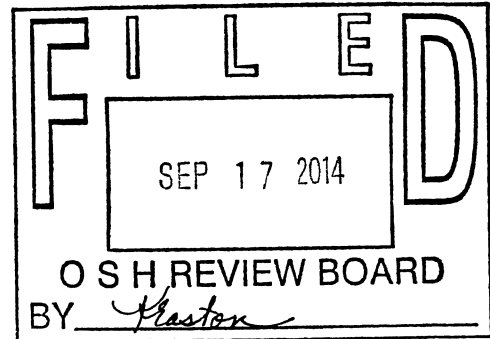


NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

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 14-1703



Complainant,

vs.

DILLARDS, INC.,

Respondent.

DECISION

This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 14th day of August, 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. TIMOTHY E. ROWE, ESQ., counsel appearing on behalf of Respondent, **Dillards, Inc.**

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.

Citation 1, Item 1, charged a violation of 29 CFR 1910.305(b)(2)(i), which provides in pertinent part:

All pull boxes, junction boxes, and fittings shall be provided with covers identified for the purpose.

1 If metal covers are used, they shall be grounded.
2 In completed installations, each outlet box shall
3 have a cover, faceplate, or fixture canopy. Covers
4 of outlet boxes having holes through which flexible
cord pendants pass shall be provided with bushings
designated for the purpose or shall have smooth,
well-rounded surfaces on which the cords may bear.

5 The complainant alleged that on October 14, 2013 employees in the
6 women's shoe department office area were not protected from inadvertent
7 contact with live wires at over a nominal 50 volts. The wires were
8 housed in junction boxes that had not been covered and located directly
9 next to filing cabinets exposing any employee using the cabinets to
10 potential serious injury due to hazardous conditions, including
11 electrical burns and shock. The violation was classified as serious.
12 The proposed penalty for the violation was \$4,050.00.

13 Citation 2, Item 1, charged a violation of 29 CFR 1904.32(a)(1),
14 which provides in pertinent part:

15 OSHA 300 Log Basic Requirement. At the end of each
16 calendar year, each employer must review the OSHA
17 300 Log to verify that the entries are complete and
accurate, and correct any deficiencies identified:

18 The complainant alleged the employer did not verify that the
19 entries were complete and accurate, as required by the standard. The
20 violation was classified as "other than serious". The proposed penalty
21 for the violation was \$2,430.00.

22 Citation 2, Item 2, charged a violation of 29 CFR 1904.40(a), which
23 provides in pertinent part:

24 Basic requirement. When an authorized government
25 representative asks for the records you keep under
26 Part 1904, you must provide copies of the records
within four (4) business hours.

27 The complainant alleged the employer did not supply records in a
28 timely manner, as required by the standard. The violation was

1 classified as "other than serious". The proposed penalty for the
2 violation is in the amount of \$810.00.

3 The parties stipulated to the admission of evidence identified as
4 complainant's Exhibits 1 through 4 containing counsel identified
5 redactions. **CHECK TRANSCRIPT FOR ADMITTED REDACTION AGENDA**

6 Complainant and respondent provided brief opening statements.

7 Complainant referenced the matter as principally involving a
8 "records" case at Citations 2, Items 1 and 2. Respondent was cited for
9 lack of verification of entries in OSHA 300 logs and failure to provide
10 the logs in a timely manner as required by the cited standards. The
11 violations were both classified as "other than serious" (other) and the
12 penalties proposed at \$2,430.00 and \$810.00, respectively. Counsel
13 asserted the respondent claims it is exempt from the provisions based
14 upon a technical argument that it was incorrectly classified as a
15 department store under the OSHA record keeping standards. Complainant
16 intends to prove that Dillards was correctly classified as a department
17 store and not exempt as asserted in its defense.

18 The violation charged at Citation 1, Item 1, is based upon
19 uncovered electrical junction boxes in an employee work area exposing
20 individuals to accidental contact with live wires carrying over a
21 nominal 50 volts. The violation is classified as serious and a penalty
22 proposed in the amount of \$4,050.00.

23 Respondent provided an opening statement asserting the respondent
24 was not required to maintain the logs as cited by the complainant in
25 Citation 2, Items 1 and 2. The department store classification for the
26 Dillards Henderson store has not previously been applied to the
27 respondent in the state of Nevada. Interpretation of the identified
28 standard in other states does not classify Dillards a "department store"

1 due to the limited merchandise available for the reason that each store
2 is "site specific" as to the merchandise carried as inventory for sale.

3 Counsel for complainant presented testimonial and documentary
4 evidence through witness Mr. Ruben White, a Compliance Safety and Health
5 Officer (CSHO). Mr. White referenced complainant's Exhibits 1 through
6 4 as stipulated in evidence. He testified in accordance with his
7 inspection and safety narrative report at Exhibit 1, pages 24 through
8 27. On or about October 14, 2013 CSHO White was assigned the subject
9 investigation based upon an anonymous complaint. During the "walkaround"
10 inspection, CSHO White observed two open electrical junction boxes
11 containing wires he confirmed to carry over 50 volts located in the
12 office area of the women's shoe section directly adjacent to filing
13 cabinets. He determined the area was used by employees on a daily basis
14 for computing tasks, as well as making labels for the products stored
15 in the women's shoe department stock room. He testified Mr. Thomas
16 Estrada, the women's shoe manager, informed him the junction boxes had
17 not been covered for the entire one year period he has been employed at
18 the Dillard's location. Mr. Estrada further stated he had spent an hour
19 or two in the area on most days. Interviewed employee number 3 informed
20 CSHO White that she is not in the area very often but occasionally uses
21 the label maker to print labels for products. CSHO White confirmed the
22 label maker and associated materials were in the same vicinity as the
23 uncovered junction boxes containing the live wires carrying over 50
24 volts.

25 CSHO White informed store manager Ms. Melody Walker of the
26 violative condition; and she informed him they would be covered
27 immediately. On a follow on visit to the site CSHO White confirmed the
28 junction boxes had been covered with appropriate closures.

1 CSHO White testified the open junction boxes were in "plain view"
2 and adjacent to filing cabinets at a level which could easily permit
3 accidental employee contact with the wires in the open box. Mr. White
4 identified the photographs at Exhibit 1, pages 65 and 65A depicting the
5 boxes and wires located inside. He explained photograph 66B as
6 depicting a test light establishing the wires to be "live" carrying over
7 50 volts.

8 On cross-examination by respondent counsel, Mr. White testified the
9 wires were inside the box enclosure and not "sticking out". He observed
10 no exposed "copper" and testified the bare wires were covered by
11 sheathing and "wire nuts".

12 In response to continued questioning, CSHO White testified the
13 National Electric Code provides that wire sheathing does not protect
14 individuals from shock. Only a cover can satisfy the protection
15 requirements under the Uniform Electrical Code and the requirements of
16 the OSHA standard. CSHO White further testified he was not informed
17 anyone had ever been shocked by the subject wires in the store nor had
18 there been any complaints with regard to same.

19 On re-direct examination, CSHO White testified as to the hazard
20 exposures identified and employee access to the hazardous conditions.
21 He explained his worksheet (OSHA 1B) penalty calculations, ratings,
22 adjustment factors, and monetary assessment rendered in accordance with
23 the Nevada Operations Manual.

24 Mr. White continued his direct testimony with regard to Citation
25 2, Items 1 and 2. He testified that during the "walkaround" he
26 inspected each storage room and documented the conditions observed in
27 accordance with initial complaints which initiated the OSHA
28 investigation. He additionally requested, ". . . as a regular part of

1 any investigation, the OSHA 300 and 300A logs in furtherance of the
2 typical request letter sent to the respondent . . .". He received the
3 300 logs for the location but did not receive the 300A portion. He made
4 a follow up request to Ms. Walker who then referred him to Ms. Rhonda
5 Garland, the safety representative for Dillard's. Mr. White spoke with
6 Ms. Garland and made the same request of her but was told she believed
7 his area of concern regarding the logs had been subject of a ". . .
8 misclassification under SIC code 5311 . . .". Ms. Garland further
9 informed him that code reference applied to **department** stores, but the
10 Dillard's Henderson facility should appropriately be classified as SIC
11 code 5600 applying to **apparel** stores; and therefore respondent exempt
12 from the requirement to maintain and/or furnish logs.

13 CSHO White referenced his narrative report in evidence at page 26
14 providing the details of his reported findings based upon the
15 discussions with Ms. Garland. He testified Ms. Garland also informed
16 him she had discussions on the subject issue on an earlier date with
17 another CSHO in the OSHA main office, Mr. Shete. She referenced an
18 email communication with Mr. Shete as confirming Dillard's had been
19 misclassified at that time and the error corrected.

20 After researching the SIC codes under the current classification,
21 and that referenced by Ms. Garland, Mr. White testified he concluded the
22 respondent was appropriately classified as a 5311 "department store".
23 Mr. White reviewed the information received from the respondent with his
24 supervisor and it was determined that Dillard's is a **department store**,
25 as opposed to an **apparel store**, and appropriately classified under the
26 SIC code which results in Dillard's not being exempt from enforcement of
27 the standards referenced and cited at Citation 2.

28 Mr. White referenced and testified from his narrative report that

1 the 300 logs requested for 2010, 2011 and 2012 were provided and
2 reviewed, but found deficient in what he described as "column F". He
3 explained that for all three years, the injuries and the body parts
4 affected were recorded, but did not include the item or substance that
5 caused the illness or injury.

6 Mr. White conducted the closing conference on about October 8, 2013
7 with store manager Ms. Melody Walker. He reported the results of the
8 OSHA inspection, the observed hazards, standard violations found and the
9 abatement requirements.

10 CSHO White continued testimony responding to questions on the
11 applicability of the Citation 2 standards to the facts found during the
12 inspection and through researching the issues for compliance. He
13 described his classification of "other" as based upon the record keeping
14 nature of the violations and no probability of death or serious physical
15 injury for the violative conduct.

16 Respondent counsel conducted cross-examination on the Citation 2,
17 Items 1 and 2 alleged violations. Mr. White testified there are
18 exemptions from compliance with the standard and explained the basis for
19 same when certain businesses are involved in "low hazard" activity. He
20 testified that he read the SIC code and concluded that because Dillards
21 sold both housewares and clothing they were appropriately classified by
22 OSHA as a department store rather than an apparel sales operation under
23 the code. He testified the respondent code reference was not considered
24 appropriate nor applicable for an exemption because he observed in plain
25 view products other than apparel for sale in the subject Dillards
26 facility. Mr. White testified he inspected all the stock rooms at the
27 Dillards store and testified on his having observed a variety of items
28 other than apparel held for sale in the facility.

1 When questioned with regard to safety representative Garland's
2 email exchange and previous understanding, counsel directed the witness
3 attention to complainant's Exhibit 4, commencing at page 99. At page
4 101 Mr. White responded to questioning as to the retail store
5 classifications under what has been referenced as the IMIS and "SIC"
6 coding for the subject purposes. Mr. White testified the OSHA
7 determination of Dillard's classification as a department store was based
8 upon the store carrying ". . . men's and women's apparel and either
9 major household appliances **or** other home furnishings". Counsel inquired
10 as to the variety of materials located in the facility and Mr. White
11 testified he observed home furnishings and apparel.

12 On continued cross-examination as to why previous OSHA inspections,
13 including that referenced at Exhibit 4 and the email exchange with
14 safety representative Garland at page 99, OSHA accepted the claim of
15 exemption under the respondent's interpretation of the SIC coding
16 classification, Mr. White responded the current subject investigation
17 was based on his inspection, personal observations, interpretation of
18 the coding, and a revision in OSHA enforcement interpretations. Counsel
19 inquired as to whether OSHA or he advised the respondent that the "law
20 had changed" to which Mr. White responded negatively. He testified that
21 OSHA is not required to inform an employer of the standards because all
22 Nevada employers are expected to inform themselves of any changes or
23 different applications of the governing law.

24 Complainant counsel presented additional witness testimony from
25 CSHO Edgar Zamora. He testified his duties include a working knowledge
26 and application of SIC codes under the published IMIS references. He
27 confirmed his research on classifications of other stores and various
28 facilities in Nevada and determinations of the applicability and

1 appropriate enforcement of the Citation 2, Items 1 and 2 requirements
2 on the respondent.

