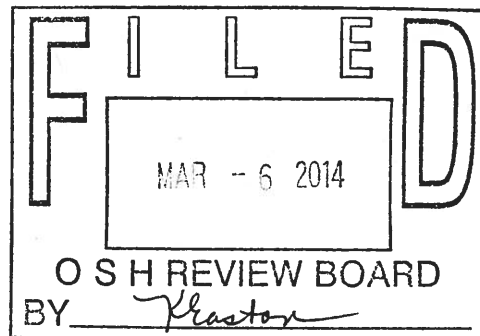


1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD

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

Docket No. LV 13-1666



Complainant,

vs.

INTERNATIONAL MARBLE OF LAS VEGAS,

Respondent.

11
12
13 **DECISION**

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 12th day of February,
16 2014, in furtherance of notice duly provided according to law, MR.
17 DONALD C. SMITH, ESQ. and MS. SALLI ORTIZ, ESQ., counsel appearing on
18 behalf of the Complainant, **Chief Administrative Officer of the**
19 **Occupational Safety and Health Administration, Division of Industrial**
20 **Relations** (OSHA); and MR. RAY FESLER, President and Managing Member
21 appearing on behalf of Respondent, **International Marble of Las Vegas;**
22 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

23 Jurisdiction in this matter has been conferred in accordance with
24 Nevada Revised Statute 618.315.

25 The complaint filed by the OSHA sets forth allegations of violation
26 of Nevada Revised Statutes as referenced in Exhibit "A", attached
27 thereto. The alleged violations in Citation 1, Item 1, referenced 29
28 CFR 1910.134(c)(1), and Citation 1, Item 2, 29 CFR 1910.134(k)(1).

1 At Citation 1, Item 1, complainant alleged the employer failed to
2 establish and implement a written respiratory protection program with
3 worksite specific procedures in violation of the cited standard. The
4 alleged violation was classified as "Repeat/Serious" and a penalty
5 proposed in the amount of \$5,600.00.

6 At Citation 1, Item 2, complainant alleged the respondent employer
7 failed to ensure that each employee assigned job duties involving the
8 use of safety half-face respirators was provided information and
9 training, including but not limited to the use, care, limitations and
10 storage of assigned respirator in violation of the cited standard. The
11 standard requires that an employer ensure each employee demonstrate
12 knowledge of the basic elements of respirators and limitations and
13 capabilities. The violation was classified as "Repeat/Serious" and a
14 penalty proposed in the amount of \$5,600.00.

15 Complainant and respondent representative stipulated to the entry
16 of Complainant Exhibits 1 through 3 prior to commencement of the
17 hearing.

18 Counsel for complainant presented evidence and witness testimony
19 from Industrial Hygienist (IH) Mr. Satish Shete and (IH) Supervisor Mr.
20 John Hutchison. The witnesses referenced the inspection, reports and
21 narrative investigative information developed at Exhibits 1, 2 and 3
22 admitted in evidence.

23 The testimony and exhibits established Nevada OSHA (NOSHA)
24 conducted initial inspections of the respondent's worksite commencing
25 in 2008. Violative conditions were found and citations issued for
26 violations of 29 CFR 1910.134(c)(1) and 29 CFR 1910.134(k)(1). The
27 respondent admitted the violations and agreed to correct the cited
28 conditions. Thereafter Abatement Certification and payment of penalties

1 were provided to NOSHA by respondent.

2 In June of 2009 a NOSHA referral report inspection of the
3 respondent worksite was performed by Mr. Shete. During the inspection,
4 the compliance officer found no abatement of the violative conditions
5 under for citation issued from the previous inspection. The findings
6 of violation of September 2008 were **not** corrected. Thereafter, Failure
7 To Abate citations for the September 2008 citations were issued based
8 upon the 2009 referral report inspection. After attempts to open
9 inspections to verify abatement through visits at the site, NOSHA
10 conducted an inspection commencing in April 2012, which led to the
11 citations for the current repeat/serious violations.

