NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

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

Complainant,

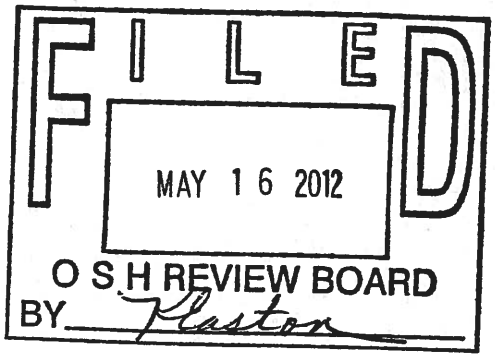
vs.

FLAMINGO LAS VEGAS/O'SHEA'S CASINO

Respondent.

_____/

Docket No. LV 12-1556



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 12th day of April 2012, in furtherance of notice duly provided according to law, MR. MICHAEL TANCHEK, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations** (OSHA); and MR. RICK ROSKELLEY, ESQ. and MS. JAMIE CHU, ESQ., counsel appearing on behalf of Respondent, **FLAMINGO LAS VEGAS/O'SHEA'S CASINO**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

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

Citation 1, Item 1, charges a violation of 29 CFR

1926.1101(k)(2)(ii)(C). The complainant alleged the respondent property owner and employer failed to notify all employers of employees on a multi-employer site of work within or adjacent to an area containing asbestos material (ACM) or presumed asbestos materials (PACM). The violation was classified as "Serious". The proposed penalty for the alleged violation is in the amount of $5,000.00.

Citation 1, Item 2, charges a violation of 29 CFR 1926.1101(k)(8)(I). The complainant alleged the employer failed to affix labels on products containing asbestos. The violation was classified as "Serious". The proposed penalty for the alleged violation is in the amount of $5,000.00.

Documents and photographs were stipulated in evidence as complainant Exhibit 1 and respondent Exhibit A.

Complainant presented testimony and documentary evidence with regard to the alleged violations. Mr. Paul Estrada a Nevada OSHA Industrial Hygienist (IH) testified as to his inspection and the citations issued to the respondent property owner. OSHA standard 29 CFR 1926.1101(k)(2)(ii)(C) provides:

> ". . . building and/or facility owners shall notify the following persons of the presence, location and quantity of ACM or PACM at the worksites in their building and facilities. Notification shall be in writing or shall consist of a personal communication between the owner and the person to whom notification must be given or their authorized representatives: On **multi-employer worksites, all employers of employees** who will be performing work within or adjacent to areas containing such materials . . ." (Emphasis added)

Mr. Estrada inspected the Flamingo Hotel and Casino in Las Vegas, Nevada based upon a complaint that floor remodeling and tile removal in the casino area surveillance room occurred without prior notice to employers of all employees in contact with ACM. The respondent property

owner hired general contractor Austin General Contracting (AGC) to perform remodel work. AGC retained subcontractor J & R Flooring (JRF) to remove floor tile material. Mr. Estrada was informed the actual tile flooring removal work occurred without the knowledge or supervision of the respondent property owner. He identified respondent representatives who told him they had not been informed by general contractor AGC that floor renovation was subcontracted to JRF or that work was performed prior to any authority by respondent to proceed. JRF removed the tile materials and completed the work task. Respondent became aware of the JRF work and notified the company of the possibility of ACM. Respondent stopped the work and inquired into the operations. An employee of JRF contacted the Clark County Department of Air Quality Management (DAQEM). By the time IH Estrada conducted his inspection, which was approximately two weeks after the receipt of the complaint, the renovation of the surveillance room floor had been completed and no tile or material samples retained for AMC testing. Mr. Estrada interviewed employees of the respondent AGC and JRF. He obtained photographs of the completed flooring (Exhibit 7). He testified the project was **multi-employer** because at least two (2) employers, AGC and JRF, were working on the surveillance room flooring; and the respondent owner had **control** of the site under its contract with AGC, the general contractor. He determined no original written notification was given for the potential of ACM and no verbal or other information provided to other employers or employees on the job site as required by the OSHA standards. He also confirmed no ACM test samplings were performed under required protocols. An employee of JRF took a sample of removed tile material to a lab for testing. However due to lack of appropriate control and "chain of custody" of the materials, no actual proof of ACM on the site could be

confirmed. Mr. Estrada could not obtain his own samples for testing because the work had been completed so there was no actual evidence of ACM. He identified and testified as to Exhibit 2, including previous respondent ACM surveys of various rooms. At page 13, the floor tile sampling for the room where the work was performed by the subcontractor employees showed no ACM. A test for a room adjacent to the work area showed approximately 5% ACM content. Mr. Estrada testified that the purpose of the surveys is to provide the employer with some knowledge of where ACM might be located so it could take samples and inform various employers and employees under the standard. He explained the standard as requiring a responsible employer identify, analyze and inform employers of employees of the potential for ACM. He concluded that respondent as the property owner in control of the multi-employer site failed to meet the requirements of the standard. He determined the violation to be serious due to the **potential** for exposure to ACM. He testified that even in a "non-friable" state, which he defined as "non-disturbed", ACM could be a danger to employees working in the removal process such as occurred in the surveillance room. Mr. Estrada calculated proposed penalties in accordance with operations manual identified at page 7.