3 At the conclusion of complainant's case, the respondent presented
4 witness testimony from department store general manager, Ms. Melody
5 Walker. She testified on the product line in the Henderson Dillards
6 store and described the variety of goods held for sale. She testified
7 the principal products were clothing, accessories, cosmetics, lingerie,
8 linens, shoes, housewares, bedding, bath, china, luggage and some small
9 appliances. She described the percentage of sales as 95% apparel and
10 5% other which comprised bedding, bath, luggage, and housewares.

11 At the conclusion of the presentation of evidence and testimony
12 counsel presented closing argument.

13 Complainant counsel referenced Citation 1, Item 1, regarding the
14 exposure of live electrical wires in the uncovered electrical boxes.
15 She asserted there was no proof requirement the wires must be "sticking
16 out" of the box. The plain meaning of the standard requires an
17 electrical box must be covered. She argued the standard plain meaning
18 of "covered" does not mean wires be only sheathed or connected with wire
19 nuts but rather the box must be covered by the plate component for
20 safety compliance. She argued the photographic exhibits regarding the
21 electrical violations subject to testimony and stipulated evidence,
22 including the voltage testing device, established the live voltage
23 hazard in the wires. Counsel asserted the burden of proof was met with
24 regard to the applicability of the standard, the exposure or access to
25 the recognized hazard by employees working in the immediate area, and
26 employer knowledge particularly after the long-standing violation
27 occurring in plain view. The violative conditions were confirmed in
28 evidence based upon not only the investigative report findings and

1 photographs but also imputed to respondent by the area supervisor's
2 knowledge and the **obvious** nature of the dangerous violative conditions.
3 It is presumed and subject to lawful inference under occupational safety
4 and health law that a reasonably safety conscious or prudent employer
5 knew or with the exercise of reasonable diligence could have known of
6 an obvious violation in plain view.

7 At Citation 2, Item 1, counsel asserted the 300 log requirement was
8 appropriate and Dillard's was not exempt. There were 130 employees in the
9 facility. Respondent witness Walker testified under oath and identified
10 items held for sale in the store that were not under any definition
11 "apparel". The standard has no percentage allocation for the type of
12 goods held for sale as a threshold for enforcement. There was no
13 evidence the respondent carried only an apparel line, but wants the SIC
14 code to exempt it from simple compliance with the OSHA 300 log standard.
15 Ms. Walker testified the merchandise in the subject Dillard's store had
16 not changed over her many years as manager. The Clark County Business
17 Licensing Division identified the facility as a "department store".
18 Dillard's holds itself out to the public as a department store. There
19 was simply no evidence, nor could there be an inference, that Dillard's
20 falls under an exemption of the SIC codes because the testimony of both
21 complainant and respondent witnesses established ". . . Dillard's carries
22 for sale not only apparel but home furnishings as well . . .". There
23 is no requirement that Dillard's carry appliances to be classified as a
24 department store. The enforcement standard is applicable if Dillard's
25 "carries either appliances **or** home furnishings". The definition for
26 exemption by use of the word "**or**" requires Dillard's be classified under
27 the department store code by OSHA. There is no exemption from
28 compliance and the **plain meaning** of the company's described and/or

1 observed merchandise, business and identity, is that it's a department
2 store for code classification and therefore compliance with the cited
3 standards.

4 At Citation 2, Item 2, counsel asserted that respondent ultimately
5 supplied the records required under the cited standard, but after the
6 expiration of 4 hours. It was therefore untimely and constituted a
7 violation under the specific terms of the standard.

8 Respondent counsel argued the respondent should not have been
9 ". . . reclassified from its apparel line classification under the SIC
10 codes and subjected to enforcement without any notice of a
11 reinterpretation or change in its previous practice and policy . . .".
12 Counsel asserted that a simple interpretation of the SIC code
13 terminology at pages 99 and 101, together with the previous OSHA
14 enforcement policy, demonstrates that indeed Dillards was exempt and
15 should continue to be exempt and not found in violation of the cited
16 standards at Citation 2, Items 1 and 2. Counsel asserted at page 101
17 under the 5311 definition, the store ". . . must carry major appliances
18 **and** home furnishings to be a 5311 . . .". He argued there was no
19 evidence the store carried major appliances and therefore should be
20 exempt. Counsel further asserted that regardless of the terminology,
21 the respondent should be classified under the "low risk" category for
22 its predominant apparel line of merchandise because that's the reason
23 behind the code classification process. It is based upon a determination
24 that risk of hazard exposures to employees is "low" in an apparel sales
25 facility. He asserted the testimonial evidence by Ms. Walker was
26 un rebutted that apparel sales are 95% of the business, therefore it is
27 the "primary activity". The definitions at Exhibit 4, page 101, provide
28 that if there are no major appliances and home furnishings,

1 classification as a department store is incorrect and therefore OSHA
2 must rely on the unrefuted "primary activity" evidence to confirm the
3 apparel classification.

4 Counsel asserted the email exchange referenced at Exhibit 4 between
5 Ms. Garland and OSHA established that two other inspections by Nevada
6 OSHA recognized exemption so why not now; and why wasn't there any
7 "notice" if there was a change in enforcement policy. That kind of
8 conduct is not appropriate in the United States, and not fair to such
9 a responsible employer as Dillards.

10 Counsel asserted there should be no violation at Citation 1, Item
11 1, regarding the uncovered electrical boxes. He admitted the box was
12 not "covered" up but it did not demonstrate any serious hazard. The
13 wires were not "sticking out" nor was copper exposed but rather wire
14 nuts protected anyone coming into contact from shock, injury or
15 electrocution. Counsel referenced page 44 at Exhibit 1 on the
16 definition of a serious violation asserting it means there must be a
17 "most likely" causal factor for death and that was not remotely possible
18 due to the covered wire nuts. So at best, if there was a violation, it
19 should be reclassified as "other than serious".

20 Complainant counsel challenged the respondent's closing argument
21 statements as to the page 101 definition for classification of goods
22 carried for sale. She referenced the document at Exhibit 4 in evidence
23 and asserted it correctly provides the company need not be shown to
24 ". . . sell apparel and only **major household appliances** but rather
25 apparel and **either** major household appliances **or** other home furnishings
26 . . .". Counsel asserted the complainant evidence was unrebutted, and
27 included manager Walker's testimony that Dillards sells "home
28 furnishings as well as apparel" therefore exemption cannot be lawfully

1 applied.

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

6 N.A.C. 618.788(1) provides:

7 In all proceedings commenced by the filing of a
8 notice of contest, the **burden of proof** rests with
the Administrator.

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

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

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 access to a
23 hazard. See *Anning-Johnson Co.*, 4 OSHC 1193, 1975-1976
OSHD ¶ 20,690 (1976).

24 A "**serious**" violation defined in NRS 618.625(2) provides in
25 pertinent part:

26 ". . . a **serious** violation exists in a place of
employment if there is a substantial probability
27 that death or serious physical harm could result
from a condition which exists or from one or more
28 practices, means, methods, operations or processes
which have been adopted or are **in use at that place**

1 of employment unless the employer did not and could
2 not, with the exercise of reasonable diligence,
3 know the presence of the violation." (Emphasis
4 added)

5 An "other than serious" violation is defined as:

6 If a direct or immediate relationship does exist
7 but there is still no probability of death or
8 serious physical injury, then an "other-than-
9 serious" designation is appropriate. *Pilgrim's*
10 *Pride Corp.*, 18 O.S.H. Cases 1791 (1999). (emphasis
11 added)

12 A "de minimis" violation is defined as:

13 "Where no direct or immediate relationship between
14 the violative condition and occupational health or
15 safety, the citation should be re-designated as a
16 *de minimis* violation without penalty. *Chao v.*
17 *Symms Fruit Ranch, Inc.*, 242 F.3d 894 (9th Cir.
18 2001). *Owens-Corning Fiberglass Corp. v. Donovan*,
19 659 F.2d 1285, 10 OSH Cases 1070 (5th Cir. 1981)
20 (fiberglass itch). Rabinowitz, Occupational Safety
21 and Health Law, 3rd Ed. 2013 at p. 263 (emphasis
22 added)

