

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,

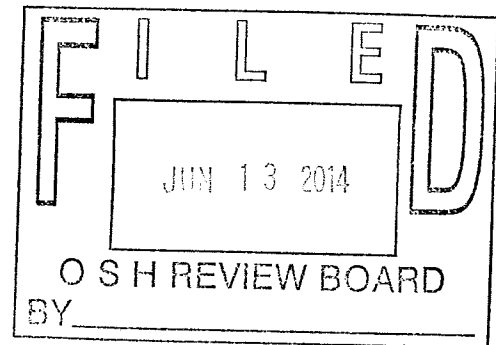
Docket No. LV 14-1704

Complainant,

vs.

UNITED EXCEL,

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 appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (OSHA)**. MR. DAVID E. REDLIN, Environmental Health & Safety Director, appearing on behalf of Respondent, **United Excel**.

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 Nevada

1 Revised Statute (NRS) 618.987(2). The statute requires in pertinent
2 part that if a supervisory employee on a construction site fails to
3 present his or her employer with a current and valid completion card for
4 an OSHA 30 course not later than 15 days after being hired, the employer
5 shall suspend or terminate his or her employment. The violation was
6 classified as Regulatory, and a monetary penalty assessed at \$200.00.

7 Complainant alleged respondent violated the statute at the United
8 Excel construction project located at Mike O'Callahan Military Hospital
9 inside Nellis Air Force Base. An employee foreman was in a supervisory
10 role without the required OSHA 30 hour training. The employer did not
11 suspend or terminate the employee after 15 days of being hired or
12 assigned to a supervisor role as required by the Nevada Revised Statute.
13 The complainant further alleged the employee had been in a supervisory
14 role for approximately two months prior to the inspection.

15 Counsel for complainant presented documentary and testimonial
16 evidence through witness Mr. Ruben White, a Compliance Safety and Health
17 Officer (CSHO). Mr. White referenced complainant's Exhibits 1 and 2
18 stipulated in evidence. He testified in accordance with his inspection
19 and safety narrative report at pages 10 through 12 of Exhibit 1. CSHO
20 White found construction foreman Michael Eberhard had been on the
21 respondent job site for approximately two months but did not possess an
22 OSHA 30 card. He continued interviews and found Mr. Eberhard had not
23 received the OSHA 30 training and concluded the respondent to be in
24 violation of NRS 618.987(2). During a closing conference Mr. John
25 Burke, safety engineer for respondent, informed CSHO White that he knew
26 the employee did not have the required OSHA training but was scheduled
27 to undertake same very shortly. CSHO White informed respondent safety
28 representative Burke of the violative condition and explained his

1 recommendation for a regulatory citation in accordance with the Nevada
2 Operations Manual.

3 CSHO White continued his testimony and explained one of the bases
4 for the statutory requirement is to ensure employees on the job site are
5 protected through supervision by qualified individuals with OSHA 30
6 training. A foreman overseeing other employees without the OSHA 30
7 training could expose employees under his authority to potential
8 workplace hazards.

9 On cross-examination CSHO White testified there were eight
10 employees on the subject job site, three of whom had OSHA 30 cards. He
11 admitted the job site was ". . . not unsupervised . . .". At Exhibit
12 1, Page 14, he testified with regard to the minimal severity rating and
13 similar minor ratings as to gravity and probability. Mr. White agreed
14 the violation was "minor". In response to a question with regard to why
15 he did not issue a "**notice in lieu of violation**" under NRS 618.465, CSHO
16 White testified he had no authority to do so.

17 On redirect examination CSHO White testified that his supervisors
18 had not implemented rules on the issuance of notices in lieu of
19 violations for minor or de minimis violative conditions because the
20 procedures were not yet in place.

21 At the conclusion of the case complainant and respondent presented
22 closing argument.

23 Complainant counsel asserted the Nevada Revised Statute is clear
24 and mandates that an employee in a supervisory role must hold an OSHA
25 30 hour training certification; and if found to be without one, the
26 employer must suspend or terminate the employee after 15 days of being
27 hired or assigned a supervisory role. It was admitted by safety engineer
28 Burke and during employee interviews that the subject employee had not

1 obtained the 30 hour training certification, although employed for
2 approximately two (2) months.

3 Counsel asserted the burden of proof was met and admitted. The
4 only defense is a claim the violation is minor and under NRS 618.465
5 should have been cited differently.

6 Respondent safety representative Redlin submitted closing argument.
7 He asserted the cited violative condition existed but the facts in
8 evidence demonstrated it to be very minor and with no direct or
9 immediate relationship to safety or health. Respondent referred to NRS
10 618.465 and argued the basis of the statute was to permit relief in
11 certain circumstances where violations are minor. Counsel argued the
12 job site employees were not unprotected because three other supervisors
13 holding OSHA 30 cards were present. There were only a total of 8
14 respondent employees on the particular site including the three OSHA 30
15 trained supervisors.