12 After a "walk around inspection" of the respondent plant site the
13 compliance officer found the original violations unabated and
14 continuing. On May 20, 2013 the complainant issued citations and
15 notification of penalties based upon the original conditions not having
16 been abated and again existent at the time of the most recent
17 inspection.

18 IH Shete testified he observed the cited hazardous conditions and
19 referenced his inspection and narrative reports in evidence. He
20 testified respondent employee George Lopez was working in the warehouse
21 section of the plant site utilizing an AO Safety Half-face Respirator.
22 Mr. Lopez was spraying a product the IH identified as Polyester Gel
23 Coat. He confirmed two major ingredients in the product were styrene
24 monomer and methyl methacrylate. After further investigation, Mr. Shete
25 determined that other harmful chemicals described as Ketone (MEK) and
26 Methyl Ketone Peroxide (MEKP) were also utilized when preparing the
27 products sprayed with the Gel Coat. Based upon interviews and document
28 requests, Mr. Shete found that employee Lopez had not received training

1 nor had the employer developed and implemented a written respiratory
2 protection program as required by the cited OSHA standards. He
3 recommended the citations at Items 1 and 2.

4 IH supervisor Hutchison identified documents in evidence at
5 Exhibits 2 and 3 as the initial inspections and citations in 2008, the
6 follow on inspections establishing failure to abate the original
7 violative conditions and the previous confirmed violations. Mr.
8 Hutchison further identified photographic evidence at Exhibit 3. He
9 testified with regard to employee medical evaluations, fit tests, proper
10 care of respirators and training involving the utilization of AO Safety
11 Half-face Respirators as required by the cited OSHA standards. He
12 testified to the lack of employer documentation to show the required
13 employee training and information, including the use, care, limitations
14 and storage of any assigned respirators.

15 Mr. Hutchison referenced at Exhibit 2, the prior citations issued,
16 the failure to abate violative conditions under the citations, and the
17 current citations issued to establish the "repeat/serious" status and
18 classification of the violations.

19 Messrs. Shete and Hutchison both testified in support of the
20 classification of "Serious" based upon the recognized hazardous
21 chemicals utilized for spraying and the need for employee respiratory
22 protection to prevent serious injury or death. Mr. Shete explained the
23 high severity rating at Citation 1, Item 1 as due to there being no
24 respiratory protection plan and the lack of competent training records
25 to show compliance referenced at Item 2. Both witnesses testified on the
26 bases of the penalty assessments under OSHA guidelines and the extensive
27 reductions made to reduce the total amounts as credits for the low
28 number of respondent employees and the duration of potential exposure.

1 Complainant counsel presented adverse witness testimony from Mr.
2 Ray Fesler, the President and Managing Member of respondent. He
3 testified with regard to the initial citations, abatement of the
4 conditions and filing of notices of correction. He acknowledged his
5 understanding of the charges in the repeat/serious citations currently
6 before the board. Mr. Fesler asserted his difficulties in communicating
7 with OSHA representatives, his failure to actually receive any notices
8 on the failure to abate, referencing IH testimony they were left with
9 an employee at the site, and his belief company efforts were compliant
10 with OSHA standards.

11 Mr. Fesler acted as both the company representative and a witness
12 in the hearing proceedings. He made statements in the form of
13 explanations rather than cross-examination. He asserted the reported
14 investigative facts of what occurred did not warrant findings of
15 violations nor repeat classifications.

16 Mr. Fesler conducted limited cross-examination of compliance
17 officers Shete and Hutchison. Mr. Shete testified he did not
18 specifically request documents identified as safety "manuals", but
19 rather requested any documents in the respondent's possession to
20 demonstrate compliance with the subject OSHA standards. Mr. Shete
21 testified he inspected the mask worn by employee Lopez at the time of
22 his investigation, determined it appeared to be in good working order
23 and the correct mask for the purpose. Mr. Shete also testified **lack of**
24 **employee knowledge and training documentation** to be the bases for the
25 cited violations and not the particular mask observed on Mr. Lopez at
26 the time of the inspection.

