

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,

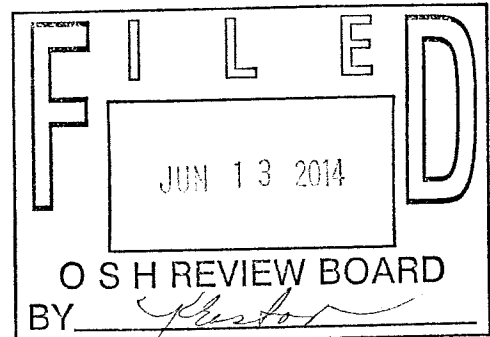
Docket No. LV 14-1702

12 Complainant,

13 vs.

14 THE RANGE USA, dba THE RANGE 702,

15 Respondent.
16 _____/



17 **DECISION**

18 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
19 **HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of November
20 2010, in furtherance of notice duly provided according to law, MS. SALLI
21 ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**
22 **Administrative Officer of the Occupational Safety and Health**
23 **Administration, Division of Industrial Relations** (OSHA); and MR. JEFF
24 KENT, appearing on behalf of Respondent, **The Range USA, dba The Range**
25 **702.**

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

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

1 Citation 1, Item 1, charges a violation of 29 CFR 1910.134(c)(1).
2 The complainant alleged the respondent employer did not establish and
3 implement a written respiratory protection program including medical
4 evaluations, fit tests, proper care of respirators and training for
5 employees assigned job duties involving the donning and doffing of
6 respirators. The violation was classified as Serious. The proposed
7 penalty for the alleged violation is in the amount of \$4,200.00.

8 Citation 1, Item 2, charges a violation of 29 CFR 1910.134(e)(1).
9 The complainant alleged the respondent employer did not provide
10 employees with medical evaluations prior to using Moldex Model 7003 Half
11 Face respirators while cleaning the firing range lanes and ammunition
12 traps. Employees were exposed to possible serious respiratory distress
13 or reduced pulmonary function as a result of not being medically
14 evaluated to use respirators. The violation was classified as Serious.
15 The proposed penalty for the alleged violation is in the amount of
16 \$4,200.00.

17 Citation 1, Item 3, charges a violation of 29 CFR 1910.134(f)(2).
18 The complainant alleged the respondent employer did not provide
19 employees with medical evaluations prior to using Moldex Model 7003 Half
20 Face respirators while cleaning the firing range lanes and ammunition
21 traps. Employees were exposed to lead at levels of 120 micrograms per
22 cubic meter and 280 micrograms per cubic meter. The violation was
23 classified as Serious. The proposed penalty for the alleged violation
24 is in the amount of \$4,200.00.

25 Citation 1, Item 4, charges a violation of 29 CFR
26 1910.134(g)(1)(i)(A). The complainant alleged two Range Safety Officers
27 with full beards were using Moldex Model 7003 Half Face respirators
28 while cleaning the firing range lanes and ammunition traps. Employees

1 were exposed to lead at levels of 120 micrograms per cubic meter and 280
2 micrograms per cubic meters; the facial hair compromised the sealing
3 surface of the face piece. The violation was classified as Serious. The
4 proposed penalty for the alleged violation is in the amount of
5 \$4,200.00.

6 Citation 1, Item 5, charges a violation of 29 CFR 1910.134(k)(1).
7 The complainant alleged the employees were not provided with information
8 and training prior to using Moldex Model 7003 Half Face respirators
9 while cleaning the firing range lanes and ammunition traps. The
10 violation was classified as Serious. The proposed penalty for the
11 alleged violation is in the amount of \$4,200.00.

12 Citation 1, Item 6, charges a violation of 29 CFR 1910.1025(c)(1).
13 The complainant alleged the employer did not ensure employees were not
14 exposed to concentrations of lead greater than 50 micrograms per cubic
15 meter of air over an 8 hour time weighted average (TWA). Employees were
16 exposed to possible serious illness from inhalation and/or ingestion of
17 lead when working inside the firing range. The violation was classified
18 as Serious. The proposed penalty for the alleged violation is in the
19 amount of \$4,900.00.

20 Citation 1, Item 7, charges a violation of 29 CFR 1910.1025(d)(2).
21 The complainant alleged the employer did not determine if employees were
22 exposed to airborne lead concentrations that were at or above the action
23 level. Employees are exposed to possible serious illness from
24 inhalation and/or ingestion of lead when working inside the firing
25 range. The violation was classified as Serious. The proposed penalty
26 for the alleged violation is in the amount of \$4,900.00.

27 Citation 1, Item 8, charges a violation of 29 CFR
28 1910.1025(e)(3)(i). The complainant alleged the employer did not

1 establish a Lead Compliance Program to reduce exposures below the
2 permissible exposure limit (PEL) to 50 micrograms per cubic meter. The
3 violation was classified as Serious. The proposed penalty for the
4 alleged violation is in the amount of \$4,900.00.

5 Citation 1, Item 9, charges a violation of 29 CFR
6 1910.1025(g)(2)(i). The complainant alleged the employer does not
7 provide daily protective work clothing to employees whose exposure
8 levels are over 200 micrograms per cubic meter. The violation was
9 classified as Serious. The proposed penalty for the alleged violation
10 is in the amount of \$4,900.00.

11 Citation 1, Item 10, charges a violation of 29 CFR
12 1910.1025(j)(1)(i). The complainant alleged the employer did not
13 establish a medical surveillance program prior to this inspection for
14 employees who are exposed to lead above the action level on a daily
15 basis. Employees are exposed to possible serious illness from
16 inhalation and/or ingestion of lead when working inside the firing
17 range. The violation was classified as Serious. The proposed penalty
18 for the alleged violation is in the amount of \$4,900.00.

19 The parties stipulated to the admission of evidence identified as
20 complainant's Exhibits 1 through 3 and respondent Exhibit A.

21 The parties presented brief opening statements. Complainant
22 asserted the testimonial documentary evidence to be presented will
23 demonstrate clear violations of the cited standards. No recognized
24 defensive positions have been advanced or provided to the division since
25 the issuance of the citations.

26 Respondent representative represented the employer was engaged in
27 all necessary steps to comply with the 29 CFR 1910 applicable standards
28 but everything still "in process". He asserted the company to be a new

1 business and exercising every good faith effort to comply with all OSHA
2 safety requirements; and further that the citations issued were
3 repetitive, duplicitous and the penalties excessive given the lack of
4 injuries, and the respondent's good faith efforts.

5 Complainant presented testimony and documentary evidence with
6 regard to the alleged violations. Ms. Kerry Sanchez, a Compliance
7 Safety and Health Officer (CSHO) testified as to her inspection, and the
8 citations issued to the employer. She referenced her narrative report
9 and testified from the investigative materials at Exhibit 1.

10 Based upon a referral complaint Ms. Sanchez commenced an inspection
11 of the respondent facilities identified as The Range 702, located in Las
12 Vegas, Nevada. The business is an indoor shooting range and employs
13 individuals identified as Range Safety Officers (RSO) to facilitate the
14 operation which includes cleaning of the firing lanes and retrieval of
15 spent ammunition debris containing lead. During the walk around
16 inspection CSHO Sanchez noted the employer had not established a
17 Respiratory Protection Program. She found conditions of violation
18 comprising two particular sections of the OSHA standards. Ms. Sanchez
19 identified 29 CFR 1910.134(c)(1) and subsections relating to employee
20 respiratory protection and use; and 29 CFR 1910.1025 involving employee
21 exposure to lead concentrations.

22 CSHO Sanchez testified that during interviews she particularly
23 noted two of the RSOs required to don respirators had facial hair that
24 would impede the seal of a face piece. She also found that employees
25 did not have safety training on workplace hazards relating to daily lead
26 exposure.

27 On direct examination Ms. Sanchez detailed her investigative
28 findings under each of the specific standards cited for violation and

1 testified accordingly.

2 At Citation 1, Items 1 through 5, CSHO Sanchez described the
3 violations as relating to respirator and related violations. At Item
4 1, the employer did not produce a written **Respiratory Protection Program**
5 and could only provide basic information on respirators which she
6 determined did not constitute a "program" under the applicable OSHA
7 standard. Ms. Sanchez noted employees wore respirators on a daily basis,
8 and were subject of exposure to hazardous conditions based upon assigned
9 job duties.

10 At Citation 1, Item 2, there were no **medical evaluations** as
11 required by the applicable OSHA standard. She explained the requirement
12 to assure employees are "medically able" to use a respirator.

13 At Citation 1, Item 3, the investigation reflected the employees
14 were not given **"fit tests"** to assure the personal employee facial or
15 bone structure could accommodate a respirator. She explained the need
16 for the protective measures given the variables and physical makeup of
17 individuals.

18 At Citation 1, Item 4, CSHO Sanchez found two RSO employees had
19 full facial beards and were using respirators while cleaning the firing
20 range lanes and ammunition traps. She determined the conduct supported
21 finding a violation because employees with full beards **could not**
22 **accommodate a tight fit respirator mask.** Use of the mask against beards
23 compromises the beneficial effect of the respirator. She further
24 testified then when informing the employer of this conduct, the CEO
25 responded the RSOs were military veterans and refused to shave or remove
26 their facial hair.

27 At Citation 1, Item 5, the employees were **not provided with**
28 **information and training** prior to actually using the respirators which

1 were given to them by the respondent employer. CSHO Sanchez explained
2 the basis for this requirement is to assure effective employee
3 protection. She inquired as to training records in furtherance of the
4 standard. Respondent informed her the employees were not yet trained
5 and the process underway. During employee interviews, Ms. Sanchez
6 referenced Exhibit 1, pages 22 and 24A as evidence the employees were
7 not fitted, trained or evaluated in accordance with the standard
8 requirements. She further testified at page 23 to as evidence the
9 employees were never trained on respirator use.

10 At Citation 1, Item 6, CSHO Sanchez explained items 6 through 10
11 all related to the **lead concentrations in the atmosphere** to which the
12 employees were exposed and the threshold bases for protection referenced
13 in the previous section. She testified the exposure limits were beyond
14 the limits required for protection under the standards referenced under
15 29 CFR 1910.1025. She identified the testing formulations and explained
16 those at Exhibit 1, page 49 and the date of testing on August 15, 2013.
17 Ms. Sanchez took samples and sent them to a lab (identified Exhibit 1,
18 page 48) to obtain the results. She referenced the identified lab report
19 and explained the difference in the reporting data based upon the
20 measurements in micrograms and milligrams and the need for conversion
21 of same. Lab reporting and the OSHA standard methodology differed but
22 the results were susceptible to a mathematical extrapolation. She did
23 a "time weighted average" in accordance with the standard by adjusting
24 for each employee's work shift schedule. CSHO Sanchez testified ". .
25 . all 13 other Range employees were exposed (lead) levels . . .".

26 CSHO Sanchez testified that during employee interviews she was told
27 the employees were never trained on lead exposure contamination and
28 could only provide a copy of the standard, and referenced Exhibit 3,

1 page 113 which was a copy of the Range rules. Neither constituted
2 compliance with training or an understanding of lead exposure or
3 contamination at the job site under the applicable OSHA standard.

4 At Citation 1, Item 7, CSHO Sanchez testified the employer provided
5 no documentation, evidence or representation that it determined if
6 **employees were exposed to airborne lead concentrations at or above the**
7 **action level.**

8 At Citation 1, Item 8, Ms. Sanchez testified the respondent
9 employer did not establish a **lead compliance program** to reduce exposures
10 below the permissible exposure limit of 50 micrograms per cubic meter.
11 She further testified the employer respondent was aware of the
12 requirement but could not provide any satisfactory documentary evidence
13 and referenced Exhibit 1, page 115.

14 At Citation 1, Item 9, CSHO Sanchez testified the employer did not
15 provide **daily protective work clothing** to the employees whose lead
16 exposure levels were over 200 micrograms per cubic meter. She explained
17 the requirement requires knowledge and information on employee
18 protection from a "build-up" on clothing after daily use from lead
19 contamination through the atmosphere or by contact with materials at the
20 facility. On reviewing the matter with the respondent CEO, he informed
21 her he was not in compliance "yet" but was working to accomplish same.

22 At Citation 1, Item 10, CSHO Sanchez found the employer did not
23 establish any **medical surveillance program** prior to the inspection for
24 the employees who were exposed to the lead concentrations on a daily
25 basis above the action level. She found there was simply no medical
26 surveillance whatsoever, and explained the employees need to have
27 regular blood tests on lead levels in their blood to be aware of the
28 extent of protection required. She testified that all levels of lead

1 were based on overall testing and again referenced the supporting
2 documentation in evidence reflecting the lab results.

3 CSHO Sanchez explained the penalty calculations and the violation
4 classifications based upon the high probabilities of serious injury or
5 death from lead contamination which is a recognized and identified toxic
6 substance when potential exposure exists above certain levels,
7 particularly on a daily basis.

8 During cross-examination CSHO Sanchez testified the inspection was
9 not conducted on a punitive basis, that compliance information was "easy
10 to get" despite responses provided to her during her investigation, and
11 that the employer simply continued to rely upon good faith efforts
12 rather than accomplish the required results. Respondent described all
13 the requirements as "in process".

14 CSHO Sanchez admitted she observed RSO's using PPE in the form of
15 "booties, respirators and eye protection" when cleaning out the range
16 facilities.

17 At the conclusion of the complainant's case respondent provided
18 witness testimony from Mr. Brian Lake, the respondent CEO. He testified
19 on his background as a general contractor and sprinkler fitter, who
20 entered the indoor shooting range business after a downturn of the
21 building industry in Las Vegas. After researching how to open and
22 operate an indoor shooting range, he contacted the State EPA and Clark
23 County Health Department. He obtained approvals and inspections of the
24 facilities ultimately constructed. Mr. Lake testified he hired an
25 experienced individual previously involved in the indoor shooting range
26 industry, but he eventually left the company which required him to hire
27 Messrs. Collier and Schutzer. He relied on these individuals to provide
28 technical expertise for the facility operations. Mr. Lake testified

1 they never informed him of the subject safety issues.

2 Respondent identified Exhibit A as the work performed at The Range
3 facility to install a professional air balance system as recommended by
4 the industry. He retained A-1 Mechanical, a company he was informed had
5 expertise on air balancing issues in such a facility. He was never
6 informed nor aware there were any special problems for an indoor range
7 other than assurance of the amount of air removal to be handled; and
8 effectuated a contractual commitment with the company. He testified as
9 to the substantial expense involved and his reliance upon an expert to
10 install the air balancing equipment to address the lead exposure issues.

11 Mr. Lake testified OSHA previously inspected the facility but never
12 issued any citation. He understood the RSOs "on the (firing) line" were
13 not required to wear respirators but only PPE for hearing and hand
14 (glove) protection. He believed employees were required to wear
15 respirators and booties only for the range cleaning work.

16 Mr. Lake testified there was very little assistive information
17 available to individuals who wished to construct or operate an indoor
18 shooting range and he struggled to obtain same from the EPA and Health
19 Department. He found it impossible to become fully informed on any OSHA
20 requirements and explained this as a partial reason for not
21 accomplishing much of that subject of the violations found by CSHO
22 Sanchez.

23 On cross-examination, Mr. Lake testified he opened the business on
24 October 4, 2012. He obtained the services of an independent lab to test
25 for lead exposure which resulted in levels far lower than those found
26 by CSHO Sanchez. He experienced "some problems" in the air system but
27 believed they had been corrected. He attributed the difficulties
28 occurred only when a great number of customers were actually firing

1 weapons in the facility. Mr. Lake admitted he had no documentation to
2 offer as evidence of the laboratory air sampling or testing results. He
3 referenced his answer to the complaint and testified he believed the
4 OSHA enforcement action was premature. He was genuinely working to
5 address the various issues, all matters subject of the citations were
6 "in process . . . and he was preparing a written program . . .". He was
7 "shocked to see the lab results from the CSHO because . . . I paid for
8 the top line equipment (air exchange) in the United States for indoor
9 ranges and very surprised at the findings."

10 At the conclusion of the submission of the testimony, the parties
11 presented closing arguments.

12 Complainant asserted the burden of proof had been met by the
13 un rebutted CSHO testimony, the documentation in evidence and no
14 recognized legal defense submitted by the respondent. Counsel argued
15 the matter was simply a case of non-compliance. There were no facts in
16 evidence to support mitigation. Counsel argued that even if the
17 employer may have mistakenly instructed some RSOs to wear respirators
18 not actually "required by the standards", that conduct "triggered
19 compliance" despite no threshold mandate. Counsel asserted that once
20 an employer provides an employee with a respirator, it must then comply
21 with all of the related OSHA standards, particularly because of
22 potential lead exposure levels to assure employee protection.

23 Counsel further argued there was no evidence the lab tests were
24 incorrect, the testing done improperly, nor the concentrations below the
25 serious danger levels all as subject of the CSHO testimony.

26 **Employer knowledge** was proven because the respondent CEO testified
27 he did obtain some testing. After two years of opening it is simply not
28 credible to assert that compliance is "in process" or the company is so

1 new he needed more time. There is no defense the enforcement action was
2 premature; the respondent was simply non-compliant.

3 Respondent offered closing argument and admitted there was no
4 contest at Citation 1, Items 1, 7 and 8; but asserted the remaining
5 items were subject of his ongoing compliance efforts or simply not
6 violations. He argued the company is a small business and ". . . we are
7 not perfect". He asserted there was simply ". . . not much information
8 around and very little help from any governmental agencies contacted,
9 . . . nor any OSHA problems in the past . . .". He was ". . . trying
10 to figure out how to address the issues . . . it's not easy . . . and
11 OSHA does not provide much assistance with the difficult terminology for
12 compliance . . .". He asserted that he had gone to the United States
13 Navy and the National Shooting Board Foundation to demonstrate that he
14 was sincerely trying to comply.

15 Mr. Lake argued the itemized violations were all related with one
16 another and duplicated the same basic charges and penalties. The total
17 penalties then resulted in an excessive total fine. He asserted the
18 ". . . state gives no leeway time to get these things done, . . . the
19 standards are not clear, and just got the cart before the horse . . .
20 on the respirators to try and protect employees and should not be
21 punished for that . . .".

22 In considering the testimony, exhibits, and arguments of counsel,
23 the Board is required to review the evidence and established legal
24 elements to prove violations under Occupational Safety & Health Law.

25 In all proceedings commenced by the filing of a
26 notice of contest, the burden of proof rests with
the Administrator. (See NAC 618.788(1)).

27 All facts forming the basis of a complaint must be
28 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD

¶16,958 (1973).

To prove a violation of a standard, the Secretary must establish (1) the applicability of the standard, (2) the existence of noncomplying conditions, (3) employee exposure or access, and (4) that the employer knew or with the exercise of reasonable diligence could have known of the 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).

A respondent may rebut allegations by showing:

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

NRS 618.625 provides in pertinent part:

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

The respondent admitted the violations charged at Citation 1, Items 1, 7 and 8. The documentary and testimonial evidence established the violations charged by a preponderance of evidence at Items 2, 3, 4, 5, 6 and 10. The Board finds insufficient proof to support the charges of violation at Citation 1, Item 9.

Complainant witness testimony of CSHO Sanchez as well as that of respondent witness Lake confirmed lack of compliance and established violations of the contested citations as above referenced.

There was no direct requirement of respirator use for certain

1 employee work efforts, however once an employee is provided a respirator
2 by an employer the broad requirements of the applicable OSHA standards
3 must be met. Overall employee protection required under the entire
4 section 1910.134 statutory scheme is a critical safety issue and
5 threshold at 29 CFR 1910.134(c)(1). Without a protection **program**
6 employees provided respirators may undertake dangerous work efforts or
7 be unaware of hazard exposures from which they are entitled protection.
8 The respirator standards are intended to protect employees by adequately
9 informing them to be aware of, avoid, and assure protection from
10 recognized hazards in the workplace. The threshold requirements of air
11 sampling, training, fit, medical evaluations and adequate information
12 for selection and use of the appropriate respirator or device are all
13 examples of essential criteria for compliance.

14 The violative conduct found, including those admitted at Citation
15 1, Items 1, 7 and 8 was clearly supported by substantial preponderant
16 evidence. With the exception of Citation 1, Item 9, there can be no
17 question of the employer's responsibility under the statutory scheme.
18 At Item 9 the CSHO did observe some protective clothing in use and the
19 respondent testified he provided same. The employee work tasks differed
20 as would the extent or need of protective clothing. The evidence of
21 violation was equivocal. The burden of proof must be met by the
22 complainant in all instances of violation. There can be no violations
23 found without proof of the required elements by a preponderance of
24 evidence.

25 The violative conduct subject of this case is divided into two
26 general categories: A) **respirators** at Citation 1, Items 1 through 5, and
27 B) **lead exposure** at Citation 1, Items 6 through 10. In reviewing
28 evidence the Board must analyze the elements required to establish

1 violations.

