NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION OF THE DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA, **Complainant,** **vs.** **B & C CABINET AND MILLWORK, INC., dba B&C CABINETS AND MILLWORK, INC.,** **Respondent.**	**Docket No. RNO 19-1960**

DECISION OF THE BOARD

This matter came on for hearing before the Nevada Occupational Safety and Health Board of Review on February 19, 2019, in furtherance of a notice duly provided according to law. Salli Ortiz, Esq., appeared on behalf of the Complainant, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (the State or OSHA). Michael Hoy, Esq., of Hoy Chrissinger Kimmel & Vallas, PC, appeared on behalf of the Respondent, B&C Cabinets and Millworks, Inc., dba B&C Cabinets and Millwork, Inc. (the "Company"). Board of Review members in attendance for the hearing were Chairman, *pro-tem*, James Halsey, Sandra Roche, and Frank Milligan. There being three members of the Board present to hear this matter, with at least one member representing management and one member

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representing labor in attendance, a quorum was present to hear the matter and conduct the business of the Board.

Jurisdiction in this matter is not disputed and is conferred in accordance with NRS 618.315. Also, a complaint may be prosecuted which arises before or during an inspection of the employer's workplace. *See*, NRS 618.435(1). And, Nevada has adopted all Federal Occupational Safety and Health Standards which the Secretary of Labor has promulgated, modified or revoked and any amendments thereto and shall be deemed Nevada Occupational Safety and Health Standards. *See*, NRS 618.295(8).

The State's complaint sets forth the allegations which the State claims constitute violations of the Nevada Revised Statutes and Regulations. At the outset of the hearing, the State offered for admission into evidence, Exhibits A through C, consisting of pages 1 through 192. Exhibits B and C were admitted into evidence initially without objection. *See,* Tr., pp. 7;11-14, 16;17-20, 156, 157.[1] The admissibility of portions of Exhibit A was challenged. Therefore, pages from Exhibit A were offered for admission throughout the course of the hearing. By the conclusion of the hearing, all of Exhibits A through C were admitted into evidence, save and except pages 41-54, the complaint and answer, the pleadings to this case. Pleadings are not evidence, though a part of the record of this matter. *See*, Tr., pp. 155-157.

This case involves a small family-owned, Tr., p. 13;18-20, Exhibit A, p.2 (the Bullentini's) cabinet and millworking business where employees were required to work around hazardous chemicals that were applied to or utilized in the cabinetmaking and millworking process. At least once every two weeks, an employee wearing a 3M half-masked tight fitting respirator would perform spraying activities in a spray paint booth located in the northwest area of the production floor. Hazardous chemicals were applied to the furniture being finished by the spraying chemicals in the "paint booth." *See*, Exhibit A, pp. 8, 9, *see also*, Tr., generally.

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[1] "Tr." stands for the Transcript of the hearing of February 19, 2019, which is followed by the page and line numbers where the reference to the Transcript can be located.

The State complains as follows:

> Citation 1, Item 1: SERIOUS. 29 CFR 1910.134(e)(1): General. The employer shall provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit-tested or required to use the respirator in the workplace. The employer may discontinue an employee's medical evaluations when the employee is no longer required to use a respirator.

The State claims that an employee was required to wear a 3M half-mask tight fitting respirator while spraying cabinets in a spray paint booth located in the northwest area of the production floor. It is alleged the employer did not provide a medical evaluation to determine the employee's fitness to use a respirator, before the employee was fit-tested or required to use a respirator in the workplace or more specifically, the spray paint booth. Exhibit A, p. 9.

This citation carries a SERIOUS label and notification of a penalty or a proposed fine in the amount of $2,142, reduced down from a gravity based fine of $4,000. Exhibit A, p. 17.

The State further alleged in Citation 1, Item 2: "SERIOUS. 29 CFR 1910.134(k)(1): Training and Information. The employer shall ensure that each employee is effectively trained and can demonstrate knowledge of at least the elements specified in paragraphs (k)(1)(i) through (vii) of this section." Here the State alleges that employees were required to wear 3M half-masked tight fitting respirators while performing spraying activities in a spray paint booth located in the northwest area of the production floor. The employer did not provide employees with effective information in training for respirator use. Exhibit A, pp. 9, 10.

The State claims this violation brought with it a SERIOUS notification and proposed fine of $2,142.

Finally, the State alleged as follows:

> Citation 1, Item 3. SERIOUS. 29 CFR 1910.1200(h)(1): "Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about has been introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets.

Here, the State alleged that employees used multiple hazardous chemicals on the production floor of the shop including PPG paints, lacquer, thinner, M.L. Campbell Magnalac,

Pre-catalyzed Lacquer, M.L. Campbell Quick-dry Vinyl Sealer, Sherwin Williams Mineral Spirits and Sherwin Williams Lacquer Thinner. The Employer did not provide employees with effective information and training on hazardous chemicals in their work area, it is alleged.

This citation also labeled SERIOUS and a fine of $2,678 was proposed.

Pursuant to NAC 618.788, the burden throughout is upon the Chief or Complainant to prove the three citations. Accordingly, the Chief must establish for each charge a *prima facie* case which requires a showing of: (1) the applicability of the OSHA Regulation to the matter at hand; (2) noncompliance with the OSHA Regulation; (3) employee exposure to a hazardous condition; and (4) the employer's actual or constructive knowledge of the wrongful conduct. *See, Original Roofing Co., LLC v. Chief Administrative Officer of the Occupational Safety and Health Administration,* 135 Nev.Adv.Op. 18, 442 P.3d. 146, 149 (2019). As elucidated below, the Board of Review concluded that the State met this burden in the prosecution of this matter for each of the citations.

STATEMENT OF FACTS

The Company is a small, family-owned cabinet and millworking business. Tr., 13;20. It is a corporation, Exhibit A, p. 1, whose business is located at 5241 Metric Way, Carson City, NV. Exhibit A, p. 2. The President of the Company is Alex Bullentini, the Secretary is Kathy Bullentini, a Director is Gino Bullentini and another Director is Rinaldo Bullentini, Exhibit 1, p. 2, who also is a supervisor. *See,* Tr., p. 143;19-23. The Company employs 35 individuals, 13 of whom are supervised by Rinaldo Bullentini. Tr., pp. 143;19-23, 151;1-8. Specializing in custom cabinets and millwork manufacturing, the Company occupies a building of approximately 100,000 square feet, including administrative offices, shipping, receiving and production floor. Exhibit A, p. 8. This case came to State OSHA by reason of an internal referral. Exhibit A, p. 5, Tