necessarily invoked application of the multi-employer work-site doctrine. Confronted by the obvious, Pier conceded the point. Sean Burke, the respondent's general superintendent, oversaw all of Pier's projects in the field. Tr., p., 235;19-21. He testified that Pier was the controlling employer, *see*, Tr., pp., 248;24-26, 249;3-4, on this job. Pier's legal counsel also conceded the point during the course of the hearing. *See*, Tr., p., 260;16-17. Mr. Burke also conceded that Pier had a duty to exert some authority over the project, by routinely inspecting and being aware of the condition of the premises. *See*, Tr., p., 242;13-16.

Since Pier concedes the application of the multi-employer work place doctrine to this matter, the State is left to show a *prima facie* case that 29 CFR § 1926.501(b)(4)(i) was violated, that the Pier either knew or should have known of the conditions resulting in the incident which precipitated the citation, a violation of 29 CFR § 1926.501(b)(4)(i), and that Pier had the capacity to do something about the prevailing conditions which precipitated the injured worker's fall into a 6 foot 6 inch hole, drilled for footings throughout the construction site.

The facts readily reveal that these criterion were met by the State, supporting the issuance of the citation to Pier, the respondent.

III. STATEMENT OF FACTS

The facts are relatively straight forward. Beginning with the overt incident, Tr., pp., 109;20-22, 110;3-7. Robert Keith Wilson was the injured worker who fell into hole, Tr., pp., 127;21-25, 133;7-9, 144;20-24, that was over six feet six inches deep. Exhibit 1, p. 110 (photo), Tr., p., 40;12-16. He was a Nevada Energy worker, who was the foreman of the Nevada Energy crew that was reporting to work at the site on January 11, 2018. Tr., pp., 138;9-11, 136;6-8.

According to Mr. Wilson, when he and his crew arrived at the jobsite, a lot of debris was evident. Pallets were strewn all around the work site, Tr., p., 132;13-18, with materials stacked upon them. There was no indication these pallets were covering holes. Tr., p., 132;19-21. It appeared to Mr. Wilson, there was a rock quarry adjacent the project with a lot of vehicle traffic like belly dumps and dump trucks going back and forth. Mr. Wilson talked to the superintendent, as it did not appear to Mr. Wilson with all these hazards present, that they were ready for his crew. There was a short briefing. The superintendent gave Mr. Wilson no information about job hazards on the site. Tr., p., 142;11-13. He identified nothing for Mr. Wilson. Tr., p., 142;14-15. He, Mr. Wilson, thought that they should pull out and come back another day. Tr., p., 129;9-18.

Mr. Wilson relented, choosing to stay on the job and stating that if conditions proved to be too unsafe, "we" will pull out of the job. Tr., p., 130;15-17. He then began to discuss how they were going to do the job with his lead lineman, Mr. Demes, and how he, Mr. Wilson, was going to back up the Nevada Energy truck to the box they had to pull into the job. As Mr. Wilson was talking, Tr., pp., 132;24-25, 133;1-4, he was also backing up, when, suddenly, Mr. Wilson vanished as he fell into the hole. Tr., p., 133;3-4.

After the fall, Mr. Wilson could not extricate himself from his predicament. His head linesman, Mr. Demes, had to drop a five/six foot ladder down so that Mr. Wilson could climb out of the hole. Because his shoulder was messed up, he needed Mr. Demes' assistance to pull him completely out of the hole. Tr., p., 133;7-11. Mr. Wilson was quite concerned about the hole caving in on him, Tr., p., 145;4-7, for good reason because when in the hole, rocks and "stuff" were coming down on Mr. Wilson, in his own words. *Ibid.*

Mr. Wilson testified that the hole was uncovered. Tr., p., 133;12. He said, there was a pallet a couple of feet away from the hole. Tr., p., 133;14. The pallet was not marked with the word, hole." Tr., p., 133;18. There was no other warning sign, either. The only time he saw the hole was after he fell into the hole. Tr., p., 133;17-21. There was a backhoe or some other piece of equipment parked within 20 feet of the hole. Tr., p., 138;18-19.

