

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
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7 CHIEF ADMINISTRATIVE OFFICER
8 OF THE OCCUPATIONAL SAFETY AND
9 HEALTH ADMINISTRATION, DIVISION
10 OF INDUSTRIAL RELATIONS OF THE
11 DEPARTMENT OF BUSINESS AND
12 INDUSTRY,

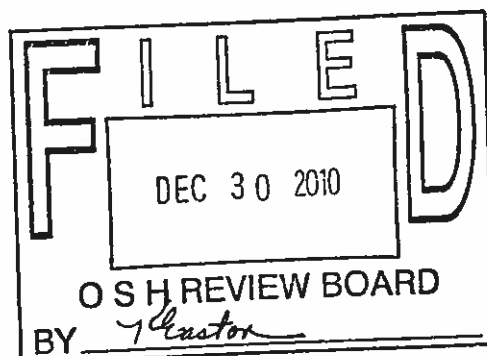
Complainant,

vs.

13 CAL INC., a foreign corporation,

14 Respondent.
15 _____/

Docket No. RNO 11-1438



16 DECISION

17 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
18 **HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of November
19 2010, in furtherance of notice duly provided according to law, MR. JOHN
20 WILES, ESQ., counsel appearing on behalf of the Complainant, **Chief**
21 **Administrative Officer of the Occupational Safety and Health**
22 **Administration, Division of Industrial Relations (OSHA)**; and MR. TIM
23 BOREMAN, Safety Consultant, appearing on behalf of Respondent, **CAL INC.**;
24 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

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

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1 thereto.

2 Citation 1, Item 1, charges a violation of 29 CFR
3 1926.1101(h)(2)(I). The complainant alleged the respondent employer
4 failed to implement a written respiratory protection program. The
5 violation was classified as Serious. The proposed penalty for the
6 alleged violation is in the amount of \$375.00.

7 Citation 2, Item 1, charges a violation of Nevada Administrative
8 Code (NAC) 618.953(2). The complainant alleged the employer failed to
9 maintain all required safety documentation at the site. The violation
10 was classified as "Other". No proposed penalty was assessed for the
11 alleged violation.

12 Prior to the presentation of evidence and testimony, respondent
13 withdrew contest of Citation 2, Item 1. Counsel further stipulated to
14 the admission of Exhibits 1, 2 and 3.

15 Complainant presented testimony and documentary evidence with
16 regard to the alleged violations. Ms. McLaughlin-Galleron, an OSHA
17 Industrial Hygienist ("IH"), testified as to her inspection and the
18 citations issued to the employer.

19 Ms. McLaughlin-Galleron conducted an inspection of respondent's
20 worksite located in Fallon, Nevada on May 11, 2010. She confirmed the
21 project involved asbestos removal which required compliance with 29 CFR
22 1926.1101(h)(2)(I). She referenced Exhibit 1, pages 25 through 28 as
23 the asbestos abatement plan submitted by respondent. Ms. McLaughlin-
24 Galleron observed informational signs regarding asbestos removal,
25 plastic barricades, and inquired as to air sampling data. She testified
26 information was provided regarding air sampling that had been done on
27 the day prior to the inspection but no samples were produced by
28 respondent. She requested copies of the written respiratory program and

1 air sample results. The respondent provided a three page document by
2 fax the following day, however the documents were insufficient to
3 satisfy the terms and requirements of the standard. Specifically the
4 documents demonstrated no specific procedures for providing respirators;
5 nothing in the documentation referenced asbestos but appeared to be a
6 generic advisory. She testified that an adequate written respiratory
7 program must spell out what types of respirators are needed for
8 particular work, the applications, as well as instructions on selection
9 and utilization. The furnished documents contained no instructions,
10 information or verbiage to enable employees to identify the level of
11 respirator protection needed for particular work efforts.

