

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH

2 REVIEW BOARD

3 CHIEF ADMINISTRATIVE OFFICER
4 OF THE OCCUPATIONAL SAFETY AND
5 HEALTH ADMINISTRATION, DIVISION
6 OF INDUSTRIAL RELATIONS OF THE
7 DEPARTMENT OF BUSINESS AND INDUSTRY,

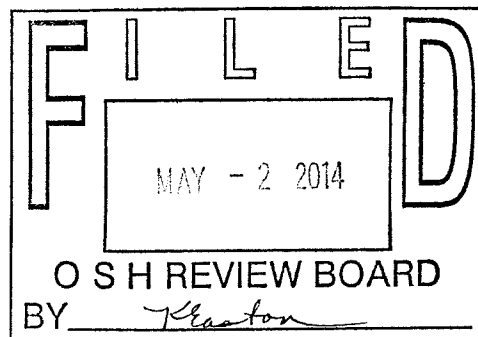
Docket No. LV 14-1691

8 Complainant,

9 vs.

10 UNIVERSITY OF NEVADA, LAS VEGAS,

11 Respondent.



12 DECISION

13 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
14 **REVIEW BOARD** at a hearing commenced April 9, 2014 and continued on April
15 10, 2014, in furtherance of notice duly provided according to law. MS.
16 SALLI ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**
17 **Administrative Officer of the Occupational Safety and Health**
18 **Administration, Division of Industrial Relations** (OSHA). MS. SUSAN
19 CARRASCO O'BRIEN, ESQ., counsel appearing on behalf of Respondent,
20 **University of Nevada, Las Vegas.**

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

23 The complaint filed by the OSHA sets forth allegations of violation
24 of Nevada Revised Statutes as referenced in Exhibit "A", attached
25 thereto.

26 The alleged violation in Citation 1, Item 1 referenced 29 CFR
27 1910.151(c). The respondent employer was charged with a failure to
28 provide employees handling corrosive chemicals with suitable eyewash
facilities. The violation was classified as serious and a penalty

1 proposed in the amount of \$6,300.00.

2 The violation charged at Citation 1, Item 2, classified as "Other
3 than Serious" and without any proposed penalty was withdrawn from
4 contest.

5 Documents and photographs were stipulated in evidence as
6 complainant Exhibits 1, 2 and 3 and Respondents Exhibits A, B and C.

7 Complainant presented testimony and documentary evidence to
8 establish the alleged violation. Mr. Satish Shete identified himself
9 as a Nevada OSHA (NOSHA) Compliance Safety and Health Officer (CSHO) and
10 Industrial Hygienist (IH). Mr. Shete referenced his narrative report at
11 Exhibit 1, pages 8-10 and testified to his inspection, findings and
12 recommendations for issuing a citation of the OSHA standard. Mr. Shete
13 identified the cited standard and read from the citation and
14 notification of penalty issued accordingly. 29 CFR 1910.151(c)
15 provides:

16 "Medical services and First Aid: Where the eyes or
17 body of any person may be exposed to injurious
18 corrosive materials, **suitable facilities** for quick
19 drenching or flushing of the eyes and body shall be
provided within the work area for immediate
emergency use." (emphasis added)

20 The citation particularly charged:

21 "The employer failed to ensure those Custodians
22 handling and dispensing, as part of assigned job
23 duties, the corrosive chemicals CBC Plus toilet
24 bowl cleaner manufactured by Ecolab Inc. and Triad
25 Disinfectant Cleaner manufactured by Diversey with
26 a pH of 1 and 13.1 at 100 percent concentration
27 respectively, were provided **suitable eyewash**
28 **facilities** for fifteen minute flushing of the eyes
inside the **Custodian Rooms located on 1st, 2nd, and**
3rd floors of the Stan Fulton building located at
the University of Nevada, Las Vegas (UNLV).
Custodians were required to mix the chemical CBC
Plus toilet bowl cleaner with water in a 3 to 1
ratio prior to August 6, 2013, and a 12 to 1 ratio
after August 6, 2013 until the opening of this
inspection of September 4, 2013. The mixed

1 solution was used during deep cleaning operations
2 of the men's and women's restrooms." Exhibit 1,
3 page 36. (emphasis added)