According to Mr. Ramses, he and Mr. Wilson restaged the event after the fall. Mr. Ramses claims that according to Mr. Wilson, the hole was partially covered, not completely uncovered,

contrary to Mr. Wilson's testimony on direct examination. Tr., p., 183;6-13. It is uncontroverted, however, that the hole was unsecured as the hole cover was not lagged down. Tr., pp., 132;21, 133;13, 15, 182;4-7.

The condition of the work site is also directly pertinent. According to the multiple photos contained in the State's exhibit package, *see*, photos, State exhibit 1, pp., 81-169, the description of the work site provided by Mr. Wilson and the witnesses that follow is corroborated. There is no question, the pallets were of various sizes, deteriorating, dilapidated, contained, themselves, holes and broken slats and were situated with garbage and other material heaped on top. It is also true, the pallets were more often than not unmarked. Tr., pp., 39;5-7, 94;3-8. Some pallets were placed upside down on the holes in an unsafe position. Tr., pp., 168, 169. *See,* State exhibit 1, photo at p. 117.

The pallets, in sum, were in a general state of disrepair. There being up to 60 holes drilled and scattered throughout the work site, at the time of the incident, the condition of the pallets were openly and notoriously evident and in plain site to see. One could not mistake the condition of the pallets and their placement throughout the work site. They constituted, concededly, a hazardous working condition. Tr., p., 194;1-6 (Fehner testimony).

In addition, the testimony of the witnesses, below, reinforces the condition of the premises depicted by the photographs. Their testimony reveals that the respondent, Pier, was fully aware of, (a) its status as a controlling employer under the multi-employer work site doctrine, (b) that Pier was fully aware of the conditions in the work site as it pertained to the pallets, and (c) that Pier and its sub-contractors inspected and monitored the work site for pallet conformance, filtered or informed by the erroneous understanding that the function of the pallets was limited to that of warning the employees of the presence of a hole. Viewing the work site through this erroneous filter, Pier and its consorts were not looking for the right attributes of a pallet, when inspecting them for compliance with the pertinent regulations governing the placement of pallets. They were looking for the wrong things, in the right places and, thus, systemically failing to correctly monitor and inspect the pallets.

///

///

This systemic failure to comprehend the role of the pallet on the job is undisputed. The result was an exacerbation of the hazardous condition created by the holes drilled throughout the work place in derogation of Pier's duty to provide a safe and hazard free workplace.

This view originated from the top with Sean Burke, Pier's general superintendent, and emanated from there. In addition to his testimony, already described, Mr. Burke admitted he had seen and was aware of the job hazard analysis (JHA), provided by Steel Partners for the covers on the holes drilled to construct the car ports on the car project. He admitted that the JHA mentioned nothing about lagging the covers over the holes or marking them, either. Tr., p., 245;1-6. *See also,* the JHA, State's exhibit, p. 182. It is quoted in the margin, below.[1] Thus, he was unconcerned about the conditions of the covers and whether they had, themselves, 5 to 7 inch holes or gaps in the covers because they were not "walking surfaces" and did not, in his opinion, have to be constructed strong enough or installed secure enough to prevent someone from landing on the cover, and crashing into the hole. Tr., p., 247;6-11. This, in turn, informed the nature or detail of inspections given the use of covers on the project. Tr., pp., 244;20-25, 243;1. For Mr. Burke, the chief superintendent on the project, the inspection of holes can be done from a distance. He did not feel that there was any need to get on his hands and knees, up close and personal, to see if the hole was covered. Inspection, therefore, to see if cover was bolted or secured over the hole was unnecessary. Tr., p., 247;1-5.

It is also clear that Pier, through its chief superintendent over the job, had knowledge of the JHA provided by Steel Partners for covers, that the JHA did not require lagging of covers, or the marking of covers, that no one would be requiring the covers to be lagged and marked and that, therefore, no one would be checking to see if the covers were lagged or marked because there was nothing in the JHA to require that to be the case. In fact, Mr. Burke conceded the point that holes were not immediately securely covered with a lagged cover after the hole had been drilled. Tr., pp., 243;17-25, 244;1-2.

---

[1] *Hazard Controls:*

...

2. Train workers to be careful of the multiple holes, and that others are very likely to step into the hole.
3. Cover Hole with new 4x4 new Pallet over Hole.

