

NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER
OF THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION, DIVISION
OF INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA,

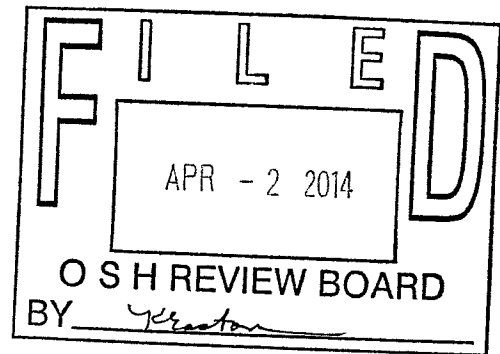
Docket No. RNO 14-1705

Complainant,

vs.

SIERRA PACKAGING & CONVERTING, LLC,

Respondent.



DECISION

This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 12th day of March, 2014, in furtherance of notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel appeared on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (OSHA)**. MR. TIMOTHY ROWE, ESQ., counsel appeared on behalf of Respondent, **Sierra Packaging and Converting, LLC**.

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

The complaint filed by the OSHA sets forth allegations of violation of Nevada Revised Statutes as referenced in Exhibit "A", attached thereto. The alleged violation in Citation 1, Item 1, referenced 29 CFR 1910.138(b). The standard requires employers base selection of appropriate hand protection on an evaluation of performance

1 characteristics relative to the work task(s), conditions present,
2 duration of use, and identified hazards.

3 Complainant alleged employees wore disposable latex gloves when
4 working with adhesives and chemical cleaning solvents listed in the
5 safety data sheet (SDS) as a potential mild skin irritant. The citation
6 charged the employer selected a glove that did not provide adequate
7 permeation and degradation characteristics for the chemicals used in the
8 duration of use. The alleged violation was classified as "other than
9 serious" and no monetary penalty proposed.

10 Counsel for the complainant presented documentary and testimonial
11 evidence through witness Mr. Marc Stewart, a Compliance Safety and
12 Health Officer (CSHO) and Industrial Hygienist (IH). Mr. Stewart
13 referenced complainant's Exhibits 1 and 2 stipulated in evidence. He
14 testified in accordance with his narrative report at pages 6-8 of
15 Exhibit 1. He conducted a "referral" investigation, defined as based
16 upon an anonymous complaint, reporting six (6) claimed violative
17 conditions. He found only one violation from those reported claims.
18 Mr. Stewart observed latex gloves used by employees working with an
19 alcohol based cleaning product. He noted hazard warnings for the
20 alcohol based chemical from the SDS, and referenced page 42 of
21 complainant's exhibit describing the potential health effects which
22 included "mild skin irritation." He described the gloves being worn by
23 employees as a ". . . typical doctor-type 5 mil latex glove . . .".
24 While he found no evidence of injuries nor received any complaints from
25 employees who utilized the gloves with the identified chemical product,
26 he determined the gloves were not adequate under the OSHA standard. He
27 noted warnings on the glove container and in the SDS, indicating
28 prolonged contact of the gloves with harsh chemicals could result in

1 potential exposure to injuries.

2 CSHO Stewart testified that while neither the warning label on the
3 glove box nor information in the SDS would be very helpful to an
4 employer; it was sufficient to alert the respondent on use of the
5 appropriate gloves with the identified chemicals. Mr. Stewart obtained
6 information through a phone call to the glove manufacturer that another
7 type glove would be appropriate for the uses subject of his inquiry.

8 CSHO Stewart testified he informed employer representative Mr.
9 David Hodges of his finding the gloves in use were not satisfactory and
10 advised of a more appropriate type glove. He was then informed through
11 email from Mr. Hodges that he implemented utilization of the recommended
12 gloves.

13 CSHO Stewart testified the standard was applicable based upon the
14 information he observed on the glove container and in the SDS. He
15 classified the violation as "other" based on the SDS and some potential
16 for exposure to "moderate" skin irritation.

17 On cross-examination, Mr. Stewart corrected his earlier testimony
18 and the charging citation to clarify that potential skin contact with
19 the cleaning product may cause "mild" as opposed to "moderate" skin
20 irritation. He testified that he is required to inspect all referrals,
21 noting many come from terminated employees, disgruntled individuals,
22 competitors or other non-assured sources. He explained that OSHA is
23 required to inspect all complaints and make a determination. CSHO
24 Stewart admitted that any employer reading the cited standard would have
25 difficulty informing his employees on what to do and how to be
26 compliant. He testified that he classified the citation as other based
27 upon employee interview statements on the limited duration of glove use,
28 lack of any employee complaints, his own observations of the undamaged

1 condition of used gloves in the waste container which he photographed,
2 and no evidence the employer ever received a reported injury of any kind
3 from the glove use. These factors caused him to conclude the violation
4 was minor not warranting a higher classification or penalty assessment.