2 The Board finds the standards referenced to be **applicable** to the
3 facts in evidence. **Non-complying conditions** were established and/or
4 admitted respectively by both complainant and respondent witnesses. The
5 employer failed to implement the required Respirator Protection Program
6 and the follow on sub-references at Items 1 through 5. The employer
7 failed to recognize, test, identify and protect the employees from
8 exposure to lead hazards at Items 6 through 10, excepting Item 9.
9 **Employee exposure** was proven both **directly** under the testing
10 requirements for the lead hazards and observations as to the respiratory
11 compliance, and through **imputed legal access** to the hazardous conditions
12 in the workplace. **Employer knowledge** of the violative conditions was
13 established by the witness testimony, the previous employer testing, and
14 imputed by the governing law to the employer when a supervisor knew or
15 with reasonable diligence could have known of the violative conditions.
16 See *Division of Occupational Safety and Health v. Pabco Gypsum*, 105 Nev.
17 371, 775 P.2d 701 (1989).

18 Complainant met the statutory burden of proof and established the
19 violations found by a preponderance of evidence at Citation 1, with the
20 exception of Item 9.

21 The classification of the violations as serious, was proven based
22 upon the evidence and testimony of a substantial probability of serious
23 injury or even death from daily exposures to lead and must also be
24 confirmed.

25 The Nevada OSHA State Plan has adopted the standards enacted by
26 Congress, through the Code of Federal Regulations (CFR). Specific
27 standards to protect employees in the workplace are implemented after
28 extensive study and determination that particular hazards are known

1 and/or **recognized** in certain industries. A hazard is deemed
2 "recognized" when the potential danger of the condition or practice is
3 either actually known to the particular employer or generally known in
4 the industry. *Continental Oil Co. v. OSHRC*, 630 R.2d 446, 448 (9th Cir.
5 1980). The documentary evidence confirmed the dangers associated with
6 lead exposure and therefore the need to protect all employees
7 accordingly. The testimonial and documentary evidence presented through
8 CSHO Sanchez also confirmed the serious classification of the
9 respiratory violations. The issue before the Board as to the violation
10 classification is not that any serious injury occurred but whether the
11 **potential** for same existed. Employees on the worksite were exposed or
12 had **access** to hazardous atmospheric levels of lead which is a recognized
13 carcinogenic that can result in serious injury or death, even many years
14 after initial exposure. The **probability** for serious injury or death
15 from exposure to hazardous conditions is the governing criterion. There
16 was a preponderance of evidence in the record to support classification
17 of the violations as serious.

18 In reviewing the proposed penalties assessed, the Board finds each
19 subset of five violations very closely interrelated making the penalty
20 aspects duplicitous. The resultant total penalties represent an onerous
21 and excessive punitive burden. The goal of the Occupational Safety and
22 Health Act is to assure workplace safety. The amount of a monetary fine
23 does not necessarily correlate to correction or resolution of employee
24 working conditions. Given the evidence and facts of violation here, it
25 is appropriate the penalties be **grouped** under the categories; first as
26 to the respiratory section and then the lead exposure. By finding the
27 respondent in serious violation of each of the referenced standards but
28 reducing the penalties, the employer respondent has no excuse but to

1 direct all funds available to an immediate, competent and thorough
2 resolution of the respiratory and lead exposure issues found at its
3 worksite. The respondent should be fully aware, that upon any
4 subsequent inspection, findings of **repeat** violations of **any** confirmed
5 here may justifiably result in the imposition of extraordinary penalties
6 in accordance with the OSHA enforcement program. The penalty reduction
7 here should not be misinterpreted by respondent as excusing or condoning
8 the violative conduct found. The facts and evidence warrant a fair and
9 reasonable reallocation of resources for the efficient and effective
10 final resolution of the violative conditions to safeguard employees at
11 the worksite.

12 The Federal courts recognize the exclusive authority of the
13 Commission (Board) to assess, raise, lower or adjust penalties.