12 On cross-examination Ms. McLaughlin-Galleron testified it is
13 impossible to analyze or approve any program under the cited standard
14 for implementation until first establishing the environmental conditions
15 by air quality monitoring and sampling. She testified that once
16 exposure levels are determined then different types of respirators can
17 be selected. The exposure level is the threshold basis for
18 implementation of a written respiratory safety program. Employees must
19 be able to make a determination based upon the hazards in the air
20 established from the sampling. Ms. McLaughlin-Galleron also testified
21 she did not cite the employer regarding respirators in use but rather
22 for the lack of established procedure on selection of appropriate
23 respiratory protection. She testified that compliance with the standard
24 enables employees to be adequately informed and make correct respirator
25 selections for their own protection.

26 Mr. Richard Meyer testified as the OSHA Industrial Hygienist (IH)
27 supervisor. He testified the cited standard requires employers who
28 commence a Class 1 asbestos project to start at the level for the

1 highest protection respirator and then adjust that protection based upon
2 the air sampling results so as to appropriately identify and protect
3 against the existent hazards. The plan submitted by the respondent was
4 generic and did not address the requirements of the standard. The
5 company plan documents do not mention selection of a type of respirator
6 before sampling the air to enable the employees to use the appropriate
7 respirator for their protection. He testified that had the plan
8 documents been found minimally compliant under the standard requirements
9 the citation would have been withdrawn.

10 Mr. Meyer further testified as to the serious nature of asbestos
11 exposure hazards due to the proven health endangerment of carcinogens.

12 On cross-examination, respondents representative directed inquiry
13 to the type of work observed by the inspecting IH and the extended
14 protective masks available at the site. Mr. Meyer testified the
15 citation issued was not based upon what was actually being worn and/or
16 whether same could qualify as a powered protection mask equivalent used
17 by respondent employees, but rather because there was no implementation
18 of a program to inform employees of options compared to air sampled
19 dangers at the site. Regardless of the type of masks worn or available,
20 the standard requires the implementation of a program to adequately
21 inform employees what is available to protect them from the dangers
22 found existent at the site, i.e. air sample results and the type of work
23 being performed in the hazardous environment. On further examination,
24 Mr. Meyer testified that the rationale for the citation was the lack of
25 a clear concise control level of documentation as required by Congress
26 through the enactment of the standard.

27 Respondent representative presented testimony from Mr. Danny Smith,
28 the job supervisor responsible for the worksite. He testified the

1 project was designated as a "Class 1" project which requires air
2 sampling and compliance with the cited standard, 29 CFR
3 1926.1101(h)(2)(I). He further testified that he is aware of OSHA
4 required respirator protection and assured battery powered full face
5 mask respirators were available to his employees at the site. He
6 testified that Exhibit 1, Section 9.4.1 represented the company plan
7 which requires employees be provided respirators in accordance with the
8 standard. He testified he performs air monitoring on all company
9 projects and for the most part utilizes protection from powered full
10 face respirators. Company procedure is to wear the powered full face
11 mask commonly known as a "PAPR" on all Class 1 sites. He admitted the
12 plan documentation furnished by respondent does not use the term "PAPR"
13 but rather "full face". He testified that notwithstanding the reference
14 to only full face, it actually means the battery powered full face air
15 respirator. He testified the company plan, while appearing generic,
16 should be acceptable because all of his employees understand what they
17 need and therefore the respondent has complied by implementing a written
18 respirator protection program. Mr. Smith testified the industry
19 standard is to utilize a "PAPR or equivalent" and his company does use
20 the powered air respirator equivalent.

21 On cross-examination, Mr. Smith testified that he was not on the
22 job site on the day of the inspection and that the job specific plan did
23 not specify use of a PAPR. He admitted Exhibit 1, page 42 referenced
24 use of a half-face mask, but he did not write the plan and enforces the
25 battery powered full mask on sites based upon what he finds after air
26 sampling. He further testified there was other than Class 1 work being
27 performed on the site, including tile removal which did not require the
28 PAPR or equivalent. He testified that page 52 of Exhibit 1 refers to

1 use of a full or half-face respirator and admitted it did not provide
2 clear written guidance to employees for selection of appropriate
3 respirator protection. Mr. Smith testified he understood the citation
4 was based upon a written safety program, not what was being done or worn
5 at the job site the day of the inspection. He admitted the standard
6 requires "worksite specific procedures" but the documents furnished did
7 not satisfy standard.