IH Estrada testified at Citation 1, Item 2 which referenced 29 CFR 1926.1101(k)(8)(I). The standard provides:

> ". . . labels shall be affixed to all products containing asbestos and to all containers for such products, including waste containers . . ."

He identified his investigative report and findings referenced at Complainant's Exhibit 1. He cited the respondent for a failure to label or assure labeling the materials that were reportedly removed and disposed by the subcontractor.

On cross-examination respondent's counsel first directed inquiry to issues of **employee hazard exposure** and **employer knowledge**. Mr. Estrada testified he had no ability to establish actual existence of ACM and/or exposure of any employees to same. He testified that he cited for the **potential** of exposure to ACM based upon a 2006 survey done by respondent, although admitted it showed no detectible ACM in the surveillance room where work was performed. He testified the ACM survey did show some presence in an adjacent room (TV room) so he had to consider the entire area for compliance and issued his citation accordingly. Mr. Estrada did not know if any ACM identified through the 2006 report in the adjacent (TV) room was "homogenous in nature" with that in the surveillance room. He responded that the standard does require the foregoing as a "trigger" needed for inclusion of the entire area for compliance. Mr. Estrada testified that because the floor tile color was different, the issue of whether the materials were homogenous could not be resolved with certainly. He testified there was no evidence the tile and mastic used in the adjacent room (TV room) and the surveillance room where the employees actually worked were homogenous.

On redirect and re-cross examination, Mr. Estrada testified that after the citation was issued respondent hired a professional abatement company to address, remove and dispose of any ACM. He further testified at Tab 5 of Exhibit A that the Clark County Air Management (DAQEM) inspected the room before it was tiled and found nothing significant for the presence of ACM. On further cross-examination he testified that he was told by the supervisor of the surveillance room, Ms. Besty Johnson, that she informed AGC, the general contractor, that asbestos could possibly be in the room. However because nothing written was provided to him, he (IH Estrada) could not confirm whether same occurred so as

to persuade him that respondent had satisfied its obligation under the standard to inform the employer of employees of the potential for ACM.

At the conclusion of complainant's case, respondent counsel presented evidence and testimony in defense of the alleged violations charged in the citations. Mr. R. T. Germaine, the Risk Manager for the respondent parent company, Caesar's Entertainment testified that a survey of the premises was conducted in 2006 as identified in Exhibit A, Tab 4 consisting of nine pages. He further testified the survey was performed in furtherance of EPA and federal guidelines. The survey showed there was no ACM detected in the surveillance room area where the work was performed. He further testified the respondent had no information that the general contractor AGC subcontracted the flooring work nor any notice the work actually commenced. He discovered same only after the job was substantially completed. He further testified the Clark County Department of Air Quality (DAQEM) report confirmed the tiles in the work area were "non-friable".

On cross-examination Mr. Germaine testified the Clark County inquiry addressed issues that were similar but distinct from OSHA. He testified that OSHA requires employers to **communicate potential presence** of ACM.

Respondent provided testimony of Ms. Betsy Johnson, who identified herself as the respondent surveillance manager. She described the overall work performed on the property by the general contractor AGC and the facts which gave rise to the follow on work subject of investigation and citation. She testified there was no color match in the flooring materials initially installed and contacted her property manager. AGC was again called to remove and replace the non-matching materials. She was never informed by AGC of any existence or potential for ACM. The

work performed was effectuated " . . . before the contract proposal had been signed, executed and/or authorized . . ." Ms. Johnson testified that she first learned there may be an ACM issue when a co-employee of respondent saw workmen in the area and asked if anyone had ever checked for ACM.

At the conclusion of the presentation of evidence and testimony, complainant respondent provided closing argument.

Complainant asserted the case involved not an issue of actual **exposure** to ACM but rather alleged failure to satisfy the requirements of **notification** and **labeling**. He argued the intent of the standard is to assure that if any work is to be performed in an area with a potential for exposure to ACM then employees can be notified and therefore protected from possible exposure. Respondent/owner was in charge and control of the project and the multiple employers (AGC and JRF) were its responsibility. Respondent also failed to assure and confirm to the IH that labeling had been placed on the bags containing ACM.

