

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,

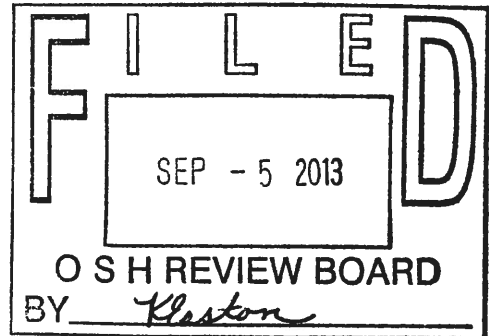
Docket No. LV 13-1647

Complainant,

vs.

12 UNITED PARCEL SERVICE,

Respondent.



14
15 D E C I S I O N

16 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
17 **HEALTH REVIEW BOARD** at a hearing commenced on the 14th day of August
18 2013, in furtherance of notice duly provided according to law, MR.
19 DONALD SMITH, ESQ., counsel appearing on behalf of the Complainant,
20 **Chief Administrative Officer of the Occupational Safety and Health**
21 **Administration, Division of Industrial Relations (OSHA)**; and MR. STEVE
22 SIMKO, ESQ., appearing on behalf of Respondent, **United Parcel Service,**
23 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

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

28 Citation 1, Item 1 charged a "Serious" violation of Nevada Revised

1 Statute 618.375. Complainant alleged respondent violated the cited
2 Nevada Revised Statute commonly known as the "General Duty Clause" by
3 allowing incompatible materials (bleach and sulfamic acid) to be stored
4 in proximity, which if accidentally mixed together could result in a
5 violent chemical reaction and expose employees to serious injury or
6 death. The violation was classified as **Serious** and a penalty in the
7 amount of FIVE THOUSAND DOLLARS (\$5,000.00).

8 Citation 2, Item 1, referencing a violation of 29 CFR 1904.32(a)(1)
9 was withdrawn by the complainant prior to the commencement of the
10 hearing.

11 Counsel for the Chief Administrative Officer presented testimony
12 and documentary evidence with regard to the alleged violation.

13 Certified Safety and Health Officer (CSHO) Greg Vilkaitis
14 identified the complainants evidence packet containing Exhibits 1
15 through 3. Mr. Vilkaitis explained the conditions found at the worksite
16 at the time he conducted his inspection. Specific reference was made
17 to the Exhibit 1 inspection report, narrative and worksheets during
18 direct examination. Mr. Vilkaitis was assigned an inspection located
19 at the United Parcel Service (UPS) facility located at 335 Arby Avenue,
20 in Las Vegas, Nevada based on three complaints. He found only one of
21 the complaints to be valid. He described his observations and the
22 photographic evidence at Exhibit 2 as depicting bleach and sulfamic acid
23 stored adjacently on metal shelving in an area identified as the "main
24 Porter's Cage". He described the markings on the bags as particularly
25 shown in photographic Exhibit 2, numbers 1, 2 and 3. He testified the
26 respondent employer provided a Material Data Safety Sheet (MSDS) which
27 referenced the bleach as incompatible with acids and potential for
28 "chlorine gas" release by contact with acids. The employer also

1 provided an MSDS for the sulfamic acid which referenced the material as
2 incompatible with oxidizers, strong bases and bleach or both. On
3 continued direct examination he described the hazards that could occur
4 if the storage bag containers were broken or accidentally opened and
5 mixed as creating the potential for an "exothermic" reaction. He
6 explained this could result in the discharge of heat and possible
7 explosion at some level.

8 Mr. Vilkaitis testified that based upon the MSDS describing the
9 potential hazards from proximate storage of acid and bleach, and his
10 understanding of the release of heat which could be violent if the
11 materials mixed, he determined the existence of a hazard likely to cause
12 serious injury or death and cited a violation of the statutory general
13 duty clause. He testified there was feasibility to easily store the
14 materials separately. Mr. Vilkaitis referenced the severity gravity and
15 probability ratings identifying the first as, high, but probability at
16 lesser because only five employees were exposed to the potential
17 dangers. He rated gravity at five (5) based upon his observations,
18 testimony and the information contained in the MSDS.