23 A "minor" violation is established upon a preponderance of evidence
24 in accordance with NRS 618.645.

25 NRS 618.465 provides in pertinent part:

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

At Citation 1, Item 1, the Board finds preponderant evidence to
meet the burden of proof of violation, the serious classification, and
appropriateness of the proposed penalty. In reviewing the elements of
proof required, it was unrefuted the standard cited for the uncovered
electrical boxes was **applicable** to the subject facts observed, testified
and photographed in evidence. The **non-complying conditions** were proved
through the photographic exhibits and un rebutted witness testimony of
CSHO White. See photographic Exhibit 1 at page 66B.

1 **Employee exposure** was established by the preponderant evidence
2 through the rule of **access**.

3 Under Occupational Safety and Health Law, there
4 need be no showing of **actual** exposure in favor of
5 a rule of **access** based upon **reasonable**
6 **predictability** - (1) the **zone of danger** to be
7 determined by the hazard; (2) **access** to mean that
8 **employees either while in the course of assigned**
9 **duties**, personal comfort activities on the job, or
10 while in the normal course of ingress-egress will
11 be, are, or have been in the zone of danger; and
12 (3) the **employer knew or could have known of its**
13 **employees' presence** so it could have warned the
14 employees or prevented them from entering the zone
15 of danger. *Gilles & Cotting, Inc.*, 3 OSHC 2002,
16 1975-1976 OSHD ¶ 20,448 (1976); *Cornell & Company,*
17 *Inc.*, 5 OSHC 1736, 1977-1978 OSHD ¶ 22,095 (1977);
18 *Brennan v. OSAHRC and Alesea Lumber Co.*, 511 F.2d
19 1139 (9th Cir. 1975); *General Electric Company v.*
20 *OSAHRC and Usery*, 540 F.2d 67, 69 (2d Cir. 1976).
21 (emphasis added)

22 **Employer knowledge** was established based upon the cited item
23 violation occurring within the **plain view** of the employer supervisory
24 employee, and presumed known by imputation as supported by the unit
25 manager statements to CSHO White. Occupational safety and health law
26 recognizes satisfaction of the employer knowledge proof element based
27 upon direct knowledge, supervisory employee knowledge, or constructively
28 through principles of **foreseeability** and presumption of reasonable
diligence.

Actual knowledge is not required for a finding of
a serious violation. Foreseeability and
preventability render a violation serious provided
that a **reasonably prudent employer, i.e., one who**
is safety conscious and possesses the technical
expertise normally expected in the industry
concerned, would know of the danger. *Candler-*
Rusche, Inc., 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723
(1976), appeal filed, No. 76-1645 (D.C. Cir. July
16, 1976); *Rockwell International*, 2 OSHC 1710,
1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d
1283 (6th Cir. 1976); *Mountain States Telephone &*
Telegraph Co., 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365
(1973).

1 *Division of Occupational Safety and Health vs.*
2 *Pabco Gypsum, 105 Nev. 371, 775 P.2d 701 (1989).*

3 The Board finds preponderant evidence to establish the violative
4 conditions alleged at Citation 2, Items 1 and 2, but insufficient proof
5 to confirm the OSHA classification of the violation as "other than
6 serious" and appropriateness of the proposed penalties.

7 The documentary and testimonial evidence demonstrates the SIC
8 designation of the Henderson Dillards as a department store was
9 factually correct, appropriate and supported findings of violative
10 conditions under the cited standards. The testimony of both complainant
11 and respondent witnesses supported the simple **plain meaning** of the
12 definition to prove Dillards carried, in addition to men's and women's
13 apparel, "other home furnishings". The plain reading of the terms at
14 Exhibit 4, page 101, provides for the classification of a retail
15 business as a department store requiring "these stores must carry men's
16 and women's apparel and **either** major household appliances **or other home**
17 **furnishings.**" The evidence is clear and convincing that respondent,
18 regardless of the percentage of the specific goods held for sale in the
19 various categories, carried the type of merchandise as identified to
20 support the classification and SIC code of "department store". There
21 was additional corroborating evidence from the Clark County Business
22 License authority and other documentation, however the direct evidence
23 alone was unrefuted and supports the definition and the appropriate
24 classification.