4 CSHO Shete referenced Exhibit 1, pages 52-55 and identified
5 photographs of the custodial room sink and faucet facilities subject of
6 the inspection and citation. He referenced other proximate water
7 sources in the restrooms and water fountain areas. Mr. Shete testified
8 the other sources of water facilities outside the custodial room did not
9 lend themselves to ready access for flushing of the face and eyes. He
10 explained the necessity to use both hands and bend ones head into the
11 flushing area using one hand to hold open the eye and the other to
12 control the water flow. The restrooms and water fountain facilities
13 were not suitable as alternate sources. IH Shete testified his
14 inspection focus and citation were on the custodial rooms on the 1st, 2nd
15 and 3rd floors of the Stan Fulton Building, as depicted in photographic
16 exhibit page 52. He specifically found the eyewash facilities were not
17 **suitable** under the terms of the standard because of inaccessibility,
18 complex configuration of the hoses, and limitations on use for the
19 purposes intended under the standard. Mr. Shete interpreted
20 "suitability" based upon the need for quick drenching and flushing of
21 the eyes and body within the work area for immediate emergency use and
22 paraphrased the cited standard accordingly.

23 Mr. Shete referenced at Exhibit 4, the MSDS information,
24 specifically pages 2 and 9 and identified the hazardous chemicals
25 classified as corrosive. He determined the nature of the chemicals
26 created the violative conditions for potential hazard exposure and
27 serious injury or blindness in the event of employee eye contact and
28 inability to readily flush the chemicals from the eyes. Mr. Shete
testified the first aid measures referenced at Exhibit 4, page 3,

1 required cool running water flow for at least 15 minutes.

2 Mr. Shete did not inform the respondent representative the "only"
3 way to comply with the standard was to install "eyewash stations", but
4 testified they were the best means to comply and assure employee ability
5 to flush both eyes and prevent serious injuries. He further testified
6 the standard was **applicable** because the MSDS and his inspection findings
7 established the corrosive nature of the materials. The employees work
8 task of mixing the identified chemical in the closet type custodial room
9 facility created the potential for accidental eye contact and potential
10 inability to access suitable facilities for immediate eye flushing under
11 a 15 minute duration water stream. Mr. Shete testified employer
12 representatives disagreed with his position regarding the water sources
13 available and informed him the restroom sinks and custodial closets
14 demonstrated compliance with the standard. They informed him the
15 employees had ready access to various water sources without any
16 requirement for installation of specific eyewash stations. Mr. Shete
17 did not reference any letters of interpretation before preparing his
18 worksheet and proposing a citation for violation under the conditions
19 found in the custodial rooms on the premises of respondent. He provided
20 all "credits" to which the respondent was entitled under the operations
21 manual, beginning with the recommended penalty at \$7,000 and reduced
22 same to \$6,300. He rated the severity as high, based upon a potential
23 loss of sight from the corrosive chemicals. He testified and discussed
24 his bases for other ratings in accordance with the penalty calculations
25 all as referenced in Exhibit 1.

26 Respondent conducted cross-examination of CSHO Shete. He denied
27 informing respondent representatives that a specific "eyewash basin" was
28 required. He testified he did not take the position that a basin was

1 required but believed it to be proscribed in the MSDS at Exhibit 4, page
2 3. However on continued cross-examination and reading of the MSDS, Mr.
3 Shete admitted there was no specific MSDS requirement for an "eyewash
4 basin". Counsel inquired as to the various and different types of
5 eyewash **facilities** that may be considered **suitable** under Mr. Shete's
6 interpretation of the applicable standard. Mr. Shete responded that he
7 interprets suitability under the standard to mean employees not be
8 required to engage in unusual maneuvers for immediate access to flushing
9 of the chemicals, particularly from eye contact. Mr. Shete did not
10 check the water pressure at any of the respondent eyewash facilities.
11 He did not test for the duration of water flows in the custodial room
12 or other facilities. Mr. Shete testified he did not take any
13 measurements nor calculate any distances to the sinks in the custodial
14 closets or alternate areas at the respondent worksite. He did not
15 evaluate the water fountain for flows, duration or accessibility. He
16 testified that he was not aware the fountains and sinks were "hands
17 free" nor automatically operated by hip contact. Mr. Shete again
18 testified on cross-examination the MSDS at the site required a 15 minute
19 eye wash duration but admitted after reviewing Exhibit 4, pages 2-6,
20 there was no such requirement in the MSDS. He denied that his only
21 basis for recommending the citation was because UNLV had no "eyewash
22 basin" rather than the "suitable eyewash facilities" required by the
23 standard.