19 On cross-examination, Mr. Vilkaitis testified he found no evidence
20 of mixing of the materials in the storage area, and observed no open
21 bags nor leakage. He did not perform tests for chlorine gas reaction
22 nor any other tests during his inspection at the worksite. He explained
23 his citation was only for storage of the materials together, not for
24 leaks or any other hazards. He further testified that his conclusion
25 as to the existence of a hazard was based solely on the MSDS
26 information.

27 On continued cross-examination, CSHO Vilkaitis responded to
28 questions on how an accidental mix of the stored materials might occur

1 and cause a chemical reaction. He stated that a shelf could collapse
2 or a fire might occur. He found no evidence of overloaded shelving nor
3 evidence of fire hazards. When questioned as to whether the potentials
4 for a mixture and creation of a chemical reaction were speculative, Mr.
5 Vilkaitis responded "I suppose so". On further questioning as to the
6 potential for serious injury or death, Mr. Vilkaitis explained that
7 employees might suffer broken bones or concussions if something
8 happened, causing a mixing reaction such as startled employees could
9 fall, strike their head, and suffer broken bones or a concussion. On
10 questioning as to how a mixture could happen he responded "I don't know
11 how it could happen . . . the basis of the citation was the storage
12 prohibitions provided in the MSDS . . ." Complainant concluded its case
13 in chief.

14 Respondent presented evidence and testimony through Mr. Mitchell
15 Ferguson who was stipulated to be qualified as an "expert witness". Mr.
16 Ferguson reviewed his background and expertise which included
17 certification in Hazardous Materials Management. He examined the
18 containers of bleach and sulfamic acid at the worksite, conducted
19 various analyses based upon his education, and performed additional
20 research of the chemical compounds contained in the two products. He
21 described the concentration in the bleach as very low, ". . . similar
22 to household bleach". Mr. Ferguson testified the sulfamic acid was
23 stored in a non-fabric weave container and he observed no leakages. He
24 described the sulfamic acid to be in a ". . . granular not liquid form
25 . . .". He opined there was no hazard by storing these two chemicals
26 near the other based upon his background, education and review of the
27 current research for any potential reaction. He testified the reaction
28 from mixing the bleach with sulfamic acid would produce ". . . only a

1 small amount of heat and a resultant salt . . . but no CO2 chlorine gas
2" He testified based upon his expertise no hazard could be
3 created by mixture of the two chemicals from a resultant salt. Mr.
4 Ferguson further testified to the lack of hazard and unlikelihood of any
5 serious injury from a mixture based on his expertise in hazard materials
6 management as supported by the **United States Hazardous Shipping**
7 **Guidelines** which do not restrict the two products from being shipped
8 together, i.e. in the same truck. He testified there are no OSHA
9 standards identifying hazards of sulfamic acid. At the respondent
10 storage facility, the amount of sulfamic acid on the shelf in granular
11 form may only create minor heat if mixed with the bleach but no chlorine
12 gas, the building cage was entirely open, and there was no evidence of
13 any accidental or intentional mixing occurring in the storage facility.
14 He further testified there was no potential for chlorine poisoning based
15 upon the well recognized research data which demonstrates the two
16 chemicals cannot produce CO2 (chlorine gas); it was simply not possible.
17 He further testified there was no possibility of a "violent" reaction
18 from mixture because only some small amount of heat can be produced as
19 the concentrations of both products were very low.

20 Mr. Ferguson identified Respondent Exhibit A stipulated in evidence
21 which included his background and "CV" as well as Exhibit B, including
22 research studies as to the chemicals.