27 At the conclusion of complainant's case respondent presented
28 testimony of witness Mr. George Lopez. He identified himself as the

1 only employee who sprays product at the plant. He testified the
2 spraying work occurs ". . . only 5 to 10 minutes at a time . . . but
3 only as necessary . . . not every day . . .". He also testified he had
4 a "manual and proper mask for spraying at all times . . .". He
5 testified to having a "fit test" every year and said he now uses a full
6 face mask which he understands to be compliant with OSHA standards.

7 On cross-examination Mr. Lopez testified he sprays "Gelco" (Gel
8 Coat) but did not know if it contained hydro peroxide. He stated "I
9 don't understand that one." He admitted not knowing the chemicals which
10 comprised Gelco (Gel Coat) but stated he had ". . . read the papers .
11 . . and I know what kind - like chemicals it have . . .". Mr. Lopez
12 could not recall whether he had used the same type mask (respirator)
13 since 2008. He testified he reads English "pretty well." Mr. Lopez
14 responded that he was given a fit test ". . . at a clinic . . .". As
15 to frequency of testing, he testified it occurred ". . . last year only,
16 I think, one." When presented with the documents furnished by
17 respondent to NIOSH reflecting a medical examination for fit testing on
18 June 1, 2012, December 10, 2012, and February 20, 2013 he could not
19 recall the dates, other than the first in June. He could not recall
20 other fit test dates, nor provide clear testimony to support the test
21 documentation. When questioned as to whether he had read the OSHA
22 standards applicable to respirator use he responded ". . . yeah, I
23 guess."

24 On continued cross-examination Mr. Lopez testified on the company
25 respirator plan furnished by respondent to NIOSH to establish the
26 existence of the respirator training program as required by the cited
27 standard. Mr. Lopez testified he saw it for the first time ". . . yeah
28 I guess" five years ago and confirmed he was consistently trained in

1 respirator use. Complainant counsel referenced Exhibit 3, page 133 as
2 the employer plan document furnished to NOSHA for verification of Mr.
3 Lopez training dates on October 3, 2012 and May 10, 2013 and bearing his
4 signature. Counsel challenged the testimony of Mr. Lopez and asked how
5 it was possible that he received and verified training on the plan over
6 the previous (5) years when his employer's own evidence showed by the
7 plan date that it did not exist until at least April or June of 2013.
8 Mr. Lopez responded "I guess . . . I don't remember". On redirect
9 examination Mr. Lopez testified he had more than one mask fit test at
10 the "Concentra Medical Center."

11 At the conclusion of evidence and testimony counsel and Mr. Fesler
12 presented closing arguments.

13 Complainant counsel asserted the preponderance of evidence
14 established current violations of the same standard violations
15 previously confirmed and therefore proved the "Repeat" status
16 classification. Counsel argued the respondent did not actually implement
17 a written respiratory program required by the cited standard until a
18 much later date **after** the inspection contrary to the defense assertions
19 and testimony that it occurred prior to April 2013. No training
20 documents are in evidence to show anything existed until **after** the most
21 recent inspection resulting in the current citations. Counsel argued
22 there were simply no documents to support the existence of a written
23 program as required at Citation 1, Item 1, nor any evidence of written
24 training prior to the issuance of the citations. The documents
25 furnished by respondent at Exhibit 3, pages 123-133 were not credible
26 evidence of a plan given the dates. He argued the testimony by Mr.
27 Lopez was contrary to the documents in evidence and simply not credible.
28 Mr. Lopez dated and initialed the Exhibit 3 document to verify his

1 training on October 3, 2012 but the plan date based upon the
2 respondent's own records shows it was not even written until April 2013.

3 Counsel concluded by asserting there was no compliance with the
4 cited standards based upon inspections in 2008, 2009, or 2013. He
5 further argued that while the company has only one employee and
6 apparently suffering from poor economic conditions, the penalties had
7 already been reduced by 60%; and the employer received every
8 consideration to mitigate the monetary assessments.