Mr. Burke admitted that the subcontract contained language requiring the subcontractor to post appropriate danger or other warning signs and required the subcontractor to take all necessary precautions for the safety of and shall provide protection to prevent damage, injury or loss to any employer or person on the project's site. Tr., pp. 239;21-25, 240;1-2. He dismissed any application of these provisions to Pier, itself. Mr. Burke erroneously stated that these provisions were intended to transfer responsibility to the subcontractor, telling the subcontractor to pay attention to safety. Tr., pp., 238;25, 239;1, 13-15.

John Fehner was the Pier Construction primary project superintendent. Tr., p., 191;12. He was with Pier for 4 years. Tr., p., 191;14. He claims he was out on the jobsite, 80% of his time. Tr., p., 195;5-8. The size of the project and the number of buildings complicated his ability to inspect and monitor the jobsite. Tr., p., 202;15-20. Mr. Fehner admits that holes can present a hazard on project jobsite. Tr., p., 194;1-3. The presence of holes throughout a jobsite, therefore, requires that protection against falls must be provided. Tr., pp., 194;4-6, 222;17-23.

When asked about hole cover protection, he admitted he had also read the Steel Partners' JHA. Parroting his boss, Sean Burke, he, Mr. Fehner, stated that he did not see in the JHA where it said, pallets were to be secured. He did not, therefore, require it. Tr., p., 223;16-20. He did not ask Steel Partners if they were securing with lag bolts, the covers. *Ibid.* Also, parroting his boss, he did not think it was necessary as the pallets were not walking surfaces. Thus, he was unconcerned about the conditions of the pallets. That is, when walking around inspecting operations, he did not check on the condition of the pallets. Tr., p., 225;9-16. In his view, the function of the pallets was to indicate a potential hazard. Tr., p., 229;7-10.

Mr. Fehner never asked Steel Partners if they were securing the pallets. Tr., p., 222;8-10. Furthermore, he would not have asked about or considered the condition or markings of the pallets prior to the incident of January 11, 2018, because he knew that the Steel Partner's JHA did not say anything about spraying a warning on the hole or caution that a hole is present. When the site was inspected on January 17, 2018, by the OSHA investigator, William Gardner, the OSHA compliance officer, Tr., p., 14;8-14, the pallets ranged in size from 40 inches wide to 48 inches long and 48 inches wide to 48 inches long, and of the 56 pallets over holes, OSHA counted 44 unmarked pallets.

Tr., pp., 73;23-25, 74;1-2, 39;5-7. Similarly, the JHA did not require the pallets to be of uniform size or condition. Tr., p., 221;7-15, 16-18. *See also*, Tr., pp., 73;23-25, 74;1-2.

It is not surprising, therefore, that the photographs admitted into evidence reveal pallets were scattered throughout the site, in various stages of deterioration and differing sizes due to the fact that the JHA did not call out the condition of the pallets, Pier knew the contents of the JHA and Pier followed it without regard for the regulations by which Pier Construction was cited for failing to provide for the safety of workers on the site. *See*, State's photos, Exhibit 1, pp., 106, 123, 138. The upshot, here, is that it really did not make that much difference if Mr. Fehner and Mr. Rangel inspected the work site, daily. Being informed of the use and requirements of covers to the holes by the JHA and by Mr. Burke's and Mr. Fehner's view that the role of the covers was simply to warn, these inspectors were looking for none of the right things in all of the wrong places when inspecting the jobsite.

Worse, Pier proceeded on this basis even though Pier was aware that the work site presented a hazardous condition. Mr. Fehner admits that the number of holes on the project presented a general hazard confronting workers. He testified that if you dig a hole, that is an obvious hazard, and that having holes throughout a work site of a multi-employer work site, a general hazard exists. Tr., p., 222;17-23.

Corroborating the absence of markings and the general disrepair of the pallets prior to the incident, multiple photographs were taken of Mr. Fehner spray painting and marking the pallets on January 17, 2018, at the request of Mr. Gardner, when he came to inspect and investigate the referral after Mr. Wilson fell. *See*, Tr., pp., 35;18-20, 39;12-15, referencing the photograph at 105 of the State's exhibits. *See also,* State's exhibit at 106, Mr. Fehner painting the word "hole" on a pallet. Tr., p.. 39;12-15. *See also,* Tr., p., 46;1-3, wherein Mr. Gardner asked Mr. Fehner to paint the word hole on a pallet, once again. *See*, photo, State's exhibit, p., 133. According to Mr. Gardner, Mr. Fehner went over multiple pallets with spray paint when Mr. Gardner showed up at the work site, post the date of the accident. Tr., p., 35;18-20.

