NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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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.** **BRADY LINEN SERVICES, LLC,** **Respondent.**	**Docket No. LV 18-1943** **Inspection No. 1265852 (Safety)**

DECISION AND ORDER OF THE BOARD
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER

This case arose out of an injury to the right hand of a Brady Linen truck driver which occurred while he was attempting to operate a hydraulic, gravity functioning truck lift gate. The matter came on for hearing before the Nevada Occupational Safety and Health Review Board (the Board) on Tuesday, March 10, 2020, at 9:00 a.m., and continued to its conclusion on March 11, 2020. The hearing was conducted in furtherance of a Notice duly provided according to law.

The Board members in attendance to hear the matter were Chairman Steve Ingersoll, Secretary Rodd Weber, and members James Halsey and Frank Milligan. The same Board members were present and heard the case during its continuation on March 11, 2020. Member James Halsey, however, had to excuse himself toward the end of the hearing on March 10, 2020, and, therefore, did not participate in the decision as he only participated in a portion of the evidentiary hearing.

Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry (the State), appeared on behalf of the Complainant (the State). Whitney J. Selert, Esq., at that time a member of Bradley, Lewin, Garg and Golden, appeared on behalf of the Respondent, Brady Linen Services, LLC.

Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised Statutes, NRS 618.315. As there were three members of the Board present to decide the case, with at least one member representing management and one member representing labor in attendance, a quorum was present to conduct the business of the Board.

Jurisdiction was not disputed. Also, a complaint may be prosecuted for circumstances which arise before or during an inspection of the employer's workplace. *See,* NRS 618.435(1). And, Nevada has adopted all Federal Occupational Safety and Health Standards which the Secretary of Labor has promulgated, modified or revoked and any amendments thereto. They are then deemed the Nevada Occupational Safety and Health Standards. *See*, NRS 618.295(8). The hearing was duly posted in accordance with the Nevada Open Meeting Law.

At the outset, the Chairman admitted into evidence State's Exhibits 1 and 2, pages 1 through 173. Brady Linen, in turn, offered for admission into evidence a packet consisting of Exhibits or tabs 1 through 24. Objections to their admissibility were made by the State as to some of these exhibits. Eventually, Brady's Exhibits or tabs 5 through 11, 13, 25, 26, and 27 were admitted into evidence. 1Tr.[1], pp. 15, 202, 206. The remaining tabs or exhibits from Brady Linen's exhibit packet were not admitted into evidence as the State's objections to those documents were sustained.

This matter was self reported to State OSHA by Brady Linen (a referral case). State's Exhibit 1, p. 4. Patricia Angi, the Safety Manager for Brady Linen at the time, called in the incident to State OSHA on September 25, 2017. *Ibid.* By the time State OSHA arrived on the scene,

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[1] "1Tr." stands for the transcript of the hearing conducted on March 10, 2020, followed by the page and line number where the matter cited can be found. "2Tr." stands for the transcript of the hearing conducted on March 11, 2020.

Ms. Angi had already conducted her own investigation into the incident including a review of the video of the incident. 1Tr., p. 53;19-24. Unfortunately, the Clark County Library facilities where the hearing was conducted did not have the capacity to display the video. The video was not made a part of the evidence for the Board to consider.

The complaint filed by the State sets forth the allegations of the violation of the Nevada Revised Statutes. *See*, State's Exhibit 1, pages 45 through 52. Citation 1, Item 1, charges a violation of NRS 618.375(1) (Nevada's General Duty Clause). There, it states: "Duties of Employers. Every employer shall furnish employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his or her employees." The State alleged a "Serious" violation. The State claimed:

> On September 25, 2017, in the north east yard by the loading docks located at 1 West Mayflower Avenue, North Las Vegas, NV 89030, Brady Linen Services, LLC, did not furnish employment free of recognized hazards likely to cause death or serious physical harm to his or her employees.
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> The employer allowed an employee to be exposed to serious caught [sic] in or crushed by hazards on a lift gate. The employee operated a Maxon, model RCW-4B, serial C91295036 hydraulic lift gate to load and unload hampers. The lifts manufacturers [sic] manual recognizes caught in or crushed by hazards and that they may cause serious injury or death. The employer did not provide the employee a copy of, or ensured the employee reviewed, the lift's operator's manual or instructions. The employer also failed to replace the missing operational instructions, warning, caution and danger signage on the lift. The employee was then exposed to the hazards of the lift during work without the specific operational or safety information necessary to mitigate the hazards. The employee got his fingers caught in the lift's moving parts while attempting to open the gate. The employee received serious injuries to the right hand such as, lacerations to the fingers, one broken finger and a partially amputated finger.
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> Reference: Maxon Operation Manual Lift gate Series, page 4 WARNING
>
> 1. Read the Operator's Manual and understand it thoroughly before operating this unit.
> 2. Read the urgent warning decal on the side of the vehicle close to the unit before operating.
> 3. If decals are dirty, clean them. If decals are defaced or missing, replace them. Free replacements are available from the manufacturer. See information at the end of the Warnings!
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> One possible means of abatement would be to follow the instructions as set forth in the operations manual. *See,* Complaint, Exhibit 1, pp. 49-50.

The State proposed a fine of $5,500 for the alleged violation of NRS 618.375(1).

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Citation 2, Item 1, alleges a Regulatory violation . It charges a violation of Nevada Administrative Code (NAC) 618.540(1)(d), which states:

> Requirements of a written safety program. Except as otherwise provided in this section, in addition to the requirements set forth in subsection 2 of NRS 618.383, a written safety program must include: The procedures that must be followed to investigate an accident which had occurred and the corrective actions that were to be initiated.

The State alleges here that on,

> ... September 25, 2017, at 1 West Mayflower Avenue, North Las Vegas, NV 89030, the employer's written safety program did not provide procedures to investigate an accident and what corrective actions will be initiated after an accident has occurred, as required by Nevada Administrative Code 618.540(1)(d). *See,* State's Complaint, Exhibit 1, p. 50.

The State classified Citation 2, Item 1 as a "REGULATORY" violation with a proposed fine of $1,100, 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. *Ibid.*

The State waived opening argument. Brady Linen, the Respondent, did not, arguing that the Complaint should be dismissed, because of bias by the State investigator, the employer was victimized by unforeseeable and unavoidable employee negligence, there was no violation and that the driver in question, Rodolfo Barahona, was adequately trained. When operating the hydraulic lift gate on the truck he had selected to drive, 1Tr., pp. 41, 46, 99, 108, Brady Linen claims, the driver operated it contrary to his training. 1Tr., pp. 72, 74-76; 2Tr., pp. 12-14.

FINDINGS OF FACTS

Brady Linen Services, LLC, (Brady Linen) is the employer of Rodolfo Barahona, the injured worker. Brady Linen is a limited liability company organized under the laws of the State of Nevada. State's Exhibit 1, pp., 1-4. Brady Linen is located at 1 West Mayflower Avenue, North Las Vegas, NV 89030. State's Exhibit 1, p. 4. Brady Linen is in the commercial laundry business, operating a fleet of trucks to service its laundry business. State's Exhibit, 1, p. 4. The incident resulting in the injury to Mr. Barahona's right hand, took place in Brady Linen's north east yard located at the Mayflower address. State's Exhibit 1, pp. 4, 23.

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Rodolfo Barahona was an experienced, Class A Teamster Union truck driver. 1Tr., pp. 98, 104, 114. He was non-English speaking, 1Tr., p. 40, and at the time of the incident, he had been employed by Brady Linen for 10-11 months. 1Tr., p. 100.

Mr. Barahona was injured on the job while operating the lift gate, 1Tr., p. 50;4-8, of the truck he selected to drive on that date. 1Tr., p. 99;11-15. The injury to his right hand was severe enough to require medical treatment. He suffered a laceration to his right hand, a broken finger, and a partial amputation of his right index finger when trying to lower the lift gate of his truck. State's Exhibit 1, pp. 3, 19, 20, 23.

Selection or use of a truck to drive was on a first come, first serve basis. State's Exhibit 1, p. 19; 1Tr., pp. 15-18. Mr. Barahona claims the trailer to the truck was the only one available, 1Tr., p. 99, that it was the trailer which used gravity to operate the lift and that he did not know how to use that kind of lift gate. 1Tr., p. 99;11-15. Mr. Barahona's job was to pick up soiled linen from and deliver clean linens to Brady Linen's casino customers, making two round trips per shift. State's Exhibit 1, p. 19.