8 Complainant presented closing argument and asserted the cited
9 violations had been established through the testimony of IH McLaughlin-
10 Galleron, IH Meyer and the respondent witness Mr. Danny Smith. He noted
11 the standard was applicable to the factual condition found at the
12 worksite; and all witnesses testified the project was "Class 1" which
13 then required compliance with the cited standard. He argued the
14 documents furnished by the respondent did not satisfy the standard
15 because they demonstrated merely a generic plan with no "written site
16 specific procedures" or criteria for respiratory identification or
17 selection procedures. He further argued the "serious" classification
18 was established by testimony from IH McLaughlin-Galleron, IH Meyer and
19 respondent witness Smith which confirmed the industry recognized dangers
20 and deadly aspects of asbestos as a known carcinogen.

21 Respondent presented closing argument by first representing that
22 the employer did in fact provide the highest level of powered air
23 respiratory protection devices (PAPR) equivalents through a battery
24 powered system on the site which were in use by some employees engaged
25 in Class 1 work. He argued the existent company written program
26 required use of respiratory protection based upon the level of exposure
27 and thereby adequately informed employees on the appropriate equipment
28 to be used in accordance with the OSHA regulations. He argued that Mr.

1 Smith's testimony confirmed employees understood the program, even
2 though generic, to mean utilization of a powered air respirator system.
3 The company plan and respirator availability at the site was
4 sufficiently equivalent to satisfy compliance with the cited standard.
5 He further argued that all employees wore the correct type of protection
6 on the day of the inspection. No one saw or testified any employees were
7 working with incorrect respirator protection nor were any exposure
8 hazards observed on the job site by the IH. He further argued that air
9 monitoring was performed daily by the respondent, safety meetings were
10 regularly conducted, multi-tasks were underway at the job site and some
11 tasks were not Class 1, which did not require the use of any
12 respirators. Respondent concluded by arguing the "serious"
13 classification should not apply because employees were not exposed to
14 serious physical harm. There was no evidence of any exposure to any
15 employees but rather only a document or "paper" violation. Proper
16 respirators were being worn by the employees on the site based upon Mr.
17 Smith's testimony. There was no evidence from the IH witnesses that any
18 employee was wearing an incorrect respirator. He submitted the serious
19 classification was simply inapplicable because there was no element of
20 exposure to serious injury or death in evidence.

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

25 In all proceedings commenced by the filing of a
26 notice of contest, the burden of proof rests with
the Administrator. (See NAC 618.788(1)).

27 All facts forming the basis of a complaint must be
28 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD

1 ¶16,958 (1973).

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

16 A respondent may rebut allegations by showing:

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

22 The admitted evidence and testimony established there to be no
23 written site specific plan in place or a written respiratory protection
24 program in furtherance of the requirements of the standard. Complainant
25 witnesses testimony as well as that of respondent witness Smith
26 confirmed the lack of compliance. Mr. Smith testified there was
27 equivalent compliance of respiratory protection program implementation
28 demonstrated by the actual use of powered respirators at the site and
no evidence of asbestos exposure to any employees. However the subject
standard is intended to protect employees by adequately informing them
to be aware of and avoid recognized hazards in the workplace. The
purpose of a site specific plan, the threshold requirement of air
sampling, and adequate information for employees to select the
appropriate respirator device are the criteria for compliance rather
than evidence of what type equipment was actually in use at the site on
the day of the inspection.

