

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3

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

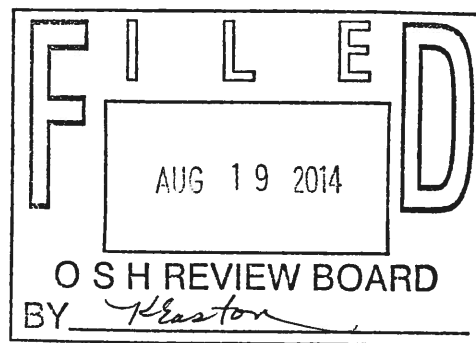
Docket No. RNO 14-1711

Complainant,

vs.

10 ORMAT NEVADA, INC.,

Respondent.



12  
13 **DECISION**

14 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
15 **REVIEW BOARD** at a hearing commenced on the 9<sup>th</sup> day of July 2014, in  
16 furtherance of notice duly provided according to law. MS. SALLI ORTIZ,  
17 ESQ., counsel appearing on behalf of the Complainant, **Chief**  
18 **Administrative Officer of the Occupational Safety and Health**  
19 **Administration, Division of Industrial Relations (OSHA).** MR. DAVID  
20 **ONGARO, ESQ.** counsel appearing on behalf of Respondent, **Ormat Nevada,**  
21 **Inc.**

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

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

27 Citation 2, Item 1 charges a violation of 29 CFR 1910.151(b) which  
28 provides:

1 In the absence of an infirmary, clinic, or hospital  
2 in near proximity to the workplace which is used  
3 for the treatment of all injured employees, a  
4 person or persons shall be adequately trained to  
5 render first aid. Adequate first aid supplies  
6 shall be readily available.

7 Complainant alleged the respondent employer failed to adequately  
8 train employees allowed to work alone on nights and weekends in the  
9 rendering of first aid where the employment facility was approximately  
10 60 miles from any infirmary, clinic or hospital. The violation was  
11 classified "Other" than serious and a zero (0) penalty proposed.

12 Documents and photographic exhibits were stipulated in evidence at  
13 complainant Exhibits 1 through 4, excepting pages 66-114 at Exhibit 3,  
14 and pages 132-134 at Exhibit 4. Respondent's evidentiary exhibits were  
15 admitted at Exhibits A through G.

16 Complainant presented testimonial and documentary evidence of the  
17 alleged violation through Mr. Jerad Mitchell, an OSHA Industrial  
18 Hygienist (IH). IH Mitchell conducted an inspection of the respondent's  
19 worksite facility in Tuscarora, Nevada on or about October 29, 2013.  
20 He referenced his inspection/safety narrative at Exhibit 1. Mr.  
21 Mitchell identified the respondent worksite as a geothermal plant  
22 facility where some employees worked alone on nights or weekends. The  
23 assigned work efforts applicable to the contested citation exposed the  
24 employees to "Pentane" a highly volatile substance utilized to start  
25 turbine engines. He identified and referenced the Pentane MSDS  
26 information and postings at the worksite in Exhibit 2, pages 62 and 65.  
27 IH Mitchell described the work of the employees to substantially  
28 comprise monitoring computers and calibration data to guard against  
leaks in the Pentane storage systems. He conducted employee interviews  
and referenced same at Exhibit 1, pages 11 through 14. After completing

1 his inspection and investigation, IH Mitchell determined there to be a  
2 violation of 29 CFR 1910.151(b) relating to employee medical first aid  
3 training. He concluded from interviews that employees were not able to  
4 demonstrate "adequate" first aid training based upon his perception of  
5 a hesitancy and inability to respond to his questions on how they would  
6 "self aid" when working alone in the event of an accident or injury.

7 He determined the plant facility was more than 60 miles from a  
8 medical facility and therefore the distance not in "near proximity" for  
9 treatment in the event of an accident, a required element referenced in  
10 the cited standard.

11 IH Mitchell testified that employees informed him they had all  
12 received first aid training by the respondent and from other companies  
13 where previously employed. He further testified there was no issue as  
14 to lack of first aid training but rather a demonstrated inability of  
15 adequate understanding on how to self aid themselves or deal with an  
16 injury in the event of an accident while working alone at the remote  
17 site.