24 Respondent presented witness testimony and referenced the Exhibits
25 in evidence. Mr. John Tomola identified himself as the OSHA Program
26 Officer at respondent UNLV. He testified CSHO Shete gave no explanation
27 at the closing conference of why the water sources at UNLV were not
28 "suitable". He testified Mr. Shete went through each point of his

1 inspection verbally but did not provide any documentation at that time.

2 Complainant and respondent presented closing arguments.

3 Counsel asserted the inspection was based upon an employee
4 complaint of inadequate eyewash facility protection from the corrosive
5 chemical products provided by respondent for use by the custodial staff.
6 Counsel asserted the custodial closet sinks and hoses were the basis for
7 the citation and violations for lack of suitability, not the restroom
8 sinks or any other areas referenced during cross-examination. The
9 chemicals are **mixed** in the custodial closets where the greatest
10 potential for accidental eye contact can occur. The photographs in
11 evidence show multiple connections from the sinks to hoses and depict
12 difficult access to the water facilities. Flushing of eyes requires both
13 hands available as described by the witness to achieve adequate flushing
14 and rinsing. The inspector found the facilities were not suitable based
15 upon his education, experience and personal observations at the site.
16 The arguments as to a lack of information during or after the inspection
17 and the inability to obtain information or explanations are incorrect
18 and immaterial. Opposing counsel had full opportunity to conduct
19 discovery as permitted under NAC 618 through interrogatories and/or
20 request for admissions; and accordingly there was no denial of due
21 process to present a defense. Counsel argued the factors taken into
22 consideration by the trained IH CSHO Shete demonstrated that sinks at
23 ground level and hoses with multiple connections are not the "suitable
24 facilities" intended by OSHA for quick eyewash and establish a violation
25 of the standard.

26 The restroom sinks were too low and shallow for rinsing eyes or
27 body in the event of chemical contact; and the CSHO testimony was
28 corroborated by the photographic exhibits. Respondent counsel

1 references to court case decisions or federal interpretation letters
2 must be viewed under the "facts presented here . . . and should stand
3 on their own subject to the board fact finding and weighing of evidence
4 . . .". Counsel further asserted it is not correct that Nevada OSHA is
5 holding respondent or other employers to compliance with an **"ANSI**
6 **standard"**. While ANSI reflects an informed common belief that the best
7 way to comply with the standard is by installing "eyewash stations", the
8 citation was not issued based on ANSI but rather the cited enforcement
9 standard. The IH made a good faith interpretation of lack of
10 suitability found in the subject facilities; he never attempted to
11 enforce ANSI and require "eyewash stations".

12 Respondent presented closing argument in defense of the violation
13 charged. Counsel asserted there were no facts in the inspection report
14 or from Mr. Shete's testimony to support a violation of the standard.
15 No burden of proof was met for finding the eyewash facilities unsuitable
16 in the custodial stations. IH Shete never tested the hoses, water
17 pressure, duration of water flow, or other relevant eyewash facility
18 factors in the custodial closet areas. Further, he never tested the
19 water flows, pressure, or related factors at the alternate water sources
20 located in the restrooms or water fountains. Counsel argued that
21 finding a violation here would be based upon "unfair notice" because the
22 employer is being held to a non-existent legal requirement. The ". . .
23 **ANSI does** recommend eyewash stations and 15 minute water flow duration
24 . . . but the **cited enforcement standard** does not require those measures
25 for compliance . . .". Further, neither the case law nor the federal
26 interpretation letter in evidence at Exhibit A require eyewash basins
27 or stations. OSHA and its inspector are attempting to hold the
28 respondent to the recommendations of an advisory standard in **ANSI** rather

1 than the cited enforcement standard in the code of federal regulations.
2 There was no burden of proof met to satisfy the elements for violation.

3 In reviewing the facts, documents and testimony in evidence the
4 board must measure same against the established law developed under the
5 Occupational Safety and Health Act (OSHA), Code of Federal Regulations
6 (CFR) and Nevada Revised Statutes (NRS).

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

9 All facts forming the basis of a complaint must be
10 proved by a preponderance of the evidence. *Armor*
Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958
11 (1973).

