

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3
4
5

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, STATE OF NEVADA,

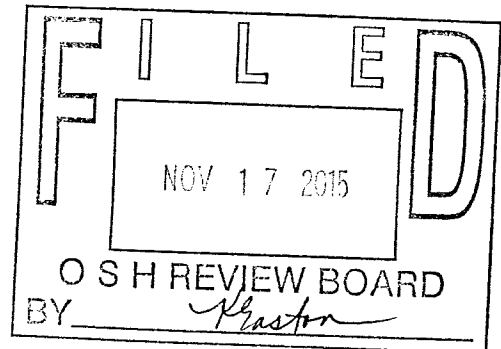
Complainant,

12 vs.

13 WALKER SPECIALTY CONSTRUCTION, INC.,

Respondent.
14

Docket No. LV 15-1798



15 **DECISION**

16 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
17 **REVIEW BOARD** at a hearing commenced on the 14th day of October, 2015, in
18 furtherance of notice duly provided according to law. MS. SALLI ORTIZ,
19 ESQ., counsel appearing on behalf of the Complainant, **Chief**
20 **Administrative Officer of the Occupational Safety and Health**
21 **Administration, Division of Industrial Relations (OSHA)**. MR. SHAN DAVIS,
22 ESQ., appearing on behalf of Respondent, **Walker Specialty Construction,**
23 **Inc.**

24 Jurisdiction in this matter has been conferred in accordance with
25 Nevada Revised Statute 618.315.

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

1 Citation 1, Item 1(a) charges a violation of 29 CFR
2 1910.134(c)(1)(ii) which provides in pertinent part:

3 In any workplace where respirators are necessary to
4 protect the health of the employee or whenever
5 respirators are required by the employer, the
6 employer shall establish and implement a written
7 respiratory protection program with worksite-
8 specific procedures. The program shall be updated
9 as necessary to reflect those changes in workplace
10 conditions that affect respirator use. The
11 employer shall include in the program the following
12 provisions of this section, as applicable: Medical
13 evaluations of employees required to use
14 respirators.

15 Complainant alleged that employer's Respiratory
16 Protection Program (RPP) did not include worksite-
17 specific procedures for medical evaluations of
18 their employees in Nevada who are required to use
19 respirators. The RPP contained procedures for
20 their employees in the state of Washington, but
21 those procedures do not apply to employees in
22 Nevada.

23 The violation was classified as "Other-than-Serious" with a
24 proposed penalty of \$0.00.

25 Citation 1, Item 1(b) charges a violation of 29 CFR
26 1910.134(c)(1)(iii) which provides in pertinent part:

27 In any workplace where respirators are necessary to
28 protect the health of the employee or whenever
respirators are required by the employer, the
employer shall establish and implement a written
respiratory protection program with worksite-
specific procedures. The program shall be updated
as necessary to reflect those changes in workplace
conditions that affect respirator use. The
employer shall include in the program the following
provisions of this section, as applicable: Fit
testing procedures for tight-fitting respirators.

29 Complainant alleged that employer's Respiratory
30 Protection Program (RPP) did not include worksite-
31 specific procedures for fit testing their employees
32 in Nevada who are required to use respirators. The
33 RPP contained procedures for their employees in the
34 state of Washington, but those procedures do not
35 apply to employees in Nevada.

36 The violation was classified as "Other-than-Serious" with a

1 proposed penalty of \$0.00.

2 Citation 1, Item 2 charges a violation of 29 CFR
3 1910.1200(h)(3)(iv) which provides in pertinent part:

4 The details of the hazard communication program
5 developed by the employer, including an explanation
6 of the labels received on shipped containers and
7 the workplace labeling system used by their
8 employer; the safety data sheet, including the
9 order of information and how employees can obtain
10 and use the appropriate hazard information.

11 The complainant alleged employees were not trained
12 on the new Safety Data Sheets format or the new
13 label elements (pictograms and signal words) by
14 December 1, 2013, as required by 29 CFR
15 1910.1200(j)(1).

16 The violation was classified as "Other-than-Serious" with a
17 proposed penalty of \$0.00.

18 Citation 2, Item 1 charges a violation of Nevada Revised Statutes
19 618.376(1) which provides in pertinent part:

20 Every employer shall, upon hiring an employee,
21 provide the employee with a document or videotape
22 setting forth the rights and responsibilities of
23 employers and employees to promote safety in the
24 workplace. The document, or evidence of receipt of
25 the videotape, must be signed by the employer and
26 employee and place in the employee's personnel
27 file. The document or videotape shall not be
28 deemed to be a part of any employment contract.