16 Respondent further argued it is extremely important for the company
17 to remain qualified and competitive for its government facility
18 construction work; and when the law and facts warrant, the damage from
19 citations for such a very minor violation should be considered and
20 treated fairly. He asserted it is not the respondent's fault the
21 administrator does not have procedures in place. There is no good
22 reason to punish such a responsible company leaving its reputation at
23 stake and record marred by violative conduct under the facts and
24 circumstances.

25 Respondent representative further argued the company has over 230
26 employees throughout the country, has an excellent safety record, and
27 referenced exhibits with regard to the company's respect for safety
28 compliance. The company is involved in primarily construction work at

1 military bases building dental and medical facilities. The security
2 requirements and the competitive nature is intense such that finding a
3 regulatory violation here will seriously hamper the company. He
4 asserted that relief is warranted because there were no facts or issues
5 impacting occupational safety or health.

6 In reviewing the facts, testimony, exhibits and arguments of
7 counsel, the Board is required to measure same against the established
8 applicable law developed under the Occupational Safety and Health Act
9 as adopted in the State of Nevada.

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

12 All facts forming the basis of a complaint must be
13 proved by a preponderance of the evidence. *Armor*
Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958
14 (1973).

15 To prove a violation of a standard, the Secretary
must establish (1) the applicability of the
16 standard, (2) the existence of noncomplying
conditions, (3) employee exposure or access, and
17 (4) that the employer knew or with the exercise of
reasonable diligence could have known of the
18 violative condition. See *Belger Cartage Service,*
Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
19 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
20 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
(No. 76-1408, 1979); *American Wrecking Corp. v.*
21 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
2003).

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

1 **NRS 618.987(2)** provides in pertinent part:

2 ". . . If a supervisory employee on a construction
3 site fails to: (a) Present his or her employer with
4 a current and valid completion card for OSHA-30
5 course; or (b) Complete and OSHA-30 alternative
 course offered by his or her employer, not later
 than 15 days after being hired, the employer shall
 suspend or terminate his or her employment. . . ."

6 **NRS 618.990** provides in pertinent part:

7 "1. If the Division finds that an employer has
8 failed to suspend or terminate an employee as
9 required by NRS 618.987, it shall: (a) Upon the
10 first violation, in lieu of any other penalty under
11 this chapter, impose upon the employer an
12 administrative fine of not more than \$500. . . .
13 Before a fine or any other penalty is imposed upon
14 an employer pursuant to this section, the Division
15 must follow the procedures set forth in this
16 chapter for the issuance of a citation, **including,**
17 **without limitation, the procedures** set forth in NRS
18 618.475 for notice to the employer and an
19 opportunity for the employer to contest the
20 violation. (emphasis added)

21 **NRS 618.465** provides in pertinent part:

22 ". . . The Administrator may prescribe procedures
23 for the issuance of a **notice in lieu of a citation**
24 with respect to: **(a) Minor violations which have no**
25 **direct or immediate relationship to safety or**
26 **health; . . .**" (emphasis added)

27 The Board finds a respondent construction foreman on the work site
28 did not possess the required OSHA 30 training certification. Three other
29 respondent supervisors with OSHA 30 certification were also on the site
30 out of a total of eight respondent employees. While the foreman without
31 the OSHA 30 certification was employed in a supervisory role, the job
32 site and employees were subject to oversight by the three other OSHA 30
33 qualified supervisors. A reasonable inference from the facts in
34 evidence is that the employees were not in jeopardy by working at a job
35 site without OSHA 30 qualified supervision.

36 OSHA 30 supervisor training certification is an important aspect

1 of workplace safety. The CSHO acted correctly in finding the violative
2 condition. However, the existence of violative conditions **for citation**
3 must be considered on a case-by-case basis under the facts and evidence.
4 Citations for violations must be reviewed fairly and the evidence
5 interpreted reasonably within the overall spirit and intent of
6 occupational safety and health law.

7 NRS 618.465 was enacted for a purpose and included a remedy to
8 address the issue of "**minor violations which have no direct or immediate**
9 **relationship to safety or health . . .**". The terms of the statute are
10 clear and the **plain meaning** evident.

11 The salient purpose of OSHA is to assure workplace safety through
12 reasonable and fair enforcement measures. Enforcement should not merely
13 be punitive.

14 The respondent employer claims an exemplary reputation for safety
15 compliance in a company with over 200 employees. There was no evidence
16 to the contrary. The cited violative condition **under the particular**
17 **facts in evidence** at the **subject job site** was **minor** and posed no danger
18 or **immediate relationship to the employees safety and health**. The
19 restricted nature of the respondent construction business at secured
20 military installations is subject to a reasonable inference. A reported
21 violation, as demonstrated in respondent's Exhibit A, could negatively
22 impact the respondent's ability to continue and/or obtain work on
23 restricted military installations. The asserted negative attitudes of
24 government employers and the insurance rating industry toward employers
25 with OSHA violations are generally known, recognized and subject of
26 reasonable inference.