Prior to his 10-11 months of employment at Brady Linen, 1Tr., p. 100, Mr. Barahona worked several years as a Class A commercial truck driver. 1Tr., pp. 40, 104. He states, however, despite all this experience, he never used the kind of lift gate on the truck defaulted to him on the day of the incident. 1Tr., p. 100. No one, he claims, ever gave him instructions on the use of this non-electric lift gate prior to the incident. 1Tr., p. 100. He was only trained on electric hydraulic lift gates. 1Tr., p. 100.

As a new hire, he, like the other new hires at Brady Linen, 1Tr., p. 105, was assigned to a senior Brady Linen driver to be trained. 1Tr., pp. 27, 38, 41. It was the practice of Brady Linen to pair new hire truck drivers with its senior drivers to show the new hires how the job works. 1Tr., pp. 90, 105. The training was strictly on-the-job training. 1Tr., p. 102; 2Tr., p. 15. There was no classroom training or written materials given the new hires as a part of the new hire training. 2Tr., p. 8. Typically, training would last 10-12 days. There was no written curriculum (written training document). 1Tr., p. 38. There was no review of training manuals about lift gates. 1Tr., p. 38;19-21.

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The training consisted of the individual predilections of the individual senior trainers. 1Tr., pp. 28, 38, 39, 41. The training imparted varied with each individual senior trainer.

Once the senior driver-trainer felt the trainee-new hire was prepared, he would tell the dock supervisor the driver was ready to drive on his or her own and the new hires would be cut loose to be assigned trucks to drive on their own. 1Tr., pp. 27, 41; 2Tr., p. 18. Brady Linen did not test to see how much the trainee actually absorbed of the training. 1Tr., p. 105;11-15. There was no written record of the training the drivers received. 1Tr., pp. 171-172.

This was the training Mr. Barahona received with one exception. His training lasted only 3 days. 1Tr., 105;11-15. Also, according to Mr. Barahona, there was no safety training, they just sent me to another driver to learn the job. 1Tr., p. 41;8-11. There was no review of the manual for the lift. 1Tr., pp. 38, 41;15-18. No one went over the hazards of the lift with Mr. Barahona. *Ibid.*, State's Exhibit 1, p.19. There was no safety training. State's Exhibit 1, p. 19. No one went over the manual with him. 1Tr., p. 102;5-10. No one trained him on the lift gate deployed on the truck he was using at the time he was injured. 1Tr., p. 102;1. As far as Mr. Barahona knew, he never saw a manual for his truck. *Ibid.*

There was, however, a manual. Brady Linen had Mr. Barahona operate on the truck he was driving to haul hampers with soiled or clean linens, a Maxon model RCW-4B serial C91295036 hydraulic lift gate. The Maxon model came with a manual that stated on page 4:

> WARNING
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> 1. Read the Operator's Manual and understand thoroughly before operating this unit.
> 2. Read the urgent warning decal on the side of the vehicle close to the unit before operating.
> 3. If decals are dirty, clean them. If decals are defaced or missing replace them. Free replacements are available from the manufacturer. See information at the end of the Warnings! State's Exhibit 1, p. 25.

This manual was non-existent in the workplace at the time of the incident. 1Tr., p. 41. It was never shown or made available to Mr. Barahona. State's Exhibit 1, p. 25. The manufacturer clearly recognizes the danger posed when operating the lift gate including being caught in or crushed when operating the lift gate. *Ibid.* Operation of the lift gate presented an existential, serious threat to

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operators if the lift gate was not operated correctly. *Ibid.* Industry-wise, operation of the lift gate was a known hazard.

A decal with operating instructions was posted on the operating side of Brady Linen's fleet of trucks, everywhere except on the truck Mr. Barahona was operating at the time of the incident. 1Tr., p. 46. The decal with instructions was missing from his truck. 1Tr., p. 46. The decals were plainly evident, however, on the rest of the Brady's fleet. 1Tr., p. 184. They were pervasive. 1Tr., p. 184, 2Tr., pp. 38, 39.

According to Louis Weiner, Director of Operations for Brady Linen at the Mayflower facility, 2Tr., p. 7;18-19, Mr. Barahona was injured when operating the lift gate because:

> ...he lowered the lift gate before undoing the safety latch. Then he tried to extend the lift gate with the switch and it would not extend because the safety chain was still in place. So instead of raising it back up and undoing the safety chain, it looks like he tried to push on it to give it enough go to take the safety chain off and then the lift gate was already operated – the extension was already pressed by the – the driver, and it opened up. 2Tr., p. 12.

This was in error, according to Mr. Wiener. 2Tr., p. 12;21. Pat Angi also claimed Mr. Barahona was not operating the lift gate correctly. 1Tr., p. 176.

According to Mr. Wiener, Mr. Barahona, when he was having trouble with the lift gate, should have notified the mechanic on duty or the dock manager and informed them he was having issues with the trailer and then asked for someone to look at the gate. 2Tr., p 13. Also, according to Mr. Wiener, there was nothing to prevent Mr. Barahona, once he had the gate in a partially lowered position, to simply reverse it. He could then have raised it back, it would have reslid and then, Mr. Barahona could have undone the chain, lowered it, and extended the tailgate. 2Tr., p. 13.

Brady Linen clearly believes and argues Mr. Barahona was not operating the lift gate properly at the time of his injury and that his error was the cause of the injury, not the fault of Brady Linen. Nonetheless, Mr. Barahona was not disciplined for operating the lift gate incorrectly when injured. 2Tr., p. 50.

Mr. Barahona, perhaps, could have taken these measures suggested by Mr. Weiner if he had been trained and, therefore, been informed of what to do. He was untrained, including a failure to relate to Mr. Barahona the hazards associated with operating a lift gate. 1Tr., p. 102. His training

was left to the vagaries of a three day,1Tr., p. 105, on-the-job training session, 1Tr., p. 180, without being provided any written training, no review of manuals, without being provided a written manual and without replacing the decal on the truck that addressed operation of the lift gate. State's Exhibit 1, p. 25, 1Tr., pp. 38, 102.

Mr. Barahona's training and safety experience was not unique. State's Exhibit 1, pp. 21-22. At best, Brady Linen's approach to their drivers', safety concerns and protection against hazards in the workplace associated with the operation of hazardous equipment crossed over the border of indifference. It was also clearly far less than rigorous.

Brady Linen produced multiple versions of its safety program. *See*, 1Tr., pp. 208-210. It is beyond dispute, however, that while an earlier version of its written safety plan contained a written, 1Tr., p. 213, instruction for how to conduct an investigation into an incident in the workplace, this was omitted from the written safety plan in effect on September 22, 2017 when Mr. Barahona was injured. 1Tr., pp. 186, 211. Nevertheless, the new Safety Manager, Pat Angi, immediately upon learning of the injury to Mr. Barahona, conducted a comprehensive investigation into the incident and had completed it by the time State OSHA's inspectors arrived. 1Tr., p. 53. Also, Pat Angi was already, as the new Safety Manager, rewriting and revising the plan to include the missing section on investigations. 1Tr., p. 211. Since the incident was promptly investigated, as would have been called for had the safety plan been complete, the absence of the plan for investigation that should have been in the safety plan at Brady Linen was *de minimis*. In this case, it would have added nothing.

CONCLUSIONS OF LAW

To the extent that any of the above findings of fact constitute conclusions of law or mixed findings of fact and conclusions of law, they are incorporated herein.

In Citation 1, Item 1, State OSHA alleges a violation of NRS 618.375(1), Nevada's analog to Section 5(a) of the Occupational Safety and Health Act of 1970 (the Act)[2], the Federal general duty clause. As Nevada has adopted all Federal Occupational Safety and Health Standards which

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[2]29 U.S.C. § 654(a)(1)

the Secretary of Labor has promulgated, modified or revoked and any amendments thereto, *see*, NRS 618.295(8), the Board is aided in the interpretation of NRS 618.375(1) by the interpretation and application given to Section 5(a) of the Act.