The complainant alleges the employer did not sign
documents provided to six (6) employees that set
forth the rights and responsibilities of employers
and employees to promote safety in the workplace.

23 The violation was classified as "Regulatory Notice" with a proposed
24 penalty of \$50.00.

25 Citation 2, Item 2 charges a violation of Nevada Administrative
26 Code 618.918(1) which provides in pertinent part:

27 To maintain his or her license, a contractor must
28 ensure that proper notification of any proposed
project for the abatement of asbestos is given in
writing to the Enforcement Section.

1 The complainant alleges the employer's Asbestos
2 Abatement Project Notification Form for a project
3 for the abatement of asbestos at 562 North Eastern
4 Avenue, Las Vegas, Nevada, listed the final
clearance firm as Terracon. However, the actual
clearance firm was CamAir.

5 The violation was classified as "Regulatory Notice" with a proposed
6 penalty of \$50.00.

7 **FACTS**

8 Complainant and respondent stipulated to admission of documentary
9 evidence at Exhibit 1, pages 1 through 121, and Exhibit 2, pages 122
10 through 294 for complainant; and respondent at Exhibits R1 through R10.

11 Counsel for complainant presented documentary and testimonial
12 evidence through witness Mr. John Hutchison, an Industrial Hygienist
13 supervisor (IH). Mr. Hutchison testified that the investigation was
14 conducted and the documentary evidence provided by CSHO Gregg Vilkaitis.
15 Mr. Hutchison explained Mr. Vilkaitis is no longer employed by Nevada
16 OSHA, but that he (Hutchison) supervised the inspection, reviewed the
17 documentation, and authorized issuance of the citations.

18 Mr. Hutchison referenced the referenced complainant's Exhibits 1
19 and 2 stipulated in evidence and referenced the information reported by
20 CSHO Vilkaitis. IH Hutchison testified from the health narrative report
21 at pages 20 through 21. The narrative described a comprehensive
22 inspection conducted at the worksite of the respondent, Walker Specialty
23 Construction, Inc. The respondent was contracted to abate asbestos on
24 the premises located on North Eastern Avenue in Las Vegas, Nevada.

25 The employer was subject of six (6) OSHA inspections in the past
26 five years resulting in no citations. The Exhibit 1 report described
27 a single story building of approximately 26,170 sq. ft. where the
28 interior walls and most flooring materials were removed. The

1 independent asbestos survey of the building reported materials
2 containing asbestos. CSHO Vilkaitis identified the respondent competent
3 person (Valdez) assigned to the project, and confirmed he and all
4 workers held valid asbestos abatement licenses as required by Nevada
5 OSHA. Mr. Vilkaitis examined the containment of asbestos and labeling.
6 He found compliance with the applicable OSHA standards. Entry Exit Logs
7 and Project Daily Logs were determined to be compliant. Mr. Vilkaitis
8 found the project notification form provided to Nevada OSHA listed a
9 final clearance contractor as Terracon, however the information was
10 determined to be incorrect.

11 Mr. Hutchison referenced the Exhibit 1 investigative report. He
12 confirmed that while the written health and safety programs did not
13 reflect any deficiencies, the hazard communication program failed to
14 address the updated requirements for SDS sheets and labeling. Notably
15 CSHO Vilkaitis found the evidence did not demonstrate employees were
16 trained on the new requirements by the designated guideline completion
17 date of December 1, 2013. After review of the respiratory protection
18 program (RPP), the inspecting CSHO found it was written for company
19 employees located in the state of Washington and referenced state laws
20 and documents as applicable, rather than Nevada. CSHO Vilkaitis found
21 the RPP did contain all the necessary elements and protocols required.
22 He also reported finding the Rights and Responsibilities pamphlets
23 provided to employees reflected that six were signed by employees but
24 not the employer.

25 Mr. Hutchison explained the purpose of the cited standards at
26 Citation 1, Item 1(a), 1(b), Citation 1, Item 2, and Citation 2, Items
27 1 and 2.