Robert Keane was employed by Steel Partners. He was the coordinator for apartment and car port installation. Tr., p., 148;12-14. As the carport foreman, Tr., p., 24-19, he scheduled the drilling

of the carport holes through REB, Tr., p., 25;4-10. In his opinion, also, the purpose of the hole covers was to provide a warning of the presence of a hole. Tr., pp., 155;25, 156;1. According to Mr. Gardner, Keane told him that he, Mr. Keane, instructed the employees to lag (secure) the covers, after the incident, not before. Tr., p., 87;1-4.

Mr. Keane also described the process for drilling the holes and erecting the supports and foundation for the carports. He said, we, meaning Steel Partners, would provide the cover, which was a pallet. Then, REB would drill the hole, cover it, and as soon as Steel Partners was finished either cleaning or erecting the column, then we'd either secure the pallet or erect the column. Thus, pending the clean up of the area by Steel Partners, and before the foundation was built, the cover would not be secured until Steel Partners returned to the drill site, cleaned the area and then, secured the cover. The process, therefore, itself, did not require the hole to be covered by a secured pallet immediately after the hole was drilled. The process contemplated an unsecured cover for the hole. Tr., pp., 149;13-17, 154;7-13 (we will leave the pallets loose), 154;25, 155;1-2, Tr., p., 32;18.

According to Mr. Keane, also, the pallets were not secured in the area where the incident occurred because Steel Partners were not finished with its work, there. Tr., p., 153;15-25. This stands to reason because, according to Mr. Keane, pallets, when initially placed, were not lagged down by REB after REB drills the holes. Tr., p., 25;13-15. When Mr. Keane was told by phone of the overt incident, on January 11, 2018, he stopped all Steel Partners work and ordered that the holes be made secure. Obviously, holes at the time were, therefore, unsecured. Tr., p., 150;21-24.

Ramses Rangel was the assistant superintendent for Pier. Tr., p., 170;5. Mr. Rangel states he was responsible for supervision of the entirety of the work design for all 24 trades. Tr., p., 180;1-4. Mr. Rangel claimed he inspected the job-site daily. Tr., p., 107;21-23. He testified that he requested a job hazard analysis from Steel Partners. Tr., p., 170;1-2. According to Mr. Rangel, it was standard for the general contractor to have general control over the work site. Tr., p., 190;1-6. He also stated, he had authority at the jobsite to require sub-contractors on site correct issues. Tr., p., 189;25, 190;1-3.

///

///

He described his "inspection" of hole coverings. He explained, monitoring the hole from afar, as long as he could see that the covering encompassed the entire hole, that satisfied his duty of inspection. He did not check for the condition of the pallet, nor did he check to see if the pallet was bolted or lagged to the ground. He was unconcerned about 5 ½ inch to 7 inch holes in the pallets, because "they were not big enough to fall through." Tr., p., 173;21-24. Mere "cover" was enough for him. Tr., p., 173;12-17. This form of inspection or degree of inquiry into the condition of the cover for the 100 holes to be dug throughout the project at depths of 7-8 feet, two feet wide, at least, Tr., p., 20;19-25, was sufficient for the person on behalf of Pier, whose duties included job safety, direction to subs and basically to look over daily activities on the jobsite. Tr., p., 170;17-21.

It took the incident involving Robert Wilson to change the attitude of Pier towards the pallets. Mr. Rangel states that after the incident, we started to look more closely at these holes because the incident was so dramatic. Tr., p., 172;19-21. They were, therefore, a dollar late and a day too short. Before the incident, according to Rangel, the holes were not immediately secured by lagged covers. Tr., p., 19;9-13.

Dwayne Powell was employed by REB. Tr., p., 95;24. He was an operator, foreman on the job. Tr., p., 96;3. Describing the process for hole drilling, REB would set the drill rig on a determined location where they were laid out by Steel Partners. REB would then drill the hole, placing the spoils (tailings from the hole drilling) off to the side, cover the hole and then move on to the next hole to drill. When the drilled hole was covered, the cover was not lagged to the ground and secured. According to Powell, REB was not supposed to secure the pallets.

According to Mr. Powell, also, prior to the incident of January 11, 2018, the pallets placed over the holes were not marked "hole." Marking the pallets placed over the hole with the word "hole" painted on the pallets did not occur until after the January 11, 2018, incident. Before that, no bolts or markings were used on the pallets from January 3, 2018, when the job began, to January 11, 2018, when the incident occurred. Tr., pp., 32;1-8, 9, 6;13-17, 21-25. Powell said that he was on the jobsite on January 11, 2018, and did not see the covers lagged down. Tr., p., 31;8-11.

///

///

From the foregoing, it is uncontroverted that Pier, as the general contractor, knew and acknowledged that it was a controlling employer under the multi-employer work site doctrine. Pier was comfortable with that status, acknowledging that it had a responsibility to make the work site safe for employees. The work site, itself, was, in fact, a multi-employer work site, with at least 24 employers on the job.

There were, at the time of the incident when Mr. Wilson fell into a hole that was deeper than six and a half feet, and two feet wide, similar holes scattered throughout the work site. There were up to 60 such holes already drilled, with 100 such holes in total to be drilled.

Pier was aware of Steel Partner's job hazard analysis (JHA), for the drilled holes and the use of the pallets. Pier followed the JHA. While inspecting the holes on the jobsite, Pier's inspection was informed by the JHA and its erroneous view that the function of the pallets covering the holes was simply to warn. The pallets were not used to protect against a fall into the hole, in the first place by providing a measure of protection, due to the lagging of the cover (pallet) over the hole and by insuring that the pallet was strong enough to prevent weight twice that of a person, from breaking through the cover over the hole. The inspections were, therefore, incomplete. Informed by this erroneous view of the role of the pallets, their inspecting the site were not checking for the right attributes of a pallet, including strength of the cover, and whether it was securely mounted to the ground. This amounted to a systemic failure to comprehend the role of the pallet on the job that is uncontroverted.

The systemic failure, known to Pier, also included the process by which the holes were drilled. It is beyond dispute, after the holes were drilled, the cover for the hole was not secured, prior to the accident, until Steel Partners eventually returned to the drill site, to clean away the tailings from the drilling and then, to secure the cover, pending Steel Partners' return to the site to pour the footings and install the carport structure. Until the incident, the cover existed at the vagaries of the conditions on the ground and could, and frequently would be damaged or moved from the hole. Tr., pp., 96;3-6, 21-25, 151;20-21. Tr., p. 29;3-5, 24-25.

The upshot was an admitted hazardous work site, due to the 60 holes strewn about the work site with covers in various states of disrepair and frequently unsecured over the hole. The upshot,

further, was that this circumstance was the direct and proximate cause of the precipitating incident. Mr. Wilson fell into a hole, that was unsecured by a cover. The cover was not secured because of the view that a cover was there to warn and not provide direct protection from falling in a hole. It was unsecured, also, because the system in place did not require REB, the driller, to secure the hole immediately after drilling. Under the system in place, the cover would not be secured, if at all, until Steel Partners came back to clean up the tailings around the hole.

Given the general dilapidated condition of the covers, even if the hole was covered, there was no attempt to provide a cover that would hold someone twice Mr. Wilson's weight as required by 29 CFR § 1926.502(i)(2)-(4). Since the view of the role of a pallet was that of a warning function, the strength of the cover for the hole was not even given a passing thought. This view of the function of a cover emanated from the top of Pier Construction. Tr., p., 247;6-11, 18-22. No pressure emanating from Pier existed, therefore, to impose upon the work site, the correct use and function of the covers for the 60 odd holes scattered throughout the work site. Had there been, it would not have been for naught. Mr. Rangel testified it was standard for the general contractor to have general control over the work site. Tr., p. 190; 1-6. He also admitted, he had authority at the jobsite to require sub-contractors on site correct issues. Tr., p.189;25, 190;1-3. Pier had general authority over the work site and the capacity to control and remedy the conditions, there.

These are the uncontroverted facts to which the multi-employer work place doctrine and the pertinent regulations for the use of pallets on the jobsite apply. They reveal, the citation issued by the State to Pier should be sustained.