The respondent argued there was no evidence of any **exposure** to employees of the hazards of ACM or PACM. He also argued there was no evidence the employer had **knowledge**, or even should have had knowledge, of a potential for ACM based upon the facts and events that occurred in the remodeling project. He asserted that even had respondent been given notice of the work and then examined the previous data collected under the 2006 survey, it would have shown there was no ACM previously detected in the subject work area and no need to notify anyone. He referenced the survey at page 13 of Exhibit 1 as establishing there was no ACM detected in the surveillance room. He further argued there was no way for the respondent to know, based upon the facts in evidence,

that AGC subcontracted the work out to flooring contractor JRF who then proceeded without authorization to actually perform the work. He argued there must be evidence showing **employer knowledge** to sustain a serious violation, and then as a core element **exposure or potential exposure to a hazardous condition** from which employees needed to be protected. The labeling charge at Item 2 must fail because respondent representatives did not even have knowledge work was being done nor whether any ACM existent for labeling. He asserted the complainant failed to meet its burden of proof to establish the violations as charged.

In reviewing the testimony, exhibits, and arguments of counsel, the board is required to measure same against the elements to establish violations under Occupational Safety & Health Law based upon the statutory burden of proof and competence of evidence.

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. (See NAC 618.788(1).
>
> All facts forming the basis of a complaint must be proved by a preponderance of the evidence. See Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).
>
> To prove a violation of a standard, the Secretary must establish (1) the **applicability** of the standard, (2) the existence of **noncomplying conditions**, (3) **employee exposure** or access, and (4) that the **employer knew** or with the exercise of reasonable diligence could have known of the violative condition. See Belger Cartage Service, Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); American Wrecking Corp. v. Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir. 2003).

A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;

2. The situation was in compliance; or lack of access to a hazard. See, Anning-Johnson Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

To sustain a serious violation at Citation 1, Item 1, the complainant is required to prove the respondent failed to provide notification of the presence, location and quantity of ACM. Regardless of the facts involving the work sequence and commencement with or without employer knowledge, the 2006 asbestos survey report indicated that the room had been tested in 2006 and the results confirmed there was no detectible asbestos in the surveillance room work area. The OSHA inspectors investigation neither detected nor confirmed ACM in the work area of the surveillance room. There was no evidence of material homogeneity in the adjacent TV room. Nevada OSHA must prove the employer actually knew, or could have known, with the exercise of reasonable diligence, of the circumstances that violate the Act. *See New York State Gas and Elec. Corp. v. Secretary of Labor,* 88 F.3d 98, 105, 17 OSH Cases 1650 (2d Cir. 1996); *Continental Elec.*, 13 OSH Cases 2153, 2154 (Rev. Comm'n 1989) (knowledge is a required element even for non-serious violations). This element must also be proved in general duty clause cases. *See United States Steel Corp.*, 12 OSH Cases 1962, 1969 (Rev. Comm'n 1986). Knowledge (*i.e.*, notification) would include any prior determinations of ACM from bulk sampling data. 29 CFR 1926.1101(k)(2)(I) (September 6, 2005 Interpretation). Accordingly, if respondent had actual knowledge, or should have known constructively through the exercise of due diligence, that materials were asbestos-containing, then it had a duty to notify prospective employers applying or bidding for work at the work sites in their building. 29 CFR 1926.1101(k)(1).

Here, the evidence is unrefuted that even had respondent known work

was to commence then respondent's likely reliance upon its 2006 Survey for Asbestos would have shown there to be no ACM issues. The results of the survey determined from bulk sampling data taken in accordance with federal and EPA guidelines established no ACM or PACM existed in the work area. See Exhibit 11 and Exhibit 12, Asbestos Control Program, License and Certificate of Completion. The Survey clearly provides that areas 414 and 415 (now the Surveillance Room) were found to be "ND" (No Asbestos Detected). Exhibit 11, pages 12-13 (areas 414 and 415 = no asbestos detected). The unrebutted facts subject of testimony and the survey in evidence showed respondent could **not** be charged with direct or constructive **knowledge** that any surveillance room tiles contained ACM, and accordingly had no duty to communicate the potential for same with or to AGC and/or JRF pursuant to 29 CFR 1926.1101(k)(2)(ii). Moreover, because respondent did not have **knowledge** of ACM in the surveillance room, nor was there any evidence of same, it was not required to affix or assure labels to any materials removed from the area within the room.