As an initial proposition, the general duty clause was intended to fill in the gaps, *see, Safeway, Inc. v. OSHRC,* 382 F.3d 1189, 1195 (10th Cir., 2004) in the umbrella of protection afforded by the Act in order to provide safe employment or a safe place of employment where no vertical or cabined statute or regulation exists. *Reich v. Arcadian Corp.*, 110 F.3d. 1192, 1196 (5th Cir., 1997)(hazardous conditions not covered by agency standards). And, it was intended to apply where a statute or regulation exists but is inadequate to provide the safety the Act was otherwise intended to provide and the employer was aware of the inadequacies. *See, UAW v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. Cir.) *cert. denied*, 484 U.S. 976 (1987). It is the responsibility of State OSHA to demonstrate the inadequacy or absence of a specific standard applicable to the condition at hand. *See, Safeway Inc., supra*, at 1194. The bottom line is that though an employer is not an insurer of employee safety, *see, e.g., National Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265-66 (D.C. Cir., 1973), "...an employer's duty to provide a safe working environment extends beyond compliance with specific safety and health standards." *Safeway*, *supra* at 1194.

The elements of a general duty violation are well established. The Complainant, State OSH must show: (1) a condition or activity in the workplace presents a hazard to an employee; (2) the condition or activity is recognized as a hazard; (3) the hazard is causing or likely to cause serious injury or death; and (4) a feasible means exists to eliminate or materially reduce the hazard. *See, National Realty, supra* at 1266; *see, e.g., Wiley Organics Inc. v. OSHRC*, 124 F.3d 201 (6th Cir., 1970.

Analysis begins with the question of whether the "general duty clause" applies in this case. The Board concludes it is applicable, here, because Brady Linen concedes the point that it applies. 2Tr., p. 44. Brady Linen asserts it did not violate the duty but concedes its application. The Board accepts Brady Linen's concession. The Board also finds and points out that no specific standard has been found or identified to the Board that would preempt the Board from applying the general duty

clause to the safe operation of a lift gate on the truck in question or the circumstances at issue in this case. *See, Safeway, Inc., supra* at 1194, 1195.

The Board disagrees that for Citation 1, Item 1, there was no violation of the general duty clause in connection with Mr. Barahona's injury and partial amputation of a finger on his right hand suffered while operating the lift gate of his truck. Taking the elements in order, first, a serious threat must be present for the general duty clause to apply. That is to say, a serious injury or death need not to have occurred for the duty clause to apply. But, the reality of a serious injury or death must be shown. *See, Reich, supra* at 1197 ("...the mere fact that a recognized hazardous condition exists...").

That showing has been made with Mr. Barahona's injury. He suffered lacerations, at least one broken bone in his hand and a partial amputation to his right index finger. No one disputes this injury was the direct and proximate result of his operation of the lift gate. His injury, the Board concludes, is sufficient to establish that conditions in the workplace posed a serious, actual hazardous condition for a Brady Linen employee. He was allowed by Brady Linen to operate the lift gate without training and without being informed of the potential hazards the lift gate poses. These circumstances were a disaster waiting to and did happen.

The hazard must also be recognized as one that might lead to serious injury or death. Recognition is an essential element of a general duty claim because recognition gives the employer fair notice of impermissible conduct or conditions, a constitutional prerequisite to citing an employer. *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1421 (D.C. Cir. 1983). As explained below, the requisite recognition exists.

Whether a condition or practice is a "recognized hazard" and one that could result in a violation of the general duty clause may be shown by proof of recognition of the hazardous condition by the industry or individual employer. In *National Realty, supra* at 489 F.2d 1257, in the case of industrial recognition of a hazard to provide fair notice to an employer, the Court concluded that actual knowledge by the cited employer was not necessary to sustain a violation and that constructive knowledge of the hazard could be imputed to the cited employer on the basis of knowledge of the hazard in the relevant industry. *Id.*, at 1265 n. 32. On the other hand, actual

notice by the employer of a hazardous condition or practice may suffice to show recognition even if the hazard is not generally known in the industry. *See, Brennan v. OSHRC,* 494 F.2d 460, 464 (8th Cir., 1974). Thus, where "an employer is shown to have actual knowledge that a practice is hazardous, the problem of fair notice does not exist." *Cape & Vineyard Div. of New Bedford Gas v. OSHRC*, 512 F.2d 1148, 1152 (1st Cir. 1975); *UAW v. General Dynamics, supra* at 815 F.2d. 1577 (where an employer knows a specific standard does not adequately protect its employees, he has a duty under 5(a)(1) to act).