14 If an employer contests the Secretary's proposed
15 penalty, the Review Commission (Board) has
16 exclusive authority to assess the penalty; the
17 Secretary's penalty is considered merely a
18 proposal. Relying on the language of Section
19 17(j), the Commission and courts of appeal have
20 consistently held that it is for the **Commission**
21 **(Board) to determine, de novo, the appropriateness**
22 **of the penalty to be imposed for violation** of the
23 Act or an OSHA standard. (Emphasis added) The
24 Review Commission therefore is not bound by OSHA's
25 penalty calculation guidelines. The Commission
26 evaluates all circumstances of a violation . . . in
27 determining what penalty, if any, should be
28 assessed. The Review Commission has held that the
criteria to be considered cannot always be given
equal weight and that no single factor is
controlling in assessing penalties. . . ."
Occupational Safety and Health Law, 2013,
Bloomberg/BNAL 3rd Ed., pages 295-297, citing cases,
U.S. *Ladish Malting Co.*, 135 F.3d 484, 18 OSH Cases
1133 (7th Cir. 1998); *Reich v. Arcadian Corp.*, 110
F.3d 1192, 17 OSH Cases 1929 (5th Cir. 1997) (citing
29 U.S.C. §§666(j), 659(a), 659(c)); *Bush &*
Burchett Inc. V. Reich, 117 F.3d 932, 939, 17 OSH
Cases 1897, 1903 (6th Cir.), cert. denied, 118 S.
Ct. (1997). *Quality Stamping Prods. Co.*, 16 OSH
Cases 1927 (Rev. Comm'n 1994); *Valdak Cor.*, 17 OSH
Cases 1135, 1137-38 & n.5 (Rev. Comm'n 1995),

1 *aff'd*, 73 F.3d 1466, 17 OSH Cases 1492 (8th Cir.
2 1996) (. . .the Commission noted that **"the Act**
3 **places no restrictions on the Commission's**
 authority to raise or lower penalties within those
 limits"). (emphasis added)

4 The Board finds, as a matter of fact and law, that violations did
5 occur as to Citation 1, Items 1, 2, 3, 4, 5, 6, 7, 8 and 10. The Board
6 denies penalties proposed but modifies the penalties by grouping same
7 as follows: Citations 1 through 5, a grouped penalty in the total sum
8 of \$4,200.00. Citations 6, 7, 8 and 10, a grouped penalty in the total
9 sum of \$4,900.00. The Board finds no violation by a preponderance of
10 evidence as to Citation 1, Item 9 based upon an insufficient burden of
11 proof to support findings a violation.

12 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
13 **REVIEW BOARD** that a violation of Nevada Revised Statutes are confirmed
14 Citation 1, Item 1, 29 CFR 1910.134(c)(1), Citation 1, Item 2, 29 CFR
15 1910.134(e)(1), Citation 1, Item 3, 29 CFR 1910.134(f)(2), Citation 1,
16 Item 4, 29 CFR 1910.134(g)(1)(i)(A), Citation 1, Item 5, 29 CFR
17 1910.134(k)(1), Citation 1, Item 6, 29 CFR 1910.1025(c)(1), Citation 1,
18 Item 7, 29 CFR 1910.1025(d)(2), Citation 1, Item 8, 29 CFR
19 1910(e)(3)(i), Citation 1, Item 10, 29 CFR 1910.1025(j)(1)(i). The
20 classification of the violations is confirmed as "Serious". The total
21 penalties are in the sum of NINE THOUSAND ONE HUNDRED DOLLAR
22 (\$9,100.00).

23 It is further the decision of the **NEVADA OCCUPATIONAL SAFETY AND**
24 **HEALTH REVIEW BOARD** that no violation did occur as to Citation 1, Item
25 9, 29 CFR 1910.1025(g)(2)(i) and the proposed penalty is denied.

26 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
27 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION,**
28 **DIVISION OF INDUSTRIAL RELATIONS,** to submit proposed Findings of Fact

1 and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
2 **REVIEW BOARD** and serve copies on opposing counsel within twenty (20)
3 days from date of decision. After five (5) days time for filing any
4 objection, the final Findings of Fact and Conclusions of Law shall be
5 submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by
6 prevailing counsel. Service of the Findings of Fact and Conclusions of
7 Law signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
8 **REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

9 DATED: This 13th day of June 2014.

10 NEVADA OCCUPATIONAL SAFETY AND HEALTH
11 REVIEW BOARD

12 By /s/
13 JOE ADAMS, CHAIRMAN
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