28 He testified while Nevada does not have a state site specific fit

1 test protocol, the document forms on RPP must include local worksite
2 specific procedures and applicable legal references. He further
3 testified as to Citation 1, Item 2, that the Federal OSHA Guidance
4 Letter at Exhibit 1, page 45, required completion of any training by
5 December 2013.

6 Mr. Hutchison explained the violations. He testified the required
7 proof element of **employer knowledge** was demonstrated by the employer's
8 efforts to maintain the actual documentation, although erroneous at
9 Citation 1, Items 1(a) and 1(b); and failing to document completed
10 training within the time constraints at Item 2. He further testified
11 on the proof of **employer knowledge** at Citation 2, Items 1 and 2. The
12 respondent was aware enough to provide the required training materials,
13 but failed to assure an employer representative was signatory on the
14 documents provided to six employees at Citation 2, Item 1 setting forth
15 the Rights and Responsibilities. At Citation 2, Item 2, Mr. Hutchison
16 noted from explanations provided in the Exhibit 1 report that the
17 employer was responsible for incorrect identification of the asbestos
18 clearance firm, identified as Terracon rather than the actual
19 contractor, CamAir.

20 Mr. Hutchison explained the classifications and appropriateness of
21 both zero dollar based penalties proposed, except for Citation 2, Items
22 1 and 2 which included proposed penalties of \$50.00 for each regulatory
23 violation.

24 IH Hutchison identified the witness statement of respondent
25 employee Contreras at Exhibit 1, Page 24 as obtained by CSHO Vilkaitis
26 to establish the existence of hazardous materials in use to support
27 Citation 1, Item 2.

28 Respondent counsel conducted cross-examination of IH Hutchison.

1 He testified the testing protocols at Citation 1, Items 1(a) and 1(b)
2 referencing Washington state were essentially the same as those enforced
3 in Nevada, as both states follow the Federal OSHA standards. Mr.
4 Hutchison reconfirmed his direct testimony that no violations were found
5 nor cited for any employees failing to receive the appropriate medical
6 evaluations or fit tests required under the standard. He testified the
7 Citation 1, Item 1(a) and 1(b) violations were issued for the mis-
8 reference to Washington state rather than Nevada locations and governing
9 law. Mr. Hutchison testified the violations are based upon a potential
10 of employees being mislead by direction to the Washington area location
11 and law.

12 At Citation 1, Item 2, Mr. Hutchison testified there was no
13 citation for lack of actual training compliance. The employer
14 established it paid the employee designated union to train. However the
15 violations were based upon lack of any record to establish completion
16 of the required training under the guideline at Exhibit 1, Page 45 by
17 the required December 2013 date.

18 At Citation 2, Item 1, Mr. Hutchison testified there was no
19 allegation the employer failed to distribute and review appropriate
20 informational documents with employees. The violation was based solely
21 upon the lack of a confirming signature by an employer representative.
22 Mr. Hutchison explained the purpose of the regulation to be assurance
23 that employees had the right and ability to discuss the subject
24 informational issues with an identified employer representative.
25 Counsel inquired whether the CSHO had any knowledge the employees
26 discussed the material with an employer representative. The witness
27 testified that he could not answer the question, but could only testify
28 there was no evidence they did or did not.

1 At Citation 2, Item 2, counsel referenced NAC 618.9181 for the lack
2 of the actual abatement clearance firm identified in accordance with the
3 regulation. The witness testified there is no requirement as to how a
4 final clearance is selected or when it is carried out, but only "proper
5 notification." Here an incorrect clearance contractor was identified
6 therefore the notification was not "proper."

7 On redirect examination, IH Hutchison testified the respondent
8 employee office manager reported to the inspecting CSHO that training
9 under Citation 1, Item 2 was not conducted until December 2014 and
10 therefore beyond the required deadline. He also explained at Citation
11 2, Item 1 the lack of signature by the employer required a citation
12 based upon the mandatory verbiage "must." Similarly at Citation 2, Item
13 2 and respondent's Exhibit 8, Mr. Hutchison testified the plain meaning
14 of the regulation was mandatory and required "proper notification."

15 At the conclusion of complainant's case, respondent presented
16 witness testimony and referenced the documentary exhibits in evidence.