Actual knowledge can be shown upon proof that the manufacturer's instructions, if including safety warnings, may constitute evidence of a violation of the general duty clause. *See, K. E. R. Enters., Inc.*, 23 OSH Cases 2241 (Rev. Comm. 2013). And, the specificity of an employer's safety manual may be used to demonstrate actual knowledge of a hazard. *Anderson Columbia Co., Inc.*, 20 O.S.H. Cas. (BNA) ¶ 1125 (O.S.H.R.C.A.L.J. Feb. 21, 2003). *See also, Safeway, supra* at 1197 (manufacturer's warnings may show individual or industry recognition of a hazard).

Given this framework, the recognition is established, here, be it by the industry or employer knowledge route. The manufacturer of the lift gate supplied a manual about the lift gate. It was more than instructional. It contained in bold type a WARNING, about the lift gate. The manufacturer also supplied decals that were supposed to be stuck on the truck adjacent to where the driver was supposed to stand when operating the lift gate. The placement of the decal on the trucks in this location was itself a safety measure getting the lift operator out of harms way.

Clearly, the manufacturer was aware the operation of the lift gate could be hazardous if not operated correctly. The decals were pasted on the side of the entire fleet, except for Mr. Barahona's truck. They were in plain sight in the truck yard for management of the employer to see. 1Tr., p. 184. The manuals were also to be found in each truck, though none were found in Mr. Barahona's truck. The distribution of manuals in the trucks with a "WARNING" and posting of decals throughout the fleet shows knowledge of the hazardous condition by both the industry and employer. Thus, the Board concludes that either by industry knowledge or employer actual knowledge, the hazardous nature of the operation of the lift gates by Brady Linen's truck drivers was known to satisfy this recognition element of a hazardous duty citation.

This leaves the last two elements, a showing the hazard at issue caused or likely will cause serious injury or death, and that there is a feasible means to eliminate or materially reduce the hazard. Short shrift can be made of both elements. Mr. Barahona, in fact, suffered a serious injury that was directly and proximately the result of the operation of a piece of equipment known to be hazardous to operate. Given the description of the injury, it is clear that he was operating the equipment incorrectly, 1Tr., p. 176, 2Tr., pp. 12-14, the likely outcome when operating dangerous equipment when untrained. It is likely, Mr. Barahona would not have been injured if he had been trained on how to use the equipment. It is even more likely, he would be injured if turned loose on dangerous equipment without training. Brady Linen imposed upon Mr. Barahona's condition that could cause, and did cause serious injury. Fortunately, for Mr. Barahona, he did not die from the incident. Brady Linen, however, clearly exposed Mr. Barahona to a hazardous condition that could cause serious injury or death. Also, a feasible means of avoiding the injury exists. Supplying the drivers with the manual which contained the WARNING about the dangers of operating the lift gate, pasting the decal in Spanish to the side of the truck and then giving the drivers adequate training about the content of the WARNING, decal and general operation of the lift gate, all of which was lacking, might well have avoided the injury. Surely, the manufacturer intended that the WARNING information and decal would help the drivers stay safe.

The Board, therefore, finds and concludes that the general duty clause applies to the facts of this case. The Board concludes that Brady Linen violated the general duty clause of NRS 618.375(1). A recognized, unsafe environment with respect to the operation of the lift gate on Mr. Barahona's truck which led to a serious injury to his right hand existed in the workplace at Brady Linen, Mr. Barahona's employer.

There remains whether the State has also shown proof of a *prima facie* case for Citation 1, Item 1. The elements of a *prima facie* case are: (1) proof the standard applies to a condition; (2) a condition exists which violates a standard; (3) employees of an employer, not necessarily the cited employer, have been or reasonably will be exposed to a violative condition; (4) the cited employer (a) is either the employer of the exposed employee, or (b) controls, created and/or had the duty to

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correct the violative condition; and (5) that the cited employer knew or, with the exercise of reasonable diligence, could have known of the violative condition.

The burden is upon the State to prove each element of the *prima facie* case. *See, Original Roofing Company, LLC. v. Chief Administrative Officer of the Occupational, Safety and Health Administration,* 442 P.3d 146, 149 (Nev., 2019). *See also,* NAC 618.788(1). The burden of proof is by a preponderance of the evidence. *See, Armor Elevator Co.*, 1 OSHC 1409 1973-1974, OSHD ¶ 16,958 (1973).