5 On continued questioning from respondent counsel on vagueness of
6 the standard and the difficulty for a reasonable employer to interpret
7 its requirements, Mr. Stewart testified he agreed it was not very
8 helpful to place an employer on notice and that it might obtain clearer
9 information for use of a different type glove.

10 Mr. Stewart testified as to the low severity rating of the
11 violation based upon brief exposure potential and the short duration of
12 use which he determined to be approximately 15 minutes per day, two
13 times each day. He rated the probability factors as "low".

14 Mr. Stewart testified the employer could have contacted the glove
15 manufacturer rather than the chemical producer; but agreed that with no
16 complaints from employees nor any notice of glove degradation found
17 after use, it was difficult for the employer to be aware of any dangers
18 associated with the subject glove.

19 At the conclusion of complainant's case, respondent presented a
20 defense to the citation. Witness Mr. David Hodges identified himself
21 as the responsible company safety representative overseeing safety
22 programs and plans for the company at the subject and other site
23 locations. He testified that he initially spoke to the manufacturer of
24 the alcohol based chemical listed in the SDS to determine the
25 appropriateness of employee hand protection and was informed the 5 mil
26 glove "should be adequate". He testified there were never any
27 complaints by or injuries to employees using the gloves. Neither he nor
28 his employer were aware of any hazardous or violative conditions. He

1 believed all reasonable steps were taken to provide employee protection
2 under the standard. He testified the OSHA Safety Consultation and
3 Training Section (SCATS) reviewed the company's alternate plant site in
4 Sparks, Nevada and raised no concern or problem with employee use of the
5 subject gloves.

6 At the conclusion of the case complainant and respondent counsel
7 presented closing argument.

8 Complainant counsel asserted the citation requires the employer
9 select "appropriate hand protection". The standard imposes the duty on
10 the employer to determine the type of glove for use, but not a
11 compliance methodology. Counsel argued the standard leaves it to an
12 employer to call the manufacturer of the gloves, or otherwise determine
13 appropriateness. Counsel asserted the employer was sufficiently
14 **notified** by the standard to comply, and should have contacted the glove
15 maker rather than the chemical manufacturer. Counsel asserted the CSHO
16 simply made a phone call and was told the glove in use was not
17 appropriate and recommended another type, so compliance was simple and
18 feasible.

19 Respondent submitted closing argument. Counsel asserted the
20 statute was vague with regard to the glove use as "appropriate,"
21 "duration of use," and "protection" levels for the work task. It did
22 not sufficiently inform the employer of any particular specifications,
23 product details or needs. Counsel argued that because the OSHA
24 regulations are quasi criminal and can subject an employer to severe
25 penalties, this law should be specific enough for an employer to
26 determine if it is or could be in violation of the standard. The cited
27 standard did not provide sufficient supporting information to cause or
28 give reasonable notice the employer must select an alternate glove. The

1 evidence shows respondent utilized a glove which appeared to satisfy all
2 the concerns the standard imposed. The witnesses testified the printed
3 information on the glove container provided the product was recommended
4 for ". . . industrial use . . . maintenance and food service . . .".
5 Accordingly, the respondent made a reasonable determination the selected
6 latex glove was appropriate to protect against accidental contact to
7 avoid minor skin irritation. There were no reported injuries to or
8 complaints from employees. Counsel argued no violation can be based
9 upon **subjective** opinions of another type of glove for the identified
10 work. Similarly, there were no findings of harmful exposure potential
11 for the **duration** of use. OSHA can not prove the employer was in
12 violation of the standard. The evidence established a brief use duration
13 of only approximately 15 minutes, two times each day. No degradation
14 of the used gloves was found. No employee complaints or injuries were
15 ever reported at respondent's two (2) Nevada plant sites. Mr. Hodges'
16 inquiry to and response by the chemical manufacturer that the gloves
17 should be appropriate, was unrefuted. There should have been no
18 citation issued from the facts in evidence or the vague guidance of the
19 cited standard. The citation has placed the employer and its
20 supervisory employees through a loss of time and money to sort it all
21 out. Counsel urged the citation be dismissed.

22 The board in reviewing the facts, documentation, testimony and
23 other evidence must measure same against the established applicable law
24 developed under the Occupational Safety and Health Act as adopted in the
25 State of Nevada.

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 "Where **no direct or immediate relationship between**
18 **the violative condition and occupational health or**
19 **safety**, the citation should be re-designated as a
20 **de minimis** violation without penalty. *Chao v.*
21 *Symms Fruit Ranch, Inc.*, 242 F.3d 894 (9th Cir.
22 2001). If a **direct or immediate relationship does**
23 **exist but there is still no probability of death or**
24 **serious physical injury**, then an "other-than-
25 **serious**" designation is appropriate. *Pilgrim's*
26 *Pride Corp.*, 18 O.S.H. Cases 1791 (1999). (emphasis
27 added) *Owens-Corning Fiberglass Corp. v. Donovan*,
28 659 F.2d 1285, 10 OSH Cases 1070 (5th Cir. 1981)
(fiberglass itch). Rabinowitz, *Occupational Safety*
and Health Law, 3rd Ed. 2013 at p. 263 (emphasis
added)

29 29 CFR 1910.138(b) Selection. Employers shall base
30 the selection of the appropriate hand protection on
31 an evaluation of the **performance characteristics** of
32 the hand protection relative to the **task(s) to be**
33 **performed, conditions present, duration of use, and**
34 the hazards and **potential hazards identified.**
(emphasis added)

35 The board finds no preponderant evidence to prove the cited
36 violation. The standard is unclear at best, and vague at worst. The
37 respondent was in compliance with the standard. There was no evidence
38 of glove degradation from or after employee **performance of the work**
39 **tasks. Potential exposure** for employee skin contact was remote. Glove
40 use was of very minimal **duration.** The **probability** for employee skin

1 contact with use of the glove was extremely low. The **potential** of
2 injury identified as mild skin irritation was remote. The employer
3 undertook **reasonable diligence** to comply with the standard by contacting
4 the chemical manufacturer to determine appropriate glove use and
5 potential harmful effects of the identified chemical products. There
6 were no employee complaints at the subject site or the respondent's
7 other location. There were never any reported employee injuries through
8 use of the gloves selected. The employer did not know nor with the
9 exercise of **reasonable** diligence could it discover a violative condition
10 through its selection of the gloves.

11 The only evidence before the board to prove the employer selected
12 gloves in use at the time of the inspection were not "appropriate" as
13 required by the specific terms of the standard was a phone call advisory
14 by the glove manufacturer to CSHO Stewart. The **hearsay** evidence subject
15 of Mr. Stewart's testimony was merely that

16 ". . . I . . . was told that these gloves would not
17 hold up for that type of chemical. . . They have a
18 selection chart, . . . I was told that the ethanol
actually degrades the latex and that nitrile was
the material that was recommended . . ."

19 The reported hearsay was not competent evidence the selected gloves were
20 not "**appropriate**". While the manufacturer recommended glove may have
21 been **better** or **more** appropriate, that is not evidence by a preponderance
22 the glove or selection process violated the terms of the cited standard.
23 Hearsay evidence alone is not sufficient to establish a violation.

24 . . . The Secretary's obligation to demonstrate the
25 alleged violation by a preponderance of the
26 reliable evidence of record **requires more than**
27 **estimates, assumptions and inferences** . . . [t]he
28 Secretary's **reliance on mere conjecture is**
insufficient to prove a violation . . . [findings
must be based on] 'the kind of evidence on which
responsible persons are accustomed to rely in
serious affairs.' *William B. Hopke Co., Inc.*, 1982

3 Had the factual conditions been cited as **de minimis**, the employer
4 would have been placed on notice of a recommended **better** or **more**
5 appropriate glove, and both complainant and respondent avoided the
6 impacts resultant from the subject contested proceedings.

7 However, the board finds no preponderance of evidence to support
8 or warrant any violation based upon the allegations charged in Citation
9 1, Item 1. Accordingly the citation is dismissed.

10 Based upon the above and foregoing, it is the decision of the
11 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation of
12 Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR
13 1910.138(b) and the proposed penalty is denied.

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

24 DATED: This 2nd day of April 2014.

25 NEVADA OCCUPATIONAL SAFETY AND HEALTH
26 REVIEW BOARD

27 By /s/
28 JOE ADAMS, Chairman