12 To prove a violation of a standard, the Secretary
13 must establish (1) the applicability of the
14 standard, (2) the existence of **noncomplying**
conditions, (3) employee exposure or access, and
15 (4) that the employer knew or with the exercise of
reasonable diligence could have known of the
16 violative condition. See *Belger Cartage Service,*
Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
17 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
18 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). (emphasis added)

19 A respondent may rebut allegations by showing:

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

24 A "serious" violation is established upon a preponderance of
25 evidence in accordance with NRS 618.625(2) which provides in pertinent
26 part:

27 . . . a serious violation exists in a place of
28 employment if there is a substantial probability
that death or serious physical harm could result

1 from a condition which exists or from one or more
2 practices, means, methods, operations or processes
3 which have been adopted or are in use at that place
4 of employment unless the employer did not and could
5 not, with the exercise of reasonable diligence,
6 know the presence of the violation. (emphasis
7 added)

8
9 29 CFR 1910.151(c): Medical services and First Aid:
10 Where the eyes or body of any person may be exposed
11 to injurious corrosive materials, **suitable**
12 **facilities** for quick drenching or flushing of the
13 eyes and body shall be provided within the work
14 area for immediate emergency use. (emphasis added)

15
16 The board finds no preponderance of evidence to meet the burden of
17 proof to establish a violation of the cited standard. The respondent
18 was in compliance with the applicable specific standard governing
19 occupational safety and health.

20 To sustain a serious violation at Citation 1, Item 1, the
21 complainant was required to prove the respondent failed to maintain
22 ". . . suitable facilities for a quick drenching or flushing of the eyes
23 and body . . . within the work area for immediate emergency use . . .
24 where the eyes or body of any person may be exposed to injurious or
25 corrosive materials . . .". The facts, photographic exhibits and
26 testimony in the record demonstrate compliance with the terms of the
27 standard. The ANSI standard is **advisory** guidance which can be relied
28 upon to satisfy **hazard recognition**. However the enforcement standard
and the elements of proof required under occupational safety and health
law must be established by a preponderance of evidence to find a
violation.

29 In the instant case, the board finds the available facilities in
30 the custodial closet areas where chemical mixing occurred were **suitable**
31 to comply with the standard terms which requires flushing availability
32 for not only the eyes but "the body" should there be contact with

1 corrosive materials. The floor level basins and open access, together
2 with the extended hoses, are facts in evidence which demonstrate ready
3 availability for an individual to abundantly flush the eyes, face, head
4 and body parts. This broad type of accessibility is not always
5 available in many "basins" or "stations" other than showers or large
6 dedicated open facilities depending upon the type of worksite involved.
7 The **standard was applicable** to the facts but the facilities were
8 **suitable to the conditions** at the worksite to safeguard custodial
9 employees through ready access to the eyewash flushing facilities in
10 evidence.

11 CSHO IH Shete made a good faith determination in his inspection for
12 lack of suitability given his observations, credentials and technical
13 training. The use of the word "suitable" in this or any enforcement
14 standard necessarily lends itself to judgmental determinations made upon
15 various factors in the field. There was no evidence respondent was
16 singled out for special or biased enforcement. Clearly the availability
17 of showers or large immersion stations for employee access where
18 corrosive chemicals might be used could solve many potential hazard
19 exposure issues; however the **suitability** or adequacy of flushing
20 facilities must be measured under the particular worksite conditions on
21 a case by case basis and proven through the weight of competent
22 evidence.

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

27 The terms of the cited standard, the federal interpretation letter,
28 and the facts in evidence demonstrate the employer to be in compliance.

1 . . . The Secretary's obligation to demonstrate the
2 alleged violation by a preponderance of the
3 reliable evidence of record **requires more than**
4 **estimates, assumptions and inferences** . . . [t]he
5 Secretary's **reliance on mere conjecture is**
6 **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
OSAHRC LEXIS 302 *15, 10 BNA OSHC 1479 (No. 81-206,
19820 (ALJ) (citations omitted). (emphasis added)

7 The well established "**plain meaning rule**", requires this board
8 review and interpret specific standards in accordance with a fair,
9 reasonable and plain meaning. *Caminetti v. United States*, 242 U.S. 470,
10 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1916) (citations omitted).

11 It is the decision of the Nevada Occupational Safety and Health
12 Review Board that no violation of Nevada Revised Statutes did occur as
13 to Citation 1, Item 1, 29 CFR 1910.151(c). The violation, serious
14 classification and proposed penalty in the amount of \$6,300.00 are
15 denied.

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

26 DATED: This 2nd day of May 2014.

27 NEVADA OCCUPATIONAL SAFETY AND HEALTH
28 REVIEW BOARD

By /s/
JOE ADAMS, Chairman