23 On closing argument, the complainant argued the case was simple
24 based on the MSDS which provides the two chemicals, acid and bleach
25 cannot be stored together. There were employees in the area satisfying
26 exposure, and the hazards recognized through the MSDS. He asserted,
27 based upon the CSHO testimony, the reaction could be dangerous and
28 likely to cause serious injury. He further asserted there was a very

1 easy methodology to eliminate or materially reduce the hazard by storing
2 the product separately. Counsel concluded asserting the burden of proof
3 had been met to satisfy the general duty clause.

4 Respondent presented closing argument. He referenced the burden of
5 proof under the general duty clause as very specific, requiring the
6 existence of a hazard and one likely to cause serious injury or death.
7 He asserted the complainant provided no evidence to establish the
8 elements for violation. He argued the key to the case is nonexistence
9 of any hazard whatsoever. He admitted that while the MSDS does restrict
10 storage of acid and bleach together, the warnings were generic. All
11 acids are not the same or dangerous. **Sulfamic** acid stored together with
12 bleach at the concentrations and in the form in evidence does not create
13 any hazard whatsoever. While the MSDS does warn individuals not to
14 store the general products together, Mr. Ferguson is a well qualified
15 expert in the field and testified that even if mixed the two products
16 identified in evidence would not result in any hazardous condition
17 created nor likelihood of serious injury. He further argued the general
18 duty clause requires a **recognized hazard** in the industry, but none was
19 in evidence to establish either storage or mixture as a hazard.
20 Further, based upon the U.S. Department of Transportation's (USDOT)
21 shipping guidelines, there is no such restriction. Further, Even bleach
22 at higher concentrations accidentally mixing with sulfamic acid would
23 not result in a hazard, therefore respondent storing these particular
24 products together should be treated similarly to the USDOT guidelines.
25 He argued that OSHA attempts to create new law under the general duty
26 clause. No specific OSHA standards identify sulfamic acid as a hazard.
27 Treating all acid products similarly simply based on an MSDS,
28 notwithstanding concentrations and without any evidence showing that

1 chlorine gas or other dangerous chemicals could result, does not satisfy
2 the burden of proof. Nothing other than low heat and salt can possibly
3 result from any accidental mixing. Counsel concluded by asserting the
4 general duty clause was reserved for unusual or peculiar situations,
5 there is no hazard codified under the OSHA standards for the two
6 chemicals being stored together creating a hazard, and no hazard is
7 "recognized by any industry" even by U.S. Department of Transportation
8 (DOT) and clearly should not be so for respondent.

9 The board in reviewing the facts, documentation, testimony and
10 other evidence must measure same against the established applicable law
11 developed under the Occupational Safety & Health Act.

12 A serious violation can be established under Nevada occupational
13 safety and health law in accordance with Nevada Revised Statutes.

14 (NRS) 618.625(2) provides:

15 ...a serious violation exists in a place of
16 employment if there is a **substantial probability**
17 **that death or serious physical harm could result**
18 **from a condition** which exists or from one or more
19 practices, means, methods, operations or processes
20 which have been adopted or are in use at the place
of employment unless the employer did not and could
not, with the exercise of reasonable diligence,
know of the presence of the violation. (Emphasis
added)

21 N.A.C. 618.788(1) provides:

22 In all proceedings commenced by the filing of a
23 notice of contest, the burden of proof rests with
the Administrator.

24 NRS 618.375(1) commonly known as the "General Duty Clause" provides
in pertinent part:

25 ". . . Every employer shall:

26 1. Furnish employment and a place of employment
27 which are free from recognized hazards that are
28 **causing or are likely to cause death or serious**
physical harm to his employees . . ." (emphasis

1 added)

2 In citing an employer under the General Duty
3 Clause, it is necessary to demonstrate the
4 **existence of a recognized hazard** as mandated by the
5 statute; whereas citing an employer under a
6 specific standard does not carry such a requirement
7 because Congress has, in codification, adopted the
8 recognition of such hazard for the particular
9 industry. To establish a violation of the **General
Duty Clause**, the complainant must **do more than show
the mere presence of a hazard**. The General Duty
Clause, ". . . obligates employers to rid their
workplaces **not** of possible or reasonably
foreseeable hazards, but **recognized hazards** . . ."
Whitney Aircraft v. Secretary of Labor, 649 F.2d
96, 100 (2nd Cir. 1981).