25 The troublesome aspect of the facts presented for consideration by
26 the review board as an appellate body, is the enforcement action which
27 resulted in the issuance of citations classified as "other than serious"
28 for record keeping violations and assessment of substantial monetary

1 penalties.

2 The evidence is uncontroverted that for an extended period of time
3 the Dillards Henderson store carried a consistently similar line of
4 merchandise but was considered by OSHA as an **apparel** rather than
5 **department** store. This apparel designation keyed the coding
6 classification used for risk analysis as well as OSHA record keeping and
7 reporting requirements. The interpretations initially made and
8 continued by the OSHA enforcement section for many years permitted an
9 exemption from compliance by considering the store as an "apparel"
10 business. That status was last reviewed and maintained on October 24,
11 2013 based upon the unrebutted evidence in the record showing the email
12 exchanges between safety representative Garland and Nevada OSHA
13 management. However, according to the testimony of CSHO White, the
14 enforcement policy and practices of OSHA changed. The subject citations
15 resulted after reinterpretation of the code classification removing the
16 exemption status and treating the violative conditions for enforcement
17 as an "other than serious" violation.

18 The respondent claims it had no "notice" of the change. CSHO White
19 admitted in his testimony that it was not the obligation of the OSHA
20 enforcement section to remind or inform employers of changes in the law,
21 nor interpretations of enforcement policies. He correctly testified
22 that employers in the state of Nevada are expected to be responsible,
23 prudent and aware of the law and any changes. However application of
24 the enforcement change under the particular facts in evidence portrays
25 an unfair result. Any bonafide Nevada employer would want to avoid
26 violations on its record and endure a variety of reporting requirements
27 when it was doing exactly what it had done previously before the
28 reinterpretation of enforcement practice and policy.

1 The Board has previously adjusted unfair results through
2 application of OSHA law where a reasonable basis or cause has been
3 demonstrated **and** no employee exposure to injury or hazards, even though
4 there may be "technical" violations of particular standards or
5 regulations. Here there was no evidence as to the Citation 2, Item 1
6 and 2 violations involved any employee harm, danger, or exposure to
7 injurious hazards. Rather the subject violations were regulatory in
8 nature and involved record keeping.

9 The respondent is on **notice** that it must comply with the current
10 interpretation and/or any changes in the applicable law or procedure by
11 the OSHA enforcement section. It is not within the purview of this
12 Board to alter future OSHA enforcement practices, however a fair
13 application of the law here requires reclassification of the violations
14 and adjustment of the penalties.

15 "Where **no direct or immediate relationship between**
16 **the violative condition and occupational health or**
17 **safety**, the citation should be re-designated as a
18 **de minimis** violation without penalty. *Chao v.*
Symms Fruit Ranch, Inc., 242 F.3d 894 (9th Cir.
2001).

19 A "minor" charge of violation is established upon a preponderance
20 of evidence in accordance with NRS 618.645 and recognized applicable
21 law.

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

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

28 The evidence is unrefuted that the logs referenced at Citation 2,
Item 2, were furnished notwithstanding the asserted defensive position
of the respondent, but beyond the **four hour** time period proscribed in

1 the record keeping standard. Accordingly, the essence of the protective
2 nature of the records was not ignored by the respondent nor was it non-
3 compliant with the spirit of the law. The records were kept, they were
4 available, but simply not furnished in a timely fashion. This should not
5 be the basis of an "other than serious" classification or a penalty but
6 rather treated as **de minimis** and a "minor violation" based upon NRS
7 618.465. There was simply no direct or immediate relationship to safety
8 or health.

9 At Citation 2, Item 1, again violation of the standard is for
10 record keeping and technical in nature but with no direct or immediate
11 relationship between the violative condition and occupational safety and
12 health. It should be treated as **de minimis** and a minor violation in
13 accordance with Nevada statute 618.465.

