

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

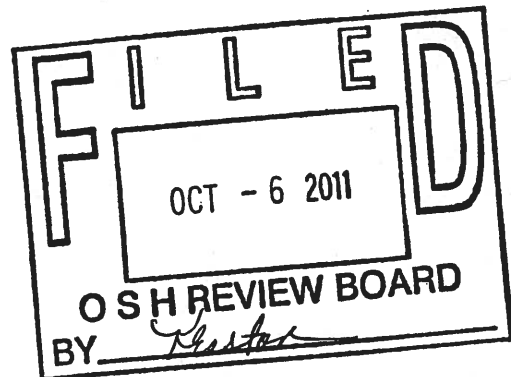
Docket No. RNO 12-1516

Complainant,

12 vs.

13 HOLLAND WATERPROOFING,

Respondent.



14
15 DECISION

16 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
17 **HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of November
18 2010, in furtherance of notice duly provided according to law, MR. JOHN
19 WILES, ESQ. and MR. MICHAEL TANCHEK, ESQ., counsel appearing on behalf
20 of the Complainant, **Chief Administrative Officer of the Occupational**
21 **Safety and Health Administration, Division of Industrial Relations**
22 (OSHA); and MR. DALE HOLLAND, President, appearing on behalf of
23 Respondent, **HOLLAND WATERPROOFING**; the **NEVADA OCCUPATIONAL SAFETY AND**
24 **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 Nevada OSHA sets forth allegations of
28 violation of Nevada Revised Statutes as referenced in Exhibit "A",

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1 attached thereto.

2 Citation 1, Item 1, charges a violation of 29 CFR
3 1910.134(c)(2)(ii). The complainant alleged the respondent employer
4 failed to provide a medical evaluation prior to employee use of a
5 respirator device. The violation was classified as "Serious". The
6 proposed penalty for the alleged violation is in the amount of ONE
7 THOUSAND FIVE HUNDRED SIXTY DOLLARS (\$1,560.00).

8 Prior to commencement of the hearing, complainant withdrew Citation
9 2, Item 1 referencing 29 CFR 1910.134(f)(2) and Citation 2, Item 2
10 referencing 29 CFR 1910.1200(g)(1).

11 Complainant and respondent stipulated to the admission of evidence
12 at Exhibits 1 through 4.

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

17 Ms. McLaughlin-Galleron conducted an inspection of respondent's
18 worksite at the Kennamental Inc. plant located in Fallon, Nevada on June
19 10, 2011. An anonymous complaint had been reported to Nevada OSHA
20 involving confined space procedures, sandblasting, and inappropriate
21 respirator equipment. However at the time of the inspection, work
22 subject of the complaint was not being performed. The respondent
23 foreman, Mr. Curren, informed the IH that he had not been present for
24 any previous sandblasting work. Accordingly, there was no ability to
25 observe the working conditions subject of complaint or conduct an
26 inspection relating to utilization of respirator equipment.

27 Ms. McLaughlin-Galleron testified that during the "walk around"
28 portion of the inspection she observed a 3M half-mask respirator in the

1 work area. She obtained information that the respirator belonged to
2 respondent employee Sergio Mariscal. The employee indicated that he had
3 used the respirator in the morning when operating a blower. The IH
4 determined the dust mask type of respirator was appropriate for the work
5 task Mr. Mariscal described. During the course of her interview with
6 Mr. Mariscal, the IH was informed that he did not recall ever having
7 been subjected to a medical evaluation or fitted by his employer for
8 respirator use. After making inquiry of the employer and visiting the
9 business office in Sparks, Nevada, Ms. McLaughlin-Galleron obtained a
10 copy of the employer's written respiratory protection program. There
11 was no evidence of employee Mariscal's medical evaluation nor a fit test
12 ever having been provided. IH McLaughlin-Galleron testified she had
13 been informed that employee Mariscal brought the respirator from home
14 and was not required to utilize same by the employer. Notwithstanding
15 the foregoing, the IH referenced the applicable standard and determined
16 it must be enforced if any employee on a worksite is utilizing a
17 respirator without having had a medical evaluation or a fit test for
18 same. She testified the employer foreman was aware employee Mariscal
19 was utilizing a respirator type face mask that he had brought from home.
20 She further confirmed other employees were aware of same based upon her
21 interviews.