10 At Citation 1, Item 1, complaint cited respondent for a violation
11 of NRS 618.375, the "General Duty Clause".

12 "The elements of a general duty clause violation
13 identified by the first court of appeals to
14 interpret Section 5(a)(1) have been adopted by both
15 the Review Commission and the courts in subsequent
16 cases. The court in *National Realty and
17 Construction Co., Inc. v. OSHRC*, 489 F.2d 1257
18 (D.C. Cir. 1973), listed three elements that OSHA
19 must prove to establish a general duty violation,
20 and the Review Commission extrapolated a fourth
21 element from the court's reasoning: (1) **a condition
or activity in the workplace presents a hazard** to
22 an employee; (2) the condition or activity is
23 **recognized as a hazard**; (3) the hazard is causing
24 or is **likely to cause death or serious physical
harm**; and (4) a feasible means exists to eliminate
25 or materially reduce the hazard. The four-part
26 test continues to be followed by the courts and the
27 Review Commission. E.g., *Wiley Organics Inc. v.
28 OSHRC*, 124 F.3d 201, 17 OSH Cases 2125 (6th Cir.
1997); *Beverly Enters., Inc.*, 19 OSH Cases 1161,
1168 (Rev. Comm'n 2000); *Kokosing Constr. Co.*, 17
OSH Cases 1869, 1872 (Rev. Comm'n 1996). The
National Realty, decision itself continues to be
routinely cited as a landmark decision. See, e.g.,
Kelly Springfield Tire Co. v. Donovan, 729 F.2d
317, 321, 11 OSH Cases 1889 (5th Cir. 1984); *Ensign-
Bickford Co. v. OSHRC*, 717 F.2d 1419, 11 OSH Cases
1657 (D.C. Cir. 1983); *St. Joe Minerals Corp. v.
OSHRC*, 647 F.2d 840, 845 n.8, 9 OSH Cases 1946 (8th
Cir. 1981); *Pratt & Whitney Aircraft Div. v.
Secretary of Labor*, 649 F.2d 96, 9 OSH Cases 1554
(2d Cir. 1981); *R.L. Sanders Roofing Co. v. OSHRC*,
620 F.2d 97, 8 OSH Cases 1559 (5th Cir. 1980); *Magma*

1 *Copper Co. V. Marshall*, 608 F.2d 373, 7 OSH Cases
2 1893 (9th Cir. 1979); *Bethlehem Steel Corp. v.*
3 *OSHRC*, 607 F.2d 871, 7 OSH Cases 1802 (3d Cir.
4 1979). (emphasis added)

5 When the Secretary has introduced evidence showing
6 the existence of a hazard in the workplace, the
7 **employer may, of course, defend by showing that it**
8 **has taken all necessary precautions to prevent the**
9 **occurrence of the violation.** *Western Mass. Elec.*
10 *Co.*, 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981).
11 (emphasis added)

12 There was insufficient evidence of an unsafe workplace and no
13 satisfaction of the complainant's burden of proof to support a violation
14 of NRS 618.375, the General Duty Clause. The board finds no evidence
15 to establish an **actual hazard in the workplace, no industry recognized**
16 **hazard**, no reasonable likelihood of the stored product accidentally
17 mixing nor a hazard **likely to cause death or serious physical harm.**
18 While the initial determination by the CSHO reflected a good faith
19 assessment based upon the generic warnings in the MSDS, the latter alone
20 is not **proof** of a hazard. The MSDS serves as a warning, often generic
21 in nature. Even assuming for purpose of argument that the MSDS
22 established a **recognized hazard in the industry** which the board does
23 not find here, ". . . once the existence of a recognized hazard has been
24 demonstrated, OSHA must prove that the hazard is 'causing or likely to
25 cause death or serious physical harm to the employees. . .'" 29 U.S.C.
26 §654(a)(1), NRS 618.375(1).