17 Mr. Bill Walker identified himself as the owner of respondent
18 corporation, and with 40 years experience in the asbestos abatement
19 industry. Mr. Walker testified the Washington state references subject
20 of Citation 1, Items 1(a) and 1(b) were simply an older version of the
21 standard form documents referencing the Washington office location and
22 state law. The documents were revised in 2007. He admitted the older
23 versions were erroneously provided to the CSHO, due to a simple mistake
24 by the company office manager. He testified his (RPP) program had been
25 reviewed by Nevada "SCATS" and found compliant. Counsel referenced the
26 Exhibit 1 narrative report at page 21. Mr. Walker testified the only
27 problem noted for violation at Citation 1, Items 1(a) and 1(b) were
28 references to a Washington state location and law. At Citation 2, Item

1 1 there was merely a lack of employer signatures on six employee rights
2 pamphlets.

3 Mr. Walker explained his interpretation of "site specific" to
4 require each job include a specific worksite plan, but not specific to
5 state locations. The form plans designed by his company are under a
6 general framework which follows the federal OSHA standards regardless
7 of state locations. He testified both Nevada and Washington follow
8 federal OSHA. He referenced Exhibit 1, page 32 which depicted a
9 handwritten entry at the bottom providing "3 pages from file . . .
10 '**Nevada** Health and Safety 2010'." He explained the entry as support for
11 a simple "mixup" in the state location and legal references in the form
12 document versions provided to CSHO Vilkaitis.

13 Mr. Walker testified his plan satisfies Nevada OSHA notwithstanding
14 Citation 1, Items 1(a) and 1(b) because it is a copy of the federal
15 protocols which are the same as those enforced in Nevada. He further
16 testified the medical evaluations and fit testings are the same in
17 Washington, Nevada and under federal OSHA. All protocols were actually
18 completed. No employees were subjected to any actual or potential
19 hazards. The citations were based on an incidental mix up at the time
20 of inspection; the notation at Exhibit 1, Page 32 demonstrates the
21 intent. Mr. Walker testified at Citation 1, Item 2 that employees were
22 in fact trained on the new SDS. He identified Exhibits R-9 and R-10 in
23 support of the testimony. He referenced the sums paid to the employee
24 union local for the training; and identified correspondence confirming
25 training from the Training Laborers Local 872 Training Director Mark
26 Edgel at Exhibit R-10. The letter dated April 10, 2015 confirms the
27 required SDS training had been completed. Mr. Walker testified that
28 based upon his own personal knowledge the training was actually

1 completed in 2012.

2 At Citation 2, Item 1 Mr. Walker testified the alleged technical
3 violation was due to a simple oversight by his office manager. He
4 testified the real purpose of the provision was met. His employees were
5 made aware of the rights and responsibilities of employers and employees
6 for safety in the workplace. The document from his company and action
7 taken for employee safety were fully compliant, only a simple signature
8 overlooked by his officer manager.

9 At Citation 2, Item 2, Mr. Walker testified that because his
10 company is in the asbestos abatement business, he is legally prohibited
11 from involvement with final clearance. He testified there was no
12 citation for clearance not being completed. The owner arranged for it
13 directly. It was completed by a different contractor than the one
14 originally identified to him. Mr. Walker testified ". . . the point is
15 that the work was done, there was just a mis-reference to the actual
16 contractor performing the work" He further testified he had no
17 knowledge the employer changed the designated clearance contractor, and
18 should not be held liable for the unknown owner action.

19 On redirect Mr. Walker testified that the phrase "site specific"
20 means each job site in any city or state must be subject of a work plan,
21 but not necessarily that each state in which the company operates
22 differentiated. He testified the standard is vague and not subject to
23 a clear interpretation. He had no knowledge that such an incidental
24 mistake would require a citation for violation where there was no actual
25 or realistic potential for employee harm or injury.

26 Respondent presented witness testimony from Ms. Melissa Unbedacht.
27 She identified herself as the office manager for the company with duties
28 involving a wide variety of job tasks including assurance to many safety

1 requirements. She explained her comments to CSHO Vilkaitis as reported
2 by him in the inspection narrative at Exhibit 1. She admitted her
3 personal error in providing the CSHO with incorrect versions of the
4 documentation at Citation 1, Items 1(a) and 1(b). Similarly she
5 admitted her error in overlooking the signature on the informational
6 pamphlets on behalf of the employer subject of Citation 2, Item 1.