1 The standard was admitted to be **applicable** to the facts in
2 evidence. **Non-complying conditions** were established and admitted by
3 both complainant and respondent witnesses. The employer failed to
4 implement a required site specific plan and include information or
5 identification for selection of respirators based upon air sampling
6 results. **Employee exposure** through **access** to hazardous conditions was
7 demonstrated by admission that the project was Class 1 which requires
8 the highest level of respiratory protection. Compliance with the
9 standard requires the employer provide selection alternatives for
10 respirator protection. **Employer knowledge** of the violative conditions
11 is imputed by the governing law to the employer when a supervisor knew
12 or with reasonable diligence could have known of the violative
13 conditions. See Division of Occupational Safety and Health v. Pabco
14 Gypsum, 105 Nev. 371, 775 P.2d 701 (1989).

15 The control over the job site and testimony of respondent supervisory
16 employee Smith demonstrated he was well experienced, trained and
17 understood the dangers of asbestos exposure.

18 Based upon the facts and applicable law, the violations must be
19 confirmed.

20 The classification of the violation as serious must also be
21 confirmed. NRS 618.625 provides in pertinent part:

22 ". . . a serious violation exists in a place of
23 employment if there is a **substantial probability**
24 **that death or serious physical harm could result**
25 **from a condition** which exists, or from one or more
26 practices, means, methods, operations or processes
which have been adopted or are in use in that place
of employment unless the employer did not and could
not, with the exercise of reasonable diligence,
know of the presence of the violation."

27 Congress, through enactment of the Code of Federal Regulations
28 (CFR), develops specific standards to protect employees in the workplace

1 after extensive study and determination that particular hazards are
2 known and/or **recognized** in certain industries. A hazard is deemed
3 "recognized" when the potential danger of the condition or practice is
4 either actually known to the particular employer or generally known in
5 the industry. Continental Oil Co. v. OSHRC, 630 R.2d 446, 448 (9th Cir.
6 1980). The testimonial evidence of all witnesses confirmed the dangers
7 associated with asbestos and the need to protect all employees
8 accordingly. The issue before the board as to the violation
9 classification is not that any serious injury occurred but whether the
10 **potential** for same existed. Employees on the worksite had **access** to
11 hazardous Class 1 atmospheric conditions of asbestos which is a
12 recognized carcinogenic that can result in serious injury or death, even
13 many years after initial exposure. The **probability** for serious injury
14 or death from exposure to hazardous conditions is the governing
15 criterion. There was a preponderance of evidence in the record to
16 support the classification of the violation as serious.

17 The board finds, as a matter of fact and law, that a violation did
18 occur as to Citation 1, Item 1, 29 CFR 1926.1101(h)(2)(I), the
19 classification of the violation as "Serious" appropriate, and the
20 proposed penalty of THREE HUNDRED SEVENTY-FIVE DOLLARS (\$375.00)
21 reasonable. The board further finds a violation occurred as to Citation
22 2, Item 1, Nevada Administrative Code 618.953(2), based upon the
23 respondent's withdrawal of contest.

24 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
25 **REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as
26 to Citation 1, Item 1, 29 CFR 1926.1101(h)(2)(I) and Citation 2, Item
27 1, Nevada Administrative Code (NAC) 618.953(2). The classification of
28 Citation 1, Item 1 as "Serious" and the proposed penalty of THREE

1 HUNDRED SEVENTY-FIVE DOLLARS (\$375.00) are confirmed and approved. The
2 classification of Citation 2, Item 1 as "Other" is confirmed and the
3 ZERO (\$0.00) penalty approved.

4 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
5 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION,**
6 **DIVISION OF INDUSTRIAL RELATIONS,** to submit proposed Findings of Fact
7 and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
8 **REVIEW BOARD** and serve copies on opposing counsel within twenty (20)
9 days from date of decision. After five (5) days time for filing any
10 objection, the final Findings of Fact and Conclusions of Law shall be
11 submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by
12 prevailing counsel. Service of the Findings of Fact and Conclusions of
13 Law signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
14 **REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

15 DATED: This 30th day of December, 2010.

16 NEVADA OCCUPATIONAL SAFETY AND HEALTH
17 REVIEW BOARD

18 By /s/
19 TIM JONES, CHAIRMAN
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