18 On cross-examination Mr. Mitchell testified he concluded the  
19 employees were capable of rendering first aid. He further testified to  
20 the adequacy and availability of the first aid supplies as compliant  
21 with OSHA standards. In questioning as to whether he obtained any  
22 employee training files to determine if they had other first aid  
23 training, including Red Cross, Bureau of Mines or OSHA, Mr. Mitchell  
24 testified he did not so inquire of the employees nor examine the  
25 employment files. Mr. Mitchell reiterated his testimony that the entire  
26 issue in contest was solely employee lack of adequate training on self  
27 first aid while working alone as violative of the cited standard.

28 On continued cross-examination Mr. Mitchell testified the employees

1 spent approximately 90% of their time monitoring the systems on  
2 computers to detect leaks. He also testified that limited exposure  
3 issues to both acids and Pentane were previously identified under  
4 certain work tasks but understood those matters had been abated and not  
5 in contest before the Board at this hearing. Interviewed employees  
6 informed Mr. Mitchell they received annual first aid training from the  
7 respondent. On further questioning by counsel, Mr. Mitchell explained  
8 that while employees were given first aid training by the respondent,  
9 "adequacy" of the training was not demonstrated by their understanding  
10 and capability to "self aid" in the event of an accident or injury while  
11 working alone. He further testified the standard does not specifically  
12 define "adequate" but rather mandates ". . . adequate training . . .".  
13 He admitted that no one could ever render first aid to themselves if  
14 they are "knocked out" or unconscious while working alone.

15 On redirect examination IH Mitchell testified he classified the  
16 violation as "**other**" because the ratings criteria under the OSHA  
17 enforcement policies were not high, nor was there likelihood of serious  
18 injury from Pentane contact as shown on the MSDS at Exhibit 2. He  
19 further testified that compliance was **feasible** even though the plant  
20 site was in a remote location because the company could have hired  
21 additional personnel so that more than one individual would be working  
22 on a shift at a time, established a clerical type employee position at  
23 a reduced cost to assist an injured lone employee, or made some  
24 arrangement with nearby ranch house personnel.

25 At the conclusion of complainant's case, respondent presented no  
26 witnesses and the parties proceeded to closing argument.

27 Complainant asserted there was no question the worksite was  
28 "remote" at approximately 60 miles and satisfied the threshold element

1 for lack of "near proximity" to medical facilities and **applicability** of  
2 the cited standard. Counsel conceded a majority of the work occurred  
3 in a control room environment while monitoring computer data but  
4 asserted there was "sulfuric acid on the premises." The employee work  
5 consisted of locating any leaks in the chemical containment and  
6 transmission components therefore potential employee exposure to  
7 hazardous conditions. Counsel agreed the matter before the Board was  
8 focused solely on a lack of "adequate training" for self aid to address  
9 injuries while working alone. There was no evidence nor any citation  
10 for lack of employee first aid safety training. Counsel also argued that  
11 the hesitant employee expressions described by IH Mitchell in his  
12 testimony would be enough to conclude that any training provided was  
13 inadequate because not "**meaningfully communicated**" to the employees.  
14 Counsel further argued there was **feasibility** to comply with the standard  
15 based upon the suggestions made by IH Mitchell.

16 Respondent presented closing argument. Counsel asserted the burden  
17 to prove a violation is upon OSHA in accordance with applicable law.  
18 The respondent was cited for a ". . . failure to adequately train . .  
19 ." but the entire case apparently based upon a single question by IH  
20 Mitchell where he sensed hesitancy in the response. It appeared from  
21 the IH testimony that he may have referenced an example of slipping on  
22 ice in the winter and suggested difficulties possibly encountered to  
23 self aid while working alone which resulted in the "hesitancy" he  
24 described in the employee answers. Counsel argued there was simply no  
25 evidence of a violation. Mr. Mitchell never examined the employee  
26 training files, never looked or asked for training records under the  
27 applicable OSHA standard, nor did he ask for or review any Red Cross,  
28 Bureau of Mines or other training to which the employees may have been

1 subject. Counsel further argued the entire case before the Board was  
2 based upon a single purported employee response to the IH, but with no  
3 supporting evidence to warrant a violation for inadequate first aid  
4 training.

5 Counsel argued the only issue before the Board is whether the state  
6 presented preponderant evidence of violation. Counsel asserted a  
7 violation cannot be lawfully based upon simply the inspectors statement.  
8 There were no employee documents, no files, info, no investigative  
9 facts, nothing to support Mr. Mitchell's understanding of an expression  
10 made by an employee. Counsel further asserted the standard merely  
11 mandates "adequate training"; and as a specific standard requires  
12 substantial evidence that was not provided to find a violation.