7 On cross-examination Ms. Unbedacht reconfirmed she sent the wrong
8 versions of the RPP program to OSHA and that it was her mistake. She
9 also explained the documentation at Exhibit 1, page 71. Ms. Undebacht
10 testified the Spanish and English version are written in parallel on the
11 forms. Her practice is to follow the English version with Spanish
12 speaking employees using the parallel version. She testified the company
13 employees also spoke enough English so both could communicate.

14 Complainant and respondent presented closing argument.

15 Complainant counsel argued Citation 1, Items 1(a) and 1(b)
16 contained "mandatory" terms which require absolute compliance. Counsel
17 asserted that "site specific" as used in the standard cannot be met if
18 you use references to Washington for Nevada based employees. Mr.
19 Walker's interpretation of the phrase "site specific" plans for medical
20 evaluation and fit testing is not a defense to the cited violations.
21 Employees could be mislead by the Washington address and law.

22 Counsel asserted the burden of proof was met to establish a
23 violation at Citation 1, Item 2, because the employees had to be trained
24 prior to December 2013. The correspondence at Exhibit R-2 contained an
25 April 2015 date on the letter but did not identify when the training had
26 actually been completed.

27 Counsel argued the burden of proof was met for all the cited
28 violations through the documents in evidence.

1 Counsel for respondent presented closing argument. He asserted the
2 absence of the actual CSHO who conducted the investigation resulted in
3 no legally acceptable witness testimonial evidence to establish the
4 complainant's burden of proof. Counsel argued the phrase "site
5 specific" means "specific job site project work," not the state
6 location. If the same federal, Washington and Nevada protocols are
7 referenced, the actual RPP program is properly documented. Counsel
8 argued the existent forms were compliant and confirmed by witness
9 testimony. The office manager admitted she sent an older erroneous
10 version with the Washington state references to OSHA. The simple
11 oversight was explained in credible testimony by both Mr. Walker and Ms.
12 Unbedacht.

13 Counsel argued the letter on training at respondent's R-2
14 applicable to Citation 1, Item 2 is evidence the training occurred, and
15 was completed within the required timeline in 2012. It was confirmed
16 through the testimony of Mr. Walker. Counsel further asserted the
17 defense to Citation 1, Item 2 was proven at Exhibit 1, page 103-104 of
18 complainant's exhibits, the training certification submitted to OSHES
19 dated April 2015. Counsel argued the 2013 interim guidance on
20 enforcement of the Revised Hazard Communications Standard supports the
21 respondent's testimony and confirms training occurred before the
22 deadline. Counsel argued the employees were already trained in 2015 ".
23 . . at the time the respondent was inspected . . ." so there was no
24 basis for issuing a citation. Counsel argued that proof the employees
25 had been trained when inspected in 2015 left no ability to cite for
26 alleged lack of training prior to 2013 before the inspection.

27 Counsel concluded referencing the Citation 2, Item 2 regulatory
28 violation on notification of clearance. He argued there was no issue

1 as to the clearance having been accomplished. It was done independently
2 of Mr. Walker's firm, "as required by law," through the employer
3 selecting a different firm than that which was originally communicated
4 to respondent. He testified the essential clearance was completed;
5 merely an insignificant and minor discrepancy occurred.

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 APPLICABLE LAW

11 In all proceedings commenced by the filing of a
12 notice of contest, the **burden of proof** rests with
13 the Administrator. N.A.C. 618.788(1). (emphasis
14 added)

15 All facts forming the basis of a complaint must be
16 **proved by a preponderance** of the evidence. *Armor*
17 *Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958
18 (1973). (emphasis added)

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

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).

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

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

7 A "de minimis" violation is defined as:

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

18 Section 9(a) of the OSH Act provides that a de
19 minimis notice is not a citation, it carries no
20 penalty and no abatement requirement. A de minimis
21 notice also does not become part of an employer's
22 history of previous violations and cannot be used
23 as the basis for a repeat violation in the future.
24 *General Carbon v. OSHRC*, 860 F2d 479, 487, 13 OSH
25 Cases 1949, 1955 (D.C. Cir. 1988); John H. Quinlan,
26 17 OSH Cases 1194 (Rev. Comm'n 1995). FIRM, ch.
27 III, C.2.g, OSH Rep. (BNA) [Reference File]
28 77:0186. *National Indus. Constructors*, 10 OSH
Cases 1081, 1095 (Rev. COmm'n 1981).

