

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 INDUSTRY,

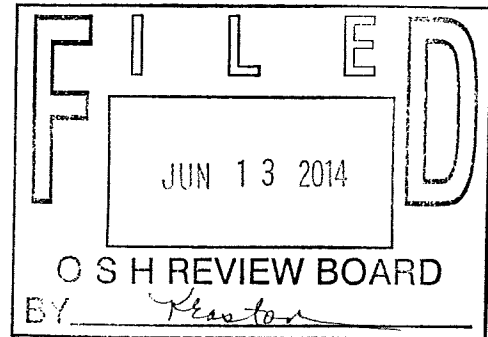
Docket No. LV 14-1697

Complainant,

vs.

10 M&H BUILDING SPECIALTIES, INC.,

11 Respondent.
12 _____/



13 **DECISION**

14 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
15 **REVIEW BOARD** at a hearing commenced May 7, 2014, in furtherance of
16 notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel
17 appearing on behalf of the Complainant, **Chief Administrative Officer of**
18 **the Occupational Safety and Health Administration, Division of**
19 **Industrial Relations** (OSHA). Mr. Tyson Hollis, safety director,
20 appearing on behalf of Respondent, **M&H Building Specialties, Inc.**

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 1910.134(d) (1) for failing to identify and evaluate respiratory hazards
28 in the workplace. The alleged violation was classified as Serious and

1 a penalty proposed in the amount \$3,600.00.

2 Documents and photographs were stipulated in evidence as
3 complainant Exhibits 1 and 2, and respondent Exhibit A.

4 Complainant presented testimony and documentary evidence to
5 establish the alleged violation. Mr. Jason Burns identified himself as
6 a Nevada OSHA (NOSHA) Compliance Safety and Health Officer (CSHO). Mr.
7 Burns referenced his narrative report at Exhibit 1 and testified to his
8 inspection, findings and recommendations for issuing a citation for
9 violation of the OSHA standard. CSHO Burns identified the cited
10 standard and read from the citation and notification of penalty issued
11 accordingly. The citation referenced 29 CFR 1910.134(d)(1); the
12 specific applicable subsection 29 CFR 1910.134(d)(1)(iii) provided:

13 "The employer shall **identify and evaluate the**
14 **respiratory hazard(s) in the workplace**; this
15 evaluation shall include a reasonable estimate of
16 employee exposures to respiratory hazard(s) and an
17 identification of the contaminant's chemical state
18 and physical form. Where the employer cannot
19 identify or reasonably estimate the employee
20 exposure, the employer shall consider the
21 atmosphere to be IDLH." (emphasis added)

18 The citation particularly charged:

19 "At the Desert Blue construction project, on
20 September 18, 2013, the employer **did not evaluate**
21 **the possible respiratory hazards** during the process
22 of dry sanding the ceiling on the 14th floor of the
23 tower. The Material Safety Data Sheets for the
24 material used to dry sand the ceiling stated that
25 a respirator is required during dry sanding
26 operations. **The Material Safety Data Sheets were**
27 **not evaluated** prior to employees dry sanding the
28 material. By **not properly evaluating** the process
of dry sanding the material the employees were
exposed to health hazards. (emphasis added)

26 CSHO Burns testified the **comprehensive** inspection involved a large
27 job site at the Desert Blue Hotel in Las Vegas, Nevada on or about
28 September 18, 2013. The building was projected to 19 floors and in

1 different stages of construction, where approximately 14 employers were
2 engaged in various phases of work. On the 14th floor respondent
3 employee, Mr. Joey Lancaster, was dry sanding joint compound with no
4 respiratory protection. CSHO Burns observed Mr. Lancaster sanding over
5 his head with dust falling into his breathing zone. The material safety
6 data sheet (MSDS) (aka SDS) posted at the job site provided the material
7 contained silica dioxide and that a dust mask should be worn for dry
8 sanding operations. The MSDS identified various hazardous chemical
9 compounds and referenced recommendations on appropriate respiratory
10 protection. Mr. Burns explained the standard requires an employer to
11 identify and evaluate the existence of health hazards, and if not done,
12 then must protect employees from respiratory health hazards in an
13 atmosphere presumed to be IDLH. He identified the respondent MSDS at
14 Exhibit 2, page 83. Mr. Burns testified the standard requires the
15 employer to either do an evaluation first or require respirator use. He
16 concluded the employer had done neither and recommended the issuance of
17 a citation accordingly.

18 On cross-examination CSHO Burns testified the employer did furnish
19 respirators to its employees; and that only the third part of the
20 standard regarding "identification and evaluation" was applicable to the
21 cited violation. He testified the employer performed all other
22 requirements under the standard but for the referenced section. Mr.
23 Burns further testified the working conditions were performed in a
24 partial open air environment, however the standard required an
25 **assumption** of an IDLH level where an employer could not identify and
26 evaluate or reasonably estimate employee exposure.

27 At the conclusion of complainant's case, respondent presented no
28 witnesses and asserted a defense in reliance upon the stipulated

1 documentary evidence, witness testimony, and a reservation for closing
2 argument.

3 Complainant argued the standard was applicable based the MSDS and
4 required mandatory protective conduct on the part of the employer
5 respondent. Counsel asserted no threshold evaluation was performed in
6 accordance with the terms of the standard. Counsel argued the employer
7 was only charged with not performing initial evaluation but not cited
8 for lack of employee respirator use, therefore employee misconduct for
9 any failure to elect use was not an available defense.

10 Respondent safety representative Mr. Tyler Hills presented closing
11 argument asserting no proof of violation and compliance with the terms
12 of the referenced standard. Respondent referenced the proof in evidence
13 that he reviewed the SDS (MSDS) with employees and therefore did in fact
14 perform an "evaluation" meeting the standard requirements. He referenced
15 respondent's Exhibit A, a copy of the weekly tailgate meetings on the
16 MSDS, chemical hazards and respiratory protection dated July 1, 2013.
17 He noted the document showed Mr. Joey Lancaster as an attendee and
18 signatory party. Mr. Hills argued there was no evidence of any IDLH and
19 no real threat to any employee; and further that employee Lancaster
20 should have been wearing the mask and which was available to him at the
21 job site as required by the company safety policy. He argued there was
22 no proof of violation based upon the evidence of **identification and**
23 **evaluation** as required by the standard, documented evidence of training
24 on the MSDS and respondent issues availability of the furnished
25 respiratory mask, and the posted MSDS/SDS on the job site.

26 In reviewing the facts, documents and testimony in evidence
27 together with the arguments of the parties the Board must measure same
28 against the established law developed under the Occupational Safety and

1 Health Act (OSHA), Code of Federal Regulations (CFR) and Nevada Revised
2 Statutes (NRS).

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

5 All facts forming the basis of a complaint must be
6 proved by a preponderance of the evidence. *Armor
Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958
7 (1973).

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

15 A respondent may rebut allegations by showing:

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

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

23 . . . a serious violation exists in a place of
24 employment if there is a **substantial probability**
25 **that death or serious physical harm could result**
26 from a condition which exists or from one or more
27 practices, means, methods, operations or processes
28 which have been adopted or are in use at that place
of employment unless the employer did not and could
not, with the exercise of reasonable diligence,
know the presence of the violation. (emphasis
added)

1 The cited standard provides:

2 29 CFR 1910.134(d)(1)(iii) The employer shall
3 **identify and evaluate the respiratory hazard(s) in**
4 **the workplace;** this evaluation shall include a
5 reasonable **estimate of employee exposures** to
6 respiratory hazard(s) and an identification of the
7 **contaminant's chemical state** and physical form.
Where the employer cannot identify or reasonably
estimate the employee exposure, the employer shall
consider the atmosphere to be IDLH. (emphasis
added)