13 Respondent counsel argued there was no potential for anything other  
14 than a minor injury as recognized in the citation by use of the "other"  
15 classification. Merely looking at gauges and monitoring does not  
16 provide any realistic potential for hazard exposure and cannot prove a  
17 violation of the cited standard. He further asserted the "close  
18 proximity" threshold is in the standard for a reason and complainant  
19 cannot establish an intent of the standard by simply referencing Federal  
20 OSHA Interpretation Letters in place of proof under the specific  
21 enforcement standard.

22 In reviewing the facts, documents and testimony in evidence must  
23 measure same against the established law developed Occupational Safety  
24 and Health Act Code of Federal Regulations (CFR) and Nevada Revised  
25 Statutes (NRS).

26 In all proceedings commenced by the filing of a  
27 notice of contest, the burden of proof rests with  
the Administrator. N.A.C. 618.788(1).

28 All facts forming the basis of a complaint must be

1 proved by a preponderance of the evidence. *Armor*  
2 *Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958  
(1973).

3 To prove a violation of a standard, the Secretary  
4 must establish (1) the applicability of the  
5 standard, (2) the existence of noncomplying  
6 conditions, (3) employee exposure or access, and  
7 (4) that the employer knew or with the exercise of  
8 reasonable diligence could have known of the  
9 violative condition. See *Belger Cartage Service,*  
10 *Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
11 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);  
12 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC  
13 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
14 (No. 76-1408, 1979); *American Wrecking Corp. v.*  
15 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.  
16 2003).

17 A respondent may rebut allegations by showing:

- 18 1. The standard was inapplicable to the situation  
19 at issue;
- 20 2. The situation was in compliance; or lack of access to a  
21 hazard. See *Anning-Johnson Co.*, 4 OSHC 1193, 1975-1976  
22 OSHD ¶ 20,690 (1976).

23 A "non-serious" charge of violation is established upon a  
24 preponderance of evidence in accordance with NRS 618.645 and recognized  
25 applicable law.

26 As defined by the Commission, an **other-than-serious**  
27 violation is 'one in which **there is a direct and**  
28 **immediate relationship between the violative**  
**condition and occupational safety and health** but  
not of such relationship that a resultant injury or  
illness is death or serious physical harm.' Other-  
than-serious violations have been found where the  
injury or illness that could result from the cited  
conditions is minor. *Crescent Wharf & Warehouse*  
*Co.*, 1 OSH Cases 1219, 1222 (Rev. Comm'n 1973).  
*Owens-Corning Fiberglass Corp. v. Donovan*, 659 F.2d  
1285, 10 OSH Cases 1080 (5<sup>th</sup> Cir. 1981) (fiberglass  
itch); *Yellow Freight Sys.*, 17 OSH Cases 1699 (Rev.  
Comm'n 1996) (dermatitis); *Hamilton Fixture*, 16 OSH  
Cases 1073, 1085 (Rev. Comm'n 1993) (minor injuries  
from tripped hazard), *aff'd on other grounds*, 16  
OSH Cases 1889 (6<sup>th</sup> Cir. 1994); *Dec-Tam Corp.*, 15  
OSH Cases 2072 (Rev. Comm'n 1993) (asbestos  
exposure but appropriate respirators worn);  
*Hackney/Brighton Corp.*, 15 OSH Cases 1884 (Rev.  
Comm'n 1992) (minor injuries from four-foot fall).

1  
2 "Where no direct or immediate relationship between  
3 the violative condition and occupational health or  
4 safety, the citation should be re-designated as a  
5 **de minimis violation** without penalty. *Chao v.*  
6 *Symms Fruit Ranch, Inc.*, 242 F.3d 894 (9<sup>th</sup> Cir.  
7 2001). If a direct or immediate relationship does  
8 exist but there is still no probability of death or  
9 serious physical injury, then an "other-than-  
10 serious" designation is appropriate. *Pilgrim's*  
11 *Pride Corp.*, 18 O.S.H. Cases 1791 (1999). (emphasis  
12 added) *Owens-Corning Fiberglass Corp. v. Donovan*,  
13 659 F.2d 1285, 10 OSH Cases 1070 (5<sup>th</sup> Cir. 1981)  
14 (fiberglass itch). (Emphasis added)

15 Hearsay testimony is generally admissible in  
16 administrative hearings; however, as a matter of  
17 law, the **board may not rely on hearsay evidence**  
18 **alone** or to supply a **critical element** of the case.  
19 See, *Kiffe v. St. Dep't Mtr. Vehicles*, 101 Nev.  
20 729, 709 P.2d 1017 (1985); *Biegler v. Nevada Real*  
21 *Est. Div.*, 95 Nev. 691 (1979); also see, *Nevada*  
22 *Employment Security Dept. v. Hilton Hotels*  
23 *Corp.*, 102 Nev. 606, at 609, 729 P.2d 497 (1986).