NRS 618.465 provides in pertinent part:

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

23 Hearsay testimony is generally admissible in
24 administrative hearings; however, as a matter of
25 law, (the board) **may not rely on hearsay evidence**
26 **alone or to supply a critical element** of the case.
27 See, *Kiffe v. St. Dep't Mtr. Vehicles*, 101 Nev.
28 729, 709 P.2d 1017 (1985); *Biegler v. Nevada Real*
Est. Div., 95 Nev. 691 (1979); also see, *Nevada*
Employment Security Dept. v. Hilton Hotels
Corp., 102 Nev. 606, at 609, 729 P.2d 497 (1986).
(emphasis added)

29 DISCUSSION

30 The citations in contest are generally categorized as "record

1 keeping" violations. Accordingly, unlike many other cases presented
2 before this Board, there are no photographs, direct observations, nor
3 testimony of hazard exposures reported by a CSHO inspecting the job
4 site. Accordingly, the Board must look to the documents to provide the
5 essential or "prima facie" evidence of violations. Records or documents
6 can satisfy the required burden of proof under applicable law, which
7 then requires the respondent to rebut the evidence with defensive proof.
8 However, **the Board cannot rely on hearsay evidence alone, nor accept it**
9 **to supply a critical element of the case.**

10 At Citation 1, Items 1(a) and 1(b) the proof offered by complainant
11 for violation was based on the documents provided to OSHA, which
12 included incorrect references to a Washington state location and law for
13 medical evaluations and fit testing rather than the state of Nevada.

14 The sworn testimony of respondent witness office manager Melissa
15 Unbedacht was that she mistakenly provided the inspecting CSHO with the
16 site specific documents for their Washington operations as opposed to
17 those applicable to Nevada. This was the same error reported by
18 inspecting CSHO Vilkaitis. See Exhibit 1, page 37. In a hand written
19 "corrected version" the CSHO referenced Section 6.1 of the "Health
20 Safety" provision for respirator fit testing using Washington State
21 protocols; but added the **"Nevada Health and Safety 2010"** version
22 provided fit testing will be administered by using **"OSHA-accepted**
23 **qualitative and quantitative fit test protocols found in WAC 296-842-**
24 **22010."** Accordingly the two written versions provide some corroborative
25 support for the witness testimony and reporting that incorrect and/or
26 erroneous document deliveries had initially been made to CSHO Vilkaitis.

27 The evidence was undisputed the respondent actually provided its
28 employees the required medical evaluations and fit testings in Nevada

1 as required by the applicable standards. The citations were based
2 solely upon evidence of preprinted "form" document failures to localize
3 the material for Nevada, despite respondent's claim of mistaken delivery
4 of the outdated incorrect version. The protocols for the medical
5 evaluations and testing in Nevada, Washington, and under Federal OSHA
6 were undisputed to appear essentially the same.

7 Exhibit 1, page 27 as applicable to Citation 1, Item 1(a) and page
8 37 as to Citation 1, Item 1(b) reflect an overall positive inspection
9 for safety compliance except for the location/law errors. The alleged
10 violations are based upon the potential hazard of misdirecting Nevada
11 employees to the incorrect Seattle, Washington locations and state law
12 references. All the subject employees, by reasonable inference from the
13 evidence, resided in the state of Nevada. The testimonial explanations
14 of obvious error by Mr. Walker and Ms. Unbedacht were credible; neither
15 were impeached nor rebutted. The evidence and testimony support
16 findings that any potential violative conduct was harmless and de
17 minimis. It is unreasonable to find or conclude that a minor error of
18 foreign state designation and law would cause Nevada resident employees
19 to believe he or she had to travel to the state of Washington for a
20 medical evaluation or fit test. Such an interpretation would produce
21 an absurd result. While OSHES is required to diligently enforce record
22 keeping provisions, including important medical evaluations and fit
23 testing, the Board cannot reasonably find preponderant evidence to
24 support the cited violations at Citation 1, Items 1(a) and 1(b). While
25 the documents reflect a prima facie case, it was effectively rebutted
26 by sworn testimonial explanations of harmless ministerial errors,
27 corroborated through the hand written note of the different versions.
28 There was simply ". . . **no direct or immediate relationship between the**

1 **alleged violative conditions and occupational safety and health law"** to
2 support anything other than a de minimis finding or dismissal entirely.
3 No purpose is served in burdening the record of the employer respondent
4 with a violation. Record keeping is an important aspect of occupational
5 safety and health compliance, however the Board finds the alleged
6 violative conduct for the technical non-compliance **de minimis**.
7 Accordingly, the violations alleged at Citation 1, Items 1(a) and 1(b)
8 are re-designated as de minimis and without penalty.