As is evident from the foregoing analysis, proof that the general duty clause has been violated also satisfies the test for proving a *prima facie* case. The general duty clause is the *prima facie* case. Proof of its violation, as shown above, meets the *prima facie* burden. The general duty clause requires a showing that a hazardous condition existed, that the employee was confronted by the hazardous condition, that the industry or employer recognized that the hazardous condition confronted the employer's employee or work force and that the hazard posed a serious threat to the health and safety of Brady Linen's employee, by reason of the nexus between operating dangerous equipment and being untrained. The Board concludes, this was, in fact, the case. That the general duty clause was violated was shown by a preponderance of the evidence. Hence, the Board concludes the State also made a *prima facie* showing for Citation 1, Item 1.

Employers like Brady Linen may defend or rebut by showing an affirmative defense or defenses. Here, Brady Linen's chief defense was its claim, 1Tr., p. 30, 2Tr., p. 39, Mr. Barahona's injury was the product of an unforeseeable and unpreventable employee misconduct for which Brady Linen could not be held accountable. The burden of proving this affirmative defense rests with Brady Linen and requires proof of each element of the affirmative defense by a preponderance of the evidence. *See, Jensen Construction Co.*, 7 OSHC 1477, 1479, OSHD ¶ 23,664, p. 28,694 (1979; *Sanderson Farms, Inc., v. OSHRC*, 348 Fed. Appx., 53, 57 (5th Cir., 2009).

The elements of this defense are, in turn, that (1) the employer has established work rules designed to overcome the violation; (2) has adequately communicated those rules to his employees; (3) has taken steps to discover violations; and (4) has effectively enforced rules when violations have been discovered. Each element must be shown to sustain the defense. *Sanderson, supra*, at 57.

Brady Linen's invocation of this defense fails. As is clear from the statement of facts, the direct and proximate cause of Mr. Barahona's injury to his right hand was his operation of the lift gate. It was not equipment failure but operator error. But, Brady Linen did not and could not establish Mr. Barahona was trained in the operation of the gravity lift gate he was using at the time of his injury. Thus, Brady Linen is incapable of showing that Mr. Barahona disregarded his training when operating the lift gate and seriously injuring himself. Further, while claiming misconduct on the part of Mr. Barahona, Brady Linen did not discipline Mr. Barahona for the alleged mishandling of the lift gate. 2Tr., p. 50. Most important, it is not unforeseeable that an injury might occur in the workplace when an employer turns loose, as here, an untrained worker to operate a dangerous/hazardous piece of equipment.

At least two elements of the unpreventable employee misconduct defense cannot be sustained by Brady Linen. The unpreventable employee misconduct defense is unavailing Brady Linen. It is neither unpreventable nor employee misconduct where, as here, the employee was sent to work untrained. It is also foreseeable that an injury might occur when an employee is sent to work untrained for the job at hand.

Brady Linen also attempts to rebut by claiming the situation was in compliance or there was a lack of access to a hazard. *See, Anning-Johnson Co.*, 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976). This defense clearly fails because the State established by a preponderance of the evidence the existential disregard for the general duty clause by Brady Linen in the face of a failure to train Mr. Barahona.

Last, Brady claims the State inspector was biased against Brady because this incident was one of three Brady complains being investigated at the same time. 1Tr., pp. 52, 53. Brady argues the investigator became jaded against Brady, given the three alleged investigations and, therefore, unduly punished Brady under Brady LV 18-1943, this claim. Aside from the argument, the Board finds no evidence of such bias. 1Tr., pp. 24, 25, 51, 147; 2Tr., pp. 45, 46.

The Board finds, therefore, and concludes that Citation 1, Item 1 is sustained. As there was no meaningful assault upon State's assessment of a $5,500 penalty if the Citation was sustained, the Board concludes that the penalty of $5,500 must also be sustained.