IV. ANALYSIS

Aside from the fact that Pier concedes through its legal counsel and general superintendent, that it was the controlling employer on this multi-employer construction work site, it is patent that the multi-employer work site applies to Pier in this case. The apartment house project involved 24 sub-contractors, Pier was the general contractor, and its general superintendent admitted that it had control of the work site and had a general duty to provide for the health and safety for all the employees on the site. Pier believed it had a duty to exert some authority over the project by routinely inspecting and being aware of the condition of the premises. *See*, Tr., p., 242;13-16.

Equally important, Pier's jobsite superintendent, Mr. Rangel, believed that he had general supervisory authority over the entire work site and could require sub-contractors to take corrective action. Tr., p., 189;25, 190;1-3.

Thus, Pier had the power on this job to control conditions and force corrective action at the work site. Pier also had the opportunity, as both Mr. Rangel and Mr. Fehner, another superintendent, claimed that they were frequently on the work site, inspecting the job, and thus, should have, if not would have, been aware of job conditions. Tr., pp., 194;13-17, 23-25, 195;1-3, 5-8. Further, both claimed, they had weekly sub-contractor meetings at which time problems could be addressed and resolved. Tr., p., 180;12-21.

Without question the multi-employer work site applies to Pier. Thus, Pier could be cited for health and safety violations for the conduct of those not Pier's employees. *See*, *Universal Constr. Co. v. OSHA, supra* at 728-731. The question, then, for the State is whether the facts of the case establish a *prima facie* case that 29 CFR § 1926.501(b)(4)(i) was violated, that the Pier either knew or should have known of the conditions resulting in the incident which precipitated the citation, a violation of 29 CFR § 1926.501(b)(4)(i), and that Pier had the capacity to do something about the prevailing conditions which precipitated the injured worker's fall into a 6 foot 6 inch hole, drilled for footings throughout the construction site.

Taking these in order, to establish a *prima facie* case, the facts must reveal that "...[(1) 29 CFR § 1926.501(b)(4)(i)] applies; (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. In a word, a *prima facie* case has been made out by the State on the uncontroverted facts before the Board.

Patently, 29 CFR § 1926.501(b)(4)(i) applies. It is quoted, above. The language need not be repeated. Suffice it to state, the regulation is intended to protect each employee on the work site from falling through holes in the working surface of the jobsite. That is precisely what occurred here. The precipitating event occurred when Mr. Wilson fell into a hole more than six feet wide and two feet wide, that was either partially, or entirely uncovered, and where the cover was unlagged. This event describes precisely that which the regulation was intended to prevent from occurring.

The regulation, moreover, was clearly violated. The hole was left exposed, causing Mr. Wilson to fall into this six foot plus hole, with rocks and stuff falling onto him, when he was in the hole. He was injured. He needed help getting out of the hole, due to the injuries suffered as a result of the fall.

There is, however, more. The regulation includes the word "cover" as a means for providing protection from a fall. The term "cover" is defined, as indicated, above. The "cover" is to be lagged to the ground to keep it over the hole. It is also supposed to be of sufficient strength, to hold twice the weight of employees, equipment and materials that might be imposed on the cover. 29 CFR § 1926.502(i)(2) and (3). The evidence is clear, these requirements were never given a passing thought by Pier, REB or Steel Partners. *See*, Rangel testimony, Tr., p., 173;12-17, 21-24. According to Mr. Burke, the Pier general superintendent, the warning function was all that was served by the pallet requirement. He could inspect a pallet from a distance because the condition of the pallet was of no moment. Tr., p., 247;1-11.

The time lag between drilling and securely covering the hole was institutional. Given the warning function, only, of the pallets, it was not a bother to Pier, Steel Partners and REB, that there was a time lag from when the hole was drilled to when, if ever, the cover would be securely placed on the hole and lagged to the ground.

These defalcations directly led to the fall by Mr. Wilson. He encountered the hole, when the cover was not lagged and during the time period in the system for drilling holes that the hole would be left unsecured until Steel Partners came back and removed the tailings from the drilling of the hole. Mr. Wilson was the product of this institutional gap in the covering of the hole.