9 The CSHO acted correctly in noting the violative conditions during
10 his inspection. However, the existence of violative conditions **for**
11 **actual citation** must be considered on a case-by-case basis under the
12 facts and preponderant evidence. Initial findings for citations of
13 violations must be reviewed fairly, and the evidence interpreted
14 reasonably within the overall spirit and intent of Nevada occupational
15 safety and health law. NRS 618.465 was enacted for a purpose. It
16 includes a remedy to address the issue of "**minor violations which have**
17 **no direct or immediate relationship to safety or health . . .**". The
18 terms of the statute are unequivocal, and the **plain meaning** of
19 legislative intent clear.

20 The salient purpose of OSHA is to assure workplace safety through
21 reasonable and fair enforcement measures. Enforcement should not be
22 merely punitive.

23 The respondent employer claims an exemplary reputation for safety
24 compliance over many years of operation. CSHO Vilkaitis reported from
25 his investigation the employer's record was free of violations for over
26 a five year time period. There was no evidence to the contrary. The
27 cited violative conduct **under the particular facts subject of the**
28 **competent evidence** at the **job site** was **minor** and posed no danger or

1 **direct or immediate relationship to the employees safety and health.**

2 The facts and evidence before the Board warrant reliance upon the
3 terms, spirit and intent of NRS 618.465 to reclassify the violative
4 conduct alleged at Citation 1, Items 1(a) and 1(b) as **de minimis** and
5 **minor**.

6 "The (Federal) **Commission** has long asserted that it
7 may **characterize a violation as de minimis.**"
8 Occupational Safety and Health Law, 3rd Ed., 2013,
9 Bloomberg/BNA, page 187. Citing *General Electric*
10 *Co.* 3 OSHC 1031, 1040, Rev. Comm'n 1975. The
11 First, Third, Fifth and **Ninth Circuits have upheld**
12 **the Commission's authority to characterize a**
13 **violation as de minimis.** *Chao v. Symms Fruit Ranch*
14 *Inc.*, 242 R.3d 894, 19 OSHC 1337 (9th Cir. 2001);
15 *Donovan v. Daniel Constr. Co.*, 396, F.2d 818, 10
16 OSHC 2188 (1st Cir. 1982); *Reich v. OSHRC (Erie Coke*
17 *Corp.)*, 998 F.2d 134, 16 OSHC 1241 (3d Cir. 1993);
18 *Phoenix Roofing Inc. V. Dole*, 874 F.2d 1027, 14
19 OSDC (5th Cir. 1989). As to what a *de minimis*
20 violation is, the Commission has formulated a test
21 in various ways . . . "A **de minimis violation is**
22 **one in which there is technical noncompliance of**
23 **the standard but the departure from the standard**
24 **bears such a negligible relationship to employee**
25 **safety and health as to render inappropriate the**
26 **assessment of a penalty or the entry of an**
27 **abatement order."** *Keco Indus. Inc.*, 11 OSHC 1932,
28 1934 (Rev. Comm'n 1984). Occupational Safety and
Health Law, 3rd Ed., 2013, Bloomberg/BNA, page 187.
(emphasis added)

19 Violations have . . . been characterized as **de**
20 **minimis** where the **likelihood of an accident** was
21 **remote** and any injuries would have been minor. The
22 Commission also found **inconsequential deviations**
23 from the from the standard's requirements to be **de**
24 **minimis.** *Hood Sailmakers*, 6 OSH Cases 1206, 1208
25 (Rev. Comm'n 1977). The Commission's authority to
26 characterize violations as *de minimis* in nature has
27 generally been upheld. *Chao v. Symms Fruit Ranch,*
28 *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).

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

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

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)

11 Citation 1, Items 1(a) and 1(b) are denied and the cited conduct
12 reclassified as de minimis. The Board finds as a matter of fact and law
13 the cited respondent conduct **under the particular facts in evidence** was
14 **"de minimis", "minor . . . and have no direct or immediate relationship**
15 **to safety or health"**

16 The Board finds no violation at Citation 1, Item 2. Complainant
17 failed to meet the burden of proof by a preponderance of evidence for
18 a lack of training as required in the cited standard. The respondent
19 evidence and documentation at Exhibits R-9 and R-10 were supported by
20 un rebutted credible sworn witness testimony of Mr. Walker and Ms.
21 Unbedacht.