Turning to Citation 2, Item 1, there is no dispute that NAC 618.541 is regulatory in nature, that it applies to Brady Linen, that as an employer, Brady Linen must have a written safety program and that the contents of the written safety program must include written procedures to investigate workplace incidents and the corrective actions that must be taken as a result of the investigation into the incident. Brady Linen produced its written safety plans for multiple years. An earlier version of the safety plan included in its contents a section on the procedures for investigating workplace incidents and the corrective measures to be taken as a result of the workplace incident. 1Tr., p. 213. Unfortunately, it is beyond dispute, the written safety plan for 2017 did not include the prescribed procedures to investigate incidents. 1Tr., pp. 186, 211. For this, the State sought to levy a $1,100 penalty.

It is also true, however, that after the incident and before the State OSHA investigator arrived, the new Safety Manager, Pat Angi, had (a) contacted State OSHA, (b) conducted a thorough investigation, reviewed the video of the incident and interviewed pertinent individuals. 1Tr., p. 53. Brady Linen did, therefore, what it would have been required to do if it had a written plan to investigate. It was as if Brady Linen had a written investigation plan in its written safety plan in the first place. Furthermore, Pat Angi, the experienced new Safety Manager, was in the process of rewriting the safety plan. Worst case, Brady Linen's shortcoming, here, was a technical violation and nothing more. Brady Linen was in the same place it would have been in, if it had a written procedure for investigating.

The Board concludes that the alleged violation of NAC 618.540(1)(d), was merely technical. The incident was investigated. While there was a technical violation, the violation was *de minimis* and warranted no penalty, an assessment that Board is authorized to make. *See, Brennen v. OSHRC*, 494 F.2d 460, 463 (8th Cir., 1974). The Board so holds.

ORDER

Accordingly, the State OSHA Board of Review sustains Citation 1, Item 1 and the penalty of $5,500. While there was a technical violation proven for Citation 2, Item 1, the violation was *de minimis* and accordingly, the Board assesses no penalty against Brady Linen for Citation 2, Item 1.

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It was moved by Rodd Weber, seconded by Frank Milligan, to sustain Citation 1, Item 1 and to assess a fine of $5,500. The motion was adopted on a vote of 3 in favor of the motion, no vote against the motion with one abstention (Halsey). It was next moved by Rodd Weber, seconded by Frank Milligan, to declare as *de minimis*, the regulatory violation of NAC 618.540(1)(d) and, therefore, to assess no penalty against Brady Linen. The motion was adopted, on a vote of 3 in favor of the motion and none against the motion, with one abstention (Halsey).

This is the Final Order of the Board.

IT IS SO ORDERED.

On January 12, 2022 the Board convened to consider adoption of this decision, as written or as modified by the Board, as the decision of the Board.

Those present and eligible to vote on this question consisted of the five current members of the Board, to-wit, Chairman Rodd Weber, Secretary William Spielberg and members Frank Milligan, Jorge Macias and Scott Fullerton. Secretary William Spielberg and members Jorge Macias and Scott Fullerton were eligible to vote because they had read both transcripts of the hearing, the pleadings and the exhibits offered and admitted into evidence (*e.g.,* the record). *See,* NRS 233B.124 (read record). Upon a motion by Frank Milligan seconded by Jorge Macias, the Board voted 5-0 to approve this Decision of the Board as the action of the Board and to authorize Chairman Weber, after any grammatical or typographical errors are corrected, to execute, without further Board review this Decision on behalf of the Nevada Occupational Safety and Health Review Board. Those voting in favor of the motion either attended the hearing on the merits or had in their possession the entire record before the Board upon which the decision was based.

On January 12, 2022, this Decision is, therefore, hereby adopted and approved as the Final Decision of the Board of Review.

Dated this 18th day of January, 2022.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: /s/Rodd Weber
Rodd Weber, Chairman

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached document, *Decision and Order of the Board, Findings of Fact and Conclusion of Law, and Final Order,* on those parties identified below by placing an original or true copy thereof in a sealed envelope, certified mail/return receipt requested, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada:

Salli Ortiz, Esq.
DIR Legal
400 West King Street, Suite 201
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Whitney J. Selert, Esq.
Garg Golden Law Firm
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Henderson, NV 89052

Dated this 18th day of January, 2022.

Karen Kennedy
Employee of
The Law Offices of Charles R. Zeh, Esq.

S:\Clients\OSHA\LV 18-1943, Brady Linen Service, LLC\Decision R15.wpd