These facts satisfy the requirements of the second and third element of a *prima facie* case. That leaves the question of knowledge. Clearly, Pier knew what was happening on the jobsite. First, it sanctioned it, leaving the JHA intact, even though Pier knew that it was lacking by failing to address the securing of covers, as well as to address the strength and condition of the cover over the hole. Also, Pier argues it routinely inspected the jobsite. The problem for Pier was the inspection was filtered by the unduly limited view of the function served by the cover, patently disregarding that cover was to protect against a fall into a hole by being strong enough to keep an employee from

crashing into a hole. The supervisors shared the same view about the function of the cover as the general supervisor and vice versa. The photographs in evidence reveal the patent visibility of the holes and their condition. Without a doubt, the knowledge requirement is satisfied. Thus, a *prima facie* case is also established on the uncontroverted facts.

This leaves, then, the question of whether Pier either knew or should have known of the conditions resulting in the incident which precipitated the citation, a violation of 29 CFR § 1926.501(b)(4)(i), and that Pier had the capacity to do something about the prevailing conditions which precipitated the injured worker's fall into a 6 foot 6 inch hole, drilled for footings throughout the construction site. The answer to these last two issues is subsumed in the discussion set out above. The simple fact of the matter is that both the prevailing conditions of the holes scattered throughout the jobsite, and the specific incident involving Mr. Wilson are the direct and proximate result of Pier's narrow view of the cover regulations, in particular, the strength and secure requirements for the pallets required by 29 CFR §§ 1926.502(i)(2) and (3). By focusing on the notice or warning function of the covers, Pier read out of the regulations the requirement that the holes be protected by cover that is secure and strong enough to hold twice the weight of the employee to keep the employee out of the hole in the first place if inadvertently imposed upon the hole.

This myopic view of the regulations allowed for a gap[2] in time between drilling and when the cover was placed securely over the hole. Mr. Wilson was the victim of both defalcations. He fell in the hole during the gap in time between drilling the hole and Steel Partner's return to remove the tailings and to secure the cover. The cover was not secured when Mr. Wilson fell into the hole. Thus, Mr. Wilson was not protected from falling through the hole, as 29 CFR § 1926.501(b)(4)(i) requires. As this situation was endemic throughout the entire jobsite, Pier was guilty again by failing to observe 29 CFR §1926.501(b)(4)(i).

///

---

[2]The gap in time issue is further systemically exacerbated in that according to the subcontract Pier had with Steel Partners, Steel Partners could take up to 8 hours to correct a hazard identified by Pier. A lot of trouble could take place in that number of hours. Tr., p. 248;17-20.

The Board concludes as a matter of fact and law, that the State's citation under 29 CFR § 1926.501(b)(4)(i) has been proven by the State. The citation is sustained.

This leaves, finally, the sanction to be imposed.

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).

Pier Construction amounted no serious challenge to the classification of the offense as "serious." It would be hard pressed to mount such a challenge, given the admission by its key personnel that the presence of drilled holes, at least 60 in number, located throughout the project constituted a hazardous condition, if not monitored correctly. Tr., pp., 194;1-6, 222;17-23. Given the inadequate view of the standard, thoroughly explored, above, for the use of covers to protect employees from falling in these holes around the project, the holes were not being adequately managed and, thus, a hazardous condition existed at the jobsite. 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. LaFronz testified that the violation was labeled serious because of the substantial probability that death or serious physical harm could occur. Tr., p., 109;6-7. Given that Pier tacitly admits that the situation was hazardous, it 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).

///

The State also considered the elements of "gravity," "severity" and "probability." The fine that could have been levied for this service offense was the sum of $6,000. The State reduced it to $2,160. Tr., p., 111;19-25. Pier mounted no challenge to the State's application of these elements for assessing a financial assessment and classification of the offense as serious. Tr., pp., 104;10, 110-112.

V. DECISION OF THE BOARD AND ORDER

Based upon the findings of fact 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 Pier Construction & Development, LLC, violated Nevada Revised Statutes Citation 1, Item 1, 29 CFR § 1926.501(b)(4)(i); 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 $2,160 is supported by substantial evidence and constitutes an appropriate level of penalty to be assessed in this case, which the respondent, Pier Construction & Development, LLC, is hereby Ordered to pay forth with; 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 by the Chairman of the Nevada Occupational Safety and Health Review Board, shall constitute the Final Order of the Board.

DATED this 1st day of April, 2019. NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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