14 While notification of changes in enforcement policy is not an
15 established threshold requirement or proof element under the cited
16 standard nor the obligation of a CSHO assigned to inspections, fairness
17 and even application of the law for a Nevada business and recognizing
18 the primary directive of occupational safety and health law to protect
19 employees are not served by a practice which could easily be handled
20 under the existing law when the facts warrant. Here the evidence
21 supports an inference that the employer was not a scofflaw or evasive
22 but rather operating under a previous enforcement policy and practice
23 with a reasonable expectancy and understanding of a defined exemption
24 status.

25 Notwithstanding the Board's findings here with regard to the
26 enforcement interpretations, it must be clear to the respondent and any
27 other parties, that this decision is limited to the facts in evidence
28 and does not result in an exemption or variance for any future

1 enforcement or compliance purposes. The respondent must be governed
2 under the law as now enforced and is on fair and due notice.

3 Violations have . . . been characterized as de
4 minimis where the likelihood of an accident was
5 remote and any injuries would have been minor. The
6 Commission also found **inconsequential deviations**
7 **from the from the standard's requirements to be de**
8 **minimis.** *Hood Sailmakers*, 6 OSH Cases 1206, 1208
9 (Rev. Comm'n 1977). The Commission's authority to
10 characterize violations as de minimis in nature has
11 generally been upheld. *Chao v. Symms Fruit Ranch,*
12 *Inc.*, 242 F.3d 894, 19 OSH Cases 1337 (9th Cir.
13 2001) (collecting cases). *Bechtel Power Corp.*, 10
14 OSH Cases 2001, 2009 (Rev. Comm'n 1982); *Alamo*
15 *Store Fixtures*, 6 OSH Cases 1150, 1151 (Rev. Comm'n
16 1977).

17 It is reasonable under the particular facts and evidence to find
18 the violative conduct at Citation 2, Items 1 and 2 as de minimis,
19 dismiss the "other" classification and reclassify same as **de minimis and**
20 **a minor** regulatory infraction under NRS 618.465. The proposed penalties
21 are dismissed.

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

24 If an employer contests the Secretary's proposed
25 penalty, the Review Commission has **exclusive**
26 authority to assess the penalty, the Secretary's
27 penalty is considered merely a proposal. Relying
28 on the language of Section 17(j), the Commission
and courts of appeal have consistently held that it
is for the Commission to determine, **de novo**, the
appropriateness of the penalty to be imposed for
violation of the Act or an OSHA standard. (Emphasis
added)

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

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

1 Based upon the evidence and testimony, it is the decision of the
2 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of
3 Nevada Revised Statute did occur as to Citation 1, Item 1, 29 CFR
4 1910.305(b)(2)(i). The classification of "Serious" is appropriate and
5 affirmed. The assessed is penalty is reasonable and confirmed in the
6 amount of FOUR THOUSAND FIFTY DOLLARS (\$4,050.00).

7 The Board further finds, as a matter of fact and law, the cited
8 respondent violative conduct under the particular facts and evidence at
9 Citation 2, Item 1, 29 CFR 1904.32(a)(1) and Item 2, 29 CFR 1904.40(a)
10 were de minimis and minor with no direct or immediate relationship to
11 safety or health. The cited violations are confirmed but reclassified
12 from "other than serious" to de minimis and minor as defined at NRS
13 618.465. The proposed penalties are denied.

14 The Board directs counsel for the Complainant, **CHIEF ADMINISTRATIVE**
15 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION**
16 **OF INDUSTRIAL RELATIONS**, to submit proposed Findings of Fact and
17 Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
18 **BOARD** and serve copies on opposing counsel within twenty (20) days from
19 date of decision. After five (5) days time for filing any objection,
20 the final Findings of Fact and Conclusions of Law shall be submitted to
21 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing
22 counsel. Service of the Findings of Fact and Conclusions of Law signed
23 by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
24 **BOARD** shall constitute the Final Order of the **BOARD**.

25 DATED: This 17th day of September 2014.

26
27 NEVADA OCCUPATIONAL SAFETY AND HEALTH
28 REVIEW BOARD

By /s/
JOE ADAMS, Chairman