27 The facts and evidence before the Board warrant reliance upon the
28 terms, spirit and intent of NRS 618.465 to reclassify the violative

1 conduct as de minimis and **minor**.

2 "The (Federal) Commission has long asserted that it
3 may characterize a violation as *de minimis*."
4 Occupational Safety and Health Law, 3rd Ed., 2013,
5 Bloomberg/BNA, page 187. Citing *General Electric*
6 *Co.* 3 OSHC 1031, 1040, Rev. Comm'n 1975. The
7 First, Third, Fifth and Ninth Circuits have upheld
8 the Commission's authority to characterize a
9 violation as *de minimis*. *Chao v. Symms Fruit Ranch*
10 *Inc.*, 242 R.3d 894, 19 OSHC 1337 (9th Cir. 2001);
11 *Donovan v. Daniel Constr. Co.*, 396, F.2d 818, 10
12 OSHC 2188 (1st Cir. 1982); *Reich v. OSHRC (Erie Coke*
13 *Corp.)*, 998 F.2d 134, 16 OSHC 1241 (3d Cir. 1993);
14 *Phoenix Roofing Inc. V. Dole*, 874 F.2d 1027, 14
OSDC (5th Cir. 1989). As to what a *de minimis*
violation is, the Commission has formulated a test
in various ways . . . "A ***de minimis* violation is**
one in which there is technical noncompliance of
the standard but the departure from the standard
bears such a negligible relationship to employee
safety and health as to render inappropriate the
assessment of a penalty or the entry of an
abatement order." *Keco Indus. Inc.*, 11 OSHC 1932,
1934 (Rev. Comm'n 1984). Occupational Safety and
Health Law, 3rd Ed., 2013, Bloomberg/BNA, page 187.
(emphasis added)

15 Violations have . . . been characterized as de
16 minimis where the likelihood of an accident was
17 remote and any injuries would have been minor. The
18 Commission also found inconsequential deviations
19 from the from the standard's requirements to be de
20 minimis. *Hood Sailmakers*, 6 OSH Cases 1206, 1208
21 (Rev. Comm'n 1977). The Commission's authority to
22 characterize violations as *de minimis* in nature has
generally been upheld. *Chao v. Symms Fruit Ranch,*
Inc., 242 F.3d 894, 19 OSH Cases 1337 (9th Cir.
2001) (collecting cases). *Bechtel Power Corp.*, 10
OSH Cases 2001, 2009 (Rev. Comm'n 1982); *Alamo*
Store Fixtures, 6 OSH Cases 1150, 1151 (Rev. Comm'n
1977).

23 It is reasonable under the particular facts and evidence to find
24 the violative conduct "de minimis", dismiss the regulatory citation and
25 reclassify the **minor** infraction to a "notice in lieu of citation".

26 The Federal courts recognize the exclusive authority of the
27 Commission (Board) to assess or adjust penalties.

28 If an employer contests the Secretary's proposed

1 penalty, the Review Commission has **exclusive**
2 authority to assess the penalty, the Secretary's
3 penalty is considered merely a proposal. Relying
4 on the language of Section 17(j), the Commission
5 and courts of appeal have consistently held that it
6 is for the Commission to determine, **de novo**, the
7 **appropriateness of the penalty** to be imposed for
8 violation of the Act or an OSHA standard. (Emphasis
9 added)

6 The Review Commission therefore is not bound by
7 OSHA's penalty calculation guidelines. The
8 Commission evaluates all circumstances.

8 "The Commission . . . may reduce or eliminate a
9 penalty by **changing the citation classification or**
10 **by amending the citation . . .**". See *Reich v.*
11 *OSCRC (Erie Coke Corp.)*, 998 F.2d 134, 16 OSH Cases
12 1241 (3d Cir. 1993) (emphasis added)

11 The Board finds as a matter of fact and law the cited respondent
12 violative conduct **under the particular facts in evidence** was "de
13 minimis" and "**minor . . . and have no direct or immediate relationship**
14 **to safety or health . . .**". The cited regulatory violation is dismissed
15 and the proposed penalty denied. The citation is amended to a **notice**
16 **in lieu of citation** and the violative conduct reclassified to **minor** as
17 defined in NRS 618.465.

18 Based upon the above and foregoing, it is the decision of the
19 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation of
20 Nevada Revised Statutes did occur as to Citation 1, Item 1, NRS
21 618.987(2) and the proposed penalty is denied.

22 The Board directs the **Respondent, UNITED EXCEL** to prepare and
23 submit proposed Findings of Fact and Conclusions of Law to the **NEVADA**
24 **OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing
25 counsel within twenty (20) days from date of decision. After five (5)
26 days time for filing any objection, the final Findings of Fact and
27 Conclusions of Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY**
28 **AND HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings

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

4 DATED: This 13th day of June 2014.

5 NEVADA OCCUPATIONAL SAFETY AND HEALTH
6 REVIEW BOARD

7 By /s/
8 JOE ADAMS, Chairman