22 The OSHA guidance referenced by respondent at Exhibit 1, page 103
23 and 104, provides reliable support for the defensive theory. The
24 required training satisfied the December 2013 timeline. When the site
25 was inspected in February 2015 the training had already been confirmed
26 as completed. The timing deadline could only be measured from the time
27 Nevada OSHA inspected the worksite in February 2015. The preponderant
28 rebuttal evidence at respondent's Exhibit R-10 demonstrated the

1 employees had already received the required training. The testimony of
2 respondent witness Walker was un rebutted that the required training had
3 actually been completed as early as 2012. The preponderant evidence
4 demonstrated under a reasonable analysis of the entire record, including
5 the guidance at Exhibit R-10, there was no violation.

6 At Citation 2, Item 1 a reasonable analysis of the evidence and
7 un rebutted witness testimony demonstrated the existence of a mere
8 oversight by the office manager in failing to sign the simple pamphlet
9 documents handed out to the six employees on behalf of the employer.
10 The respondent employer cannot be held to the required proof element of
11 **employer knowledge** under the complainant's statutory burden of proof
12 when such a simple ministerial act as that cited is overlooked from time
13 to time by an employee. It is reasonable to infer from the evidence and
14 testimony that this respondent, like any responsible employer, should
15 be able to rely upon office workers to effectuate a task as simple as
16 signing the documents he/she hands out to the employees. The subject
17 documents were prepared on the letterhead of respondent, and signed by
18 the employees to evidence they had received the appropriate
19 informational material. The evidence demonstrated there was a meeting
20 with the office manager and the subject employees in the employer's
21 offices with personnel available to discuss the issues and answer
22 questions. Further evidence was the employer respondent and employees
23 had the opportunity to review them in English and parallel Spanish
24 versions.

25 The technical noncompliance with the regulation was a **negligible**
26 **inconsequential departure with no direct or immediate relationship**
27 **between the violative conditions and occupational safety and health law.**
28 The violation is de minimis, and the proposed penalty denied.

1 At Citation 2, Item 2, the Board finds sufficient preponderant
2 evidence to support a finding of violation and confirms the regulatory
3 citation and proposed penalty in the amount \$50.00. While there was
4 evidence of good faith and some justification by the respondent,
5 asbestos abatement notification is critically important through the
6 final clearance stage. The regulatory requirement must be interpreted
7 strictly notwithstanding the "record keeping violation" status. This
8 violation does in fact relate to a critical element of workplace safety.

9 Based upon the above and foregoing, it is the decision of the
10 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD:**

11 Citation 1, Item 1(a), 29 CFR 1910.134(c)(1)(ii) and Citation 1,
12 Item 1(b), 29 CFR 1910.134(c)(1)(iii) be dismissed as cited. The
13 violative conditions are found to be **de minimis**, amended to a **notice in**
14 **lieu of citation**, and the non-compliant conduct classified **minor** as
15 defined in NRS 618.465.

16 It is the further order of the **NEVADA OCCUPATIONAL SAFETY AND**
17 **HEALTH REVIEW BOARD** no violation of Nevada Revised Statutes did occur
18 at Citation 1, Item 2, 29 CFR 1910.1200(h)(3)(iv) and the citation
19 dismissed.

20 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**
21 **HEALTH REVIEW BOARD** that no violation of Nevada Revised Statutes did
22 occur as to Citation 2, Item 1, NRS 618.376(1). The violative condition
23 was **de minimis**, the citation amended to a **notice in lieu of citation**
24 with the violative conduct reclassified to **minor** as defined in NRS
25 618.465.

26 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**
27 **HEALTH REVIEW BOARD** that violation of Nevada Revised Statutes did occur
28 as to Citation 2, Item 2, NAC 618.918(1), and the proposed penalty in

1 the amount of \$50.00 confirmed.

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

12 DATED: This 17th day of November 2015.

13 NEVADA OCCUPATIONAL SAFETY AND HEALTH
14 REVIEW BOARD

15 By _____/s/
16 JOE ADAMS, Chairman
17
18
19
20
21
22
23
24
25
26
27
28