The testimony of Ms. Johnson and Mr. Germaine was credible. Notwithstanding the survey, which anyone would have referenced prior to work to determine no ACM existed, Ms. Johnson testified she had no knowledge of AGC's subcontracted renovation work to JRF and particularly that the work would or did commence without a contract in place. She also testified that, before any work occurred, she verbally informed AGC of the possibility of ACM in compliance with the OSHA standard at Item 1. Once respondent became aware that work was being conducted in the surveillance room it stopped the work and informed the JRF workers of the possibility of the existence of asbestos.

The subject standard and the basis of the citation to the

respondent premises owner is one with regard to a duty to notify. That duty must be measured against the unrebutted facts subject of sworn testimony and particularly, the survey report conducted in 2006 which would have been the point of reference for notification requirements if respondent had known work was to be done. There would have been no duty to notify of the potential of ACM based upon the information available.

In order to prove a violation, the underlying threshold for Nevada OSHA is to establish that employees had or would have access to a hazardous condition. If no employee was or could be exposed to the hazard potential in question, no violation of the Act can exist.

Here, there is no evidence that an ACM hazard ever existed to subject respondent to a duty to inform nor that the subcontractor, JRF workers, were ever potentially exposed to ACM.

Nevada OSHA failed, understandably, to collect samples of the removed tiles from the surveillance room (Exhibit 6, page 4). By the time of the inspection, almost two weeks after the complaint, the renovation of the surveillance room had already been completed. However Nevada OSHA might have obtained samples from the adjacent TV room or a different area, but there was no determination made to obtain samples for analysis to establish the existence of any ACM anywhere on the property. In fact, IH Estrada testified the flooring in the TV room being a different color indicated a lack of homogeneity which eliminated the basis of inquiry to consider the entire area for compliance. There was no evidence to support a violation based upon a duty to inform of potential exposure, actual exposure, access, or employer knowledge. With no evidence of the existence of ACM provided by complainant, and the only admitted evidence regarding ACM being the 2006 Asbestos Survey which indicated the surveillance room work area did **not** contain ACM,

there is no basis for charging the respondent with failure to notify.

Further, notwithstanding the Asbestos Survey, the Clark County DAQEM Report found a minimal disturbance of tile materials and those disturbed were found to be non-friable (Exhibit 4). Clearly with the respondent's survey report showing no detectable asbestos in the work area surveillance room, and because the disturbed tiles were found non-friable, there was no hazard and no basis for even Clark County to take action.

At Citation 1, Item 2, the board can find no evidence to satisfy the burden of proof that respondent was required to label material where there has been no evidence those materials even potentially contained ACM. No testing occurred to establish ACM. There was no evidence any employees were ever exposed to ACM. There is further no evidence the employer knew, or with the exercise of reasonable diligence could have known, that any ACM might have existed in the materials removed and bagged. To the contrary, the evidence showed there was no ACM in the surveillance room. Again, as in Citation 1, Item 1, if the employer knew work was to commence prior to what happened according to the facts subject of testimony, it would have looked at the 2006 survey and determined there to be no ACM in the subject area. It might have further looked at the survey to determine in the adjacent (TV) room, where no work was conducted, there was only a small detection of non-friable material. However, no material homogeneity was ever established to trigger inclusion of the TV room for compliance. The unrebutted facts indicate that here work was done on a very small area of tile removed before work stopped. To extrapolate a violation for labeling without any underlying evidence of violative conditions, challenges the extensive case law incumbent upon complainant to prove a violation.

> To prove a violation of a standard, the Secretary must establish (1) the **applicability** of the standard, (2) the existence of **noncomplying conditions**, (3) **employee exposure** or access, and (4) that the **employer knew** or with the exercise of reasonable diligence could have known of the violative condition. See Belger Cartage Service, Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); American Wrecking Corp. v. Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir. 2003).

How can the respondent be found in violation of a labeling standard when there was no proof there were materials even potentially containing ACM requiring labeling. There is no proof of **non-complying conditions**, **employee exposure** or access, or that the **employer knew** or with the exercise of reasonable diligence could have known of a violative condition if one even existed.

The board finds, as a matter of fact and law, there was no preponderance of proof of violations as to Citation 1, Item 1, 29 CFR 1926.1101(k)(2)(ii)(C), and Citation 1, Item 2, 29 CFR 1929.1101(k)(8)(I).

It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violations of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR 1926.1101(k)(2)(ii)(C) and Citation 1, Item 2, 29 CFR 1926.1101(k)(8)(I). The violations, classifications and proposed penalties are denied and dismissed.

The Board directs counsel for the respondent, **FLAMINGO LAS VEGAS/O'SHEA'S CASINO**, to submit proposed Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel within twenty (20) days from date of decision. After five (5) days time for filing any objection,

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 16th day of May 2012.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JOE ADAMS, CHAIRMAN