27 The evidence of the described storage area, the undisputed
28 conditions of the products stored, the expert testimony regarding
29 chemical properties, the un rebutted expert testimony describing the
30 limited resultant chemical reactions, all prevent a finding of a hazard
31 by a preponderance of evidence.

32 Furthermore, the CSHO testimony as to what and any likelihood of

1 serious injury or harm might occur was speculative and not supported by
2 the evidence nor persuasive given opposing testimony.

3 ". . . the existence of a hazard is established if
4 the hazard can **occur under other than freakish or**
5 **utterly implausible concurrence of circumstances.**"
6 *Walden Healthcare Ctr.*, 16 OSH Cases 1052, 1060
(Rev. Comm'n 1993) (quoting *National Realty &*
Constr. Co. v. OSHRC, 489 F.2d 1257, 1265-66, 1 OSH
Cases 1422 (D.C. Cir. 1973)). (emphasis added)

7 The testimony of CSHO Vilkaitis comports with the respondent
8 position as to the lack of probability for any hazard to occur, even
9 under a "catastrophic" condition. The Federal Review Commission has
10 rejected **catastrophe** for protection under the probability factors.
11 However, the evidence here was clearly that even under catastrophic
12 circumstances no dangerous chemical reaction could occur and certainly
13 not one likely to cause or result in serious injury or death.

14 The United States Circuit Court in *National Realty* (supra) is often
15 cited in support of the statutory mandate that ". . . OSHA must prove
16 that **the hazard is causing or likely to cause death or serious physical**
17 **harm to employees . . .**" (Emphasis added)

18 ". . . The statute language does not require the
19 Secretary to show that an accident is likely but
20 rather that **if** an accident were to occur, death or
21 serious physical harm would **likely be the result**
22 Where an occupational illness can result
23 from exposure to a chemical compound, the Secretary
24 is not required to prove a substantial probability
25 that an exposed employee will contract the disease
26 but only that death or serious physical harm is
27 likely if the disease does occur." *National Realty*
Constr. CO. v. OSHRC, 489 F.2d 1257, 1265 n.33, 1
OSH Cases 1422 (D.C. Cir. 1973). *Accord Titanium*
Metals Corp. v. Usery, 579 F.2d 536, 543, 6 OSH
Cases 1873 (9th Cir. 1978).

26 . . . The Secretary's obligation to demonstrate the
27 alleged violation by a preponderance of the
28 reliable evidence of record **requires more than**
estimates, assumptions and inferences . . . [t]he
Secretary's **reliance on mere conjecture is**
insufficient to prove a violation . . . [findings

1 must be based on] 'the kind of evidence on which
2 responsible persons are accustomed to rely in
3 serious affairs.' *William B. Hopke Co., Inc.*, 1982
4 OSAHRC LEXIS 302 *15, 10 BNA OSHC 1479 (No. 81-206,
5 1982) (ALJ) (citations omitted). (emphasis added)

6 Violations of the general duty clause are the most difficult to
7 prove. The subject case demonstrates the respondent did not ". . . fail
8 to furnish employment and a place of employment . . . free from
9 **recognized hazards . . . likely to cause death or serious physical harm**
10 **to employees . . .**" NRS 618.375(1), 29 U.S.C. §654(a)(1) supra.

11 Based upon the facts, evidence and testimony, it is the decision
12 of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no
13 violation of Nevada Revised Statutes did occur as to Citation 1, Item
14 1, NRS 618.375, the general duty clause, and the proposed classification
15 and penalty is denied.

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

25 DATED: This 5th day of September 2013.

26 NEVADA OCCUPATIONAL SAFETY AND HEALTH
27 REVIEW BOARD

28 By /s/
 JOE ADAMS, Chairman