22 On direct examination as to the classification of serious, Ms.
23 McLaughlin-Galleron testified that the violation could result in death
24 or serious bodily harm and any impairment could be temporary or
25 permanent. The IH testified she has been given training knowledge of
26 death or serious injury occurring from this type of violation. She
27 provided no additional evidence or documentation to establish the
28 violative conduct to be of a serious nature but reaffirmed her training

1 and experience indicated a potential for same.

2 IH McLaughlin-Galleron testified to penalty calculations which she
3 referenced as having been assessed in furtherance of the enforcement
4 manual. She testified that she used a "medium severity" reference for
5 the calculations based upon the facts she discovered and her opinion.
6 She rendered credits for the employer size and other factors as
7 applicable which reduced the penalty to that proposed in the amount of
8 ONE THOUSAND FIVE HUNDRED SIXTY DOLLARS (\$1,560.00). She further
9 testified that the employer was not required to maintain a safety
10 program due to its size.

11 On cross-examination Ms. McLaughlin-Galleron testified she observed
12 no other employees working with or in possession of employer provided
13 respiratory protection. She found no direct evidence of "use" of
14 respirators on the site, and stated she "gathered" employee Mariscal was
15 using the device while working from her interviews with other employees
16 and his own responses to her during the inspection. She admitted her
17 testimony on potential for death was anecdotal and that she had no
18 personal knowledge of actual death occurring under the facts presented.

19 Counsel and respondent representative both provided closing
20 arguments. Complainant argued that the reasons for medical evaluations
21 for respiratory use are well supported in codified occupational safety
22 and health law. He asserted there was no evidence or testimony that
23 contradicted the facts of violation as provided by Industrial Hygienist
24 McLaughlin-Galleron. There was no employer record of employee Mariscal
25 having been tested or given a medical evaluation prior to the violation,
26 although the employer did follow through with an evaluation after the
27 citation. Counsel argued the complainant met its burden of proof under
28 the applicable law to demonstrate a violation of the cited standard.

1 Respondent provided closing argument asserting employee Mariscal
2 was not required to utilize a face mask respirator for his job task nor
3 provided one by the employer. The employee simply brought a dust mask
4 type respirator from home just for his own personal convenience. He
5 argued the law did not intend to enforce the cited standard against an
6 employer under the facts presented. The respondent asserted a lack of
7 **applicability** of the standard to the subject facts in evidence. He
8 further argued that since the employer did not provide the respirator,
9 there was no requirement for a medical evaluation or a fit so there
10 could be no violation of the standard. Respondent asserted there was
11 no **employer knowledge** of respirator use because the employer was not
12 required to wear a mask for his job task therefore no violation of the
13 standard. Respondent argued that the bureaucratic misapplication of the
14 cited OSHA standard demonstrated the burden government places upon
15 businesses with laws that make no sense or have any practical
16 relationship to a working environment.

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

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

23 All facts forming the basis of a complaint must be
24 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD
25 ¶16,958 (1973).

26 To prove a violation of a standard, the Secretary
27 must establish (1) the **applicability** of the
28 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,

1 Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
2 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
3 Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
4 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).

5 A respondent may rebut allegations by showing:

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

10 The voluntary use of a face mask respirator by an employee at a
11 worksite, notwithstanding a lack of any employer requirement to do so
12 or a job task that required same represents a difficult case for both
13 enforcement and review. These unusual circumstances require reasonable
14 application of the standards, however the parameters for review of
15 alleged violations by this board must be subject to the governing law.
16 The board is empathetic to the position of a small employer and
17 understanding of the facts where an employee elects to utilize personal
18 protection based upon his own comfort and convenience, however the board
19 must apply the established law to the facts, evidence and arguments.