9 Respondent presented closing argument. Mr. Fesler argued IH
10 Hutchison testified he left enforcement documentation with an employee
11 at the plant site in 2009, but he (Fesler) never received it; therefore
12 he received no lawful "notice". He asserted there was no evidence to
13 establish or prove his receipt of the 2009 documentation and therefore
14 no evidence to support a repeat violation. He argued the required
15 training was provided to Mr. Lopez. He asserted Mr. Lopez is the only
16 employee of the company involved in the spraying process which occurs
17 for only approximately 10 minutes per week, therefore exposure levels
18 were very low. He asserted there had never been an accident at his
19 plant. Mr. Shete never ". . . specifically asked for the **training**
20 **manual** so I (Fesler) never realized exactly what OSHA wanted . . . when
21 . . . I finally figured out from OSHA what they wanted I (Fesler)
22 furnished them our respiratory protection program in evidence at Exhibit
23 3 . . .".

24 The board in reviewing the facts, documentation, testimony and
25 evidence in the record must measure same against the established
26 applicable law developed under the Occupational Safety & Health Act.

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

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

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

11 A **respondent may rebut** allegations by showing:

- 12 1. That the standard was inapplicable to the
13 situation at issue;
- 14 2. That the situation was in compliance; or lack
15 of access to a hazard. See, *Anning-Johnson*
16 *Co.*, 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690
(1976).

16 A "**serious**" violation is established in accordance with NRS
17 618.625(2) which provides in pertinent 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
23 which have been adopted or are in use at that place
24 of employment unless the employer did not and could
25 not, with the exercise of reasonable diligence,
26 know the presence of the violation.

23 A "**repeat**" violation is established based upon **prior violation of**
24 **the same standard**, a different standard, or general duty clause, if the
25 present and prior violation is substantially similar.

26 A violation is considered a repeat violation:

27 If, at the time of the alleged repeat violation,
28 there was a Commission **final order against the**
employer for a substantially similar violation.

1 Potlatch Corp., 7 BNA OSHC 1061, 1063 (no. 16183,
2 1979). A prima facie case of substantial
3 similarity is established by a showing that the
4 prior and present violations were for failure to
5 comply with the same standard. *Superior Electric
6 Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597,
7 1996). *Robert B. Reich, Secretary of Labor, United
8 States Department of Labor v. D.M. Sabia Company
9 and Occupational Safety and Health Review
10 Committee*, 90 F.3d 854 (1996); *Caterpillar, Inc. v.
11 Alexis M. Herman, Secretary of Labor, and
12 Occupational Safety and Health Administration,
13 Respondents and United Auto Workers, Local 974,
14 Intervenors*, 154 F.3d 400 (1998).

8 A repeated violation may be found based on a prior
9 violation of the same standard, a different
10 standard, or the general duty clause, but the
11 present and prior violations must be substantially
12 similar. *Caterpillar, Inc.*, 18 OSH Cases 1005,
13 1006 (Rev. Comm'n 1997), *aff's*, 154 F.3d 400, 18
14 OSH Cases 1481 (7th Cir. 1998); *GEM Indus., Inc.*, 17
15 OSH Cases 1861, 1866 (Rev. Comm'n 1996). OSHA may
16 generally establish its prima facie case of
17 substantial similarity by showing that the prior
18 and present violations are of the same standard.
19 The employer may rebut that showing by establishing
20 that the violations were substantially different.
21 Where the citations involve different standards,
22 OSHA must present "sufficient evidence" to
23 establish the substantial similarity of the
24 violations. A similar showing must be made if the
25 citations involve the same standard but the
26 standard is broadly worded. Repeated violations
27 are not limited to factually identical occurrences.
28 Provided that the hazards are similar, minor
differences in the way machines work or in the size
and shape of excavations will usually not lead to
a finding of dissimilarity. In general, the key
factor is whether the two violations resulted in
substantially similar hazards. It is not necessary,
however, that the seriousness of the hazard
involved in the two violations be the same.
Rabinowitz, Occupational Safety and Health Law, 2nd
Ed. 2008 at pp. 230-231. (emphasis added)