8 To sustain a serious violation at Citation 1, Item 1, complainant
9 must initially prove the respondent failed to ". . . **identify** and
10 **evaluate** the respiratory hazards . . ." as a threshold for finding
11 violation of the cited standard. However, respondent's Exhibit A
12 stipulated in evidence confirms the attendance of employee Lancaster and
13 other respondent employees at tailgate safety training for review of the
14 MSDS which included references to the chemical exposures, protection and
15 respirator use. Further, the MSDS at complainant's Exhibit 2, pages 83
16 through 86 identifies the chemicals and training related to the work to
17 be performed by the employees. Page 91 reflects the signature of
18 employee Lancaster who was observed by CSHO Burns working without
19 respirator protection. He received the subject training, viewed a video
20 tape, and signed a verification dated September 16, 2013. The documents
21 in evidence support the respondent's argument that the applicable terms
22 of the cited standard, as testified by CSHO Burns, were satisfied. It
23 is reasonable to conclude from the direct evidence and by inference that
24 the subject of the training and topic of the MSDS satisfied the
25 requirement of an **identification, evaluation and contaminant chemical**
26 **state.**

27 The cited violative conduct was not demonstrated by a preponderance
28 of evidence to meet complainant's burden of proof. Based upon the

1 evidence, testimony and photograph of the work area it is reasonable to
2 find the respondent **identified** and **evaluated** the respecting hazards in
3 partial open air workplace conditions. The MSDS training was confirmed
4 through employee signatures including not only the employee observed
5 working without a respirator but other employees at the job site. There
6 are insufficient proof elements to demonstrate violation. The
7 verification of attendance at the meeting **prior to the inspection**, the
8 signature by employees including the subject employee that page 91,
9 Exhibit 2, which included the MSDS referencing chemicals and respirator
10 use, admission of a posted MSDS at the job site, and the photographic
11 evidence at page 66A depicting an open air environment all serve to
12 support the respondents defense and argument that it was in compliance.
13 Given even a partial open air environment, it is reasonable to infer
14 there was negligible potential for employee exposure to a health hazard
15 even under the assumed IDLH of the standard.

16 When the Secretary has introduced evidence showing
17 the existence of a hazard in the workplace, the
18 employer may, of course, defend by showing that it
19 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)

20 The terms of the standard and the facts in evidence demonstrate the
21 employer to be in compliance.

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

28 The well established "**plain meaning rule**", requires this Board

1 review and interpret specific standards for violative conduct in
2 accordance with a fair, reasonable and plain meaning.

3 *Caminetti v. United States*, 242 U.S. 470, 485, 37
4 S.Ct. 192, 194, 61 L.Ed. 442 (1917) (citations
5 omitted). It is a long established rule that,
6 absent ambiguity, a statute's plain meaning
7 controls, and no further analysis is permitted.
8 *State Farm Mut. Auto. Ins. Co. v. Commissioner of*
9 *Ins.*, 114 Nev. 535, 540, 958 P.2d 773, 736 (1998).

10 While the violative conduct charged did not include a citation for
11 lack of employee respirator use, the evidence demonstrated employee
12 Lancaster observed by CSHO Burns during the inspection had been subject
13 of training on respirator use and chemical exposure potential in the
14 workplace. The substantial evidence of a safety meeting, training,
15 review, posted MSDS notice, and working conditions demonstrate the
16 employer acted reasonably and satisfied that portion of the standard
17 relied upon for citation, i.e. identification, evaluation and reliance
18 upon the working conditions. Employers are not held accountable under
19 the long-standing Federal Court and Review Commission interpretations
20 of occupational safety and health law when employees disregard training
21 and protection notwithstanding reasonable efforts.

22 *National Realty and Construction Co., Inc. v.*
23 *OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973), is the
24 fountainhead case repeatedly cited to relieve
25 employers responsibility for the allegedly
26 disobedient and negligent act of employees which
27 violate specific standards promulgated under the
28 Act, and sets forth the principal which has been
29 confirmed in an extensive line of OSHC cases and
30 reconfirmed in *Secretary of Labor v. A. Hansen*
31 *Masonry*, 19 O.S.H.C. 1041, 1042 (2000).

32 The board finds no preponderance of evidence to meet the burden of
33 proof to establish a violation of the cited standard. The facts and
34 documents in evidence demonstrate the respondent was in compliance with
35 the applicable specific standard governing occupational safety and