24 29 CFR 1910.151(b): In the absence of an infirmary,  
25 clinic, or hospital **in near proximity** to the  
26 workplace which is used for the treatment of all  
27 injured employees, a person or persons shall be  
28 **adequately trained** to render first aid. Adequate  
first aid supplies shall be readily available.

The Board finds no preponderant or legally competent evidence to prove a violation of the cited standard.

To sustain a violation at Citation 2, Item 1, the complainant is required to prove by a preponderance that respondent failed to meet the terms of compliance which required employees be "adequately trained to render first aid" if working in an area **remote** from a medical facility.

The only testimonial evidence offered with regard to the lack of "adequate training" was that of IH Mitchell. There was no corroborating evidence in the employee witness statements nor did the interviewed employees testify at the time of the hearing. Further, the witness statements did not support existence of the alleged violative conditions. While Mr. Mitchell is a recognized credible witness, his



1 testimony alone cannot be relied upon under well established Nevada law  
2 to prove the violation. Without substantial corroborating evidence,  
3 there was merely minimal hearsay testimony of violation before the  
4 Board. See, *Kiffe, Biegler, Hilton, supra*. The witness statements at  
5 Exhibit 1 did not reference any lack of adequate first aid training nor  
6 even raise a concern on rendering first aid while working alone. Indeed  
7 there was no independent evidence whatsoever to support or corroborate  
8 the IH testimony of ". . . hesitancy . . . or inability to explain and  
9 understand . . ." first aid to even extrapolate violative facts. It is  
10 the legal obligation of the complainant to establish a violation by  
11 preponderance through lawful evidence. The evidence must be **competent**,  
12 meaning it cannot be based solely upon hearsay. The statements made by  
13 IH Mitchell as to employee(s) hesitancy in response(s) to his questions  
14 is hearsay and cannot be relied upon to establish an essential element  
15 or finding of violation standing alone and without corroboration.

16 Additionally, complainant would also require this Board to rewrite  
17 the standard through expansive interpretation. The standard terms  
18 "adequately trained to render first aid" do not readily extend to **self-**  
19 **aid for first aid**. Creation of enforcement standards is not within the  
20 purview, realm, or jurisdiction of this Board. Under the recognized  
21 "**plain meaning rule**" the Board must review and interpret specific OSHA  
22 enforcement standards in accordance with the fair, reasonable and plain  
23 meaning. *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192,  
24 194, 61 L.Ed. 442 (1916) (citations omitted).

25 The Board is confronted with a need in the present case to  
26 extrapolate a violation without sufficient evidence, factual data or  
27 terms in the standard. This would necessitate a disregard for the  
28 elements of proof required by a preponderance of evidence under Nevada

1 and occupational safety and health law.

2 . . . The Secretary's obligation to demonstrate the  
3 alleged violation by a preponderance of the  
4 **reliable** evidence of record **requires more than**  
5 **estimates, assumptions and inferences** . . . [t]he  
6 Secretary's **reliance on mere conjecture is**  
7 **insufficient to prove** a violation . . . [findings  
8 must be based on] 'the kind of evidence on which  
9 responsible persons are accustomed to rely in  
10 serious affairs.' *William B. Hopke Co., Inc.*, 1982  
11 OSAHRC LEXIS 302 \*15, 10 BNA OSHC 1479 (No. 81-206,  
12 19820 (ALJ) (citations omitted). (emphasis added)

13 The Board finds no substantial, legally competent nor preponderant  
14 evidence of non-compliant or violative conditions to satisfy the proof  
15 elements for violation.

16 It is the decision of the Nevada Occupational Safety and Health  
17 Review Board that no violation of Nevada Revised Statutes did occur as  
18 to Citation 2, Item 1, 29 CFR 1910.151(b). The violation, "other than  
19 serious" classification are dismissed without penalty.

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

DATED: This 20th day of August 2014.

NEVADA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW BOARD

By       /s/        
JOE ADAMS, Chairman