24 Despite the fact that OSHA has imposed limitations
25 in its Field Inspection Reference Manual (FIRM)
26 upon the length of time that a citation may serve
27 as the basis of a repeated violation, the
28 Commission continues to hold that such time
limitations are not binding. *Secretary of Labor v.
Active Oil Serv.*, 21 OSH Cases 1185, 1189 (Rev.
Comm'n 2005) (the amount of time between violations
does not affect whether a violation is repeated);

1 *Hackensac Steel Corp*, 20 OSH Cases 1387, 1392-93
2 (Rev. Comm'n 2003) (FIRM is not binding on OSHA or
3 the Commission and does not create substantive
 rights for employers) Rabinowitz, Occupational
 Safety and Health Law, 2nd Ed. 2008 at p. 271.

4 The board finds a preponderance of substantial evidence to support
5 findings of violation at Citation 1, Item 1, referencing 29 CFR
6 1910.134(c)(1) and Citation 1, Item 2, referencing 29 CFR
7 1910.134(k)(1). The evidence proved the violative conditions were
8 **serious and repeated** as defined by the applicable Nevada statutes and
9 OSHA standards. The complainant established all the required elements
10 of violation by a preponderance of evidence to meet its burden of proof.

11 The respondent defense in rebuttal to the violations provided no
12 substantial or competent evidence of compliance nor mitigation of the
13 classifications or penalties assessed.

14 The testimony of Mr. Lopez was confusing, unclear, and not
15 credible. The testimony did not comport with the respondent's
16 documentary evidence dates for adoption or implementation of the
17 respiratory program, nor the fit test requirements and training which
18 Mr. Lopez claimed to have occurred.

19 Mr. Fesler provided no evidence or recognized defense to the
20 violations under occupational safety and health law. The arguments
21 relating to his lack of knowledge regarding notifications, actual
22 training, and/or employee exposure were not supported by sufficient or
23 competent evidence. There was no evidence to support a recognized
24 **lawful excuse** for the lack of compliance.

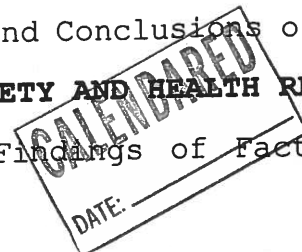
25 **Actual knowledge is not required for a finding of**
26 **a serious violation. Foreseeability and**
27 **preventability render a violation serious provided**
28 **that a reasonably prudent employer, i.e., one who**
 is safety conscious and possesses the technical
 expertise normally expected in the industry
 concerned, would know of the danger. Candler-

1 *Rusche, Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723
2 (1976), appeal filed, No. 76-1645 (D.C. Cir. July
3 16, 1976); *Rockwell International*, 2 OSHC 1710,
4 1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d
 1283 (6th Cir. 1976); *Mountain States Telephone &*
 Telegraph Co., 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365
 (1973). (emphasis added)

5 While the board regrets the substantial penalties and violation
6 classifications with which the respondent as a small business is now
7 confronted, there was no evidence of mitigation or any reasonable bases
8 upon which the board could rely to reduce the penalties or modify the
9 classifications in view of the overwhelming evidence of violations,
10 failure to abate, and repeat status of the serious conditions.
11 Accordingly, the violations, classifications, and proposed penalties
12 must be confirmed.

13 It is the decision of the Nevada Occupational Safety and Health
14 Review Board that violations of Nevada Revised Statutes did occur as to
15 Citation 1, Item 1, 29 CFR 1910.134(c)(1) and Citation 1, Item 2, 29 CFR
16 1910.134(k)(1). The classification of "Repeat/Serious" was established
17 by a preponderance of evidence and the penalty is appropriate and
18 affirmed in the amount of ELEVEN THOUSAND TWO HUNDRED DOLLARS
19 (\$11,200.00).

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



1 Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL**
2 **SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the
3 **BOARD.**

4 DATED: This 6th day of March 2014.

5 NEVADA OCCUPATIONAL SAFETY AND HEALTH
6 REVIEW BOARD

7 By: /s/
8 JOE ADAMS, CHAIRMAN

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