20 The cited standard as codified is **applicable** to the facts in
21 evidence. Employee Mariscal was utilizing a face mask respirator on the
22 job site while working for the respondent employer. **Non-complying**
23 **conditions** were established under the sworn testimony of Industrial
24 Hygienist McLaughlin-Galleron and not subject to any sworn testimony
25 in rebuttal. No medical evaluation or fit test was provided by the
26 employer. **Employee exposure** through **access** to potential hazardous
27 conditions was demonstrated because there was a mask on site, it was
28 utilized by an employee, and there was simply no medical evaluation

1 performed. **Employer knowledge** of the violative conditions is imputed
2 under the governing law to the employer when a supervisor knew **or with**
3 **reasonable diligence** could have known of the violative conditions. See
4 Division of Occupational Safety and Health v. Pabco Gypsum, 105 Nev.
5 371, 775 P.2d 701 (1989). The job site was not large, the number of
6 employees was limited, and the foreman clearly could have known, with
7 the exercise of reasonable diligence, that employee Mariscal was wearing
8 a mask notwithstanding a lack of any requirement for his job task. The
9 foreman, acting in the place of the respondent owner, should have
10 challenged the employee for wearing a non-required mask which had not
11 been subject of the OSHA requirements for fitting, testing and medical
12 evaluation.

13 Based upon the facts and applicable law, the violation must be
14 confirmed.

15 The classification of the violation as **serious** must reviewed under
16 the terms of applicable Nevada law. NRS 618.625 provides in pertinent
17 part:

18 ". . . a serious violation exists in a place of
19 employment if there is a **substantial probability**
20 **that death or serious physical harm could result**
21 **from a condition** which exists, or from one or more
22 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."

23 The board finds insufficient proof to support classification of the
24 violation as "serious". The facts in evidence do not demonstrate a
25 "substantial probability" that death or serious physical harm could
26 result due to the subject employee failing to have been given a medical
27 evaluation for use of a simple face mask or dust mask prevention device
28 not required for his employment. At Exhibit 1, pages 5 through 6 in

1 evidence, the IH determined the severity at Medium (M), probability at
2 Lesser (L) and the gravity at 05. The conditions, facts and evidence
3 involved in this violation, coupled with the unusual circumstances in
4 the voluntary use of a common face or dust mask by an employee do not
5 meet the burden of proof to confirm a serious violation. However the
6 board finds substantial evidence for reclassification of the violation
7 as "other than serious".

8 "Where the Secretary alleges but fails to prove the
9 seriousness of a violation, a non-serious violation
10 generally will be found. A.R.A. Mfg., 11 OSH Cases
11 1861, 1863-64 (Rev. Comm'n 1984). Rabinowitz,
Occupational Safety and Health Law, 2008, 2nd Ed.,
page 225."

12 The board finds, as a matter of fact and law, that a violation did
13 occur as to Citation 1, Item 1, 29 CFR 1910.134(c)(2)(ii). The
14 violation is reclassified from "Serious" to "Other". The proposed
15 penalty is reduced based upon the evidence to ONE THOUSAND DOLLARS
16 (\$1,000.00) reasonable.

17 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
18 **REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as
19 to Citation 1, Item 1, 29 CFR 1910.134(c)(2)(ii). The violation is
20 reclassified from "Serious" to "Other". The proposed penalty is reduced
21 to ONE THOUSAND DOLLARS (\$1,000.00) is confirmed.

22 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
23 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION,**
24 **DIVISION OF INDUSTRIAL RELATIONS,** to submit proposed Findings of Fact
25 and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
26 **REVIEW BOARD** and serve copies on opposing counsel within twenty (20)
27 days from date of decision. After five (5) days time for filing any
28 objection, the final Findings of Fact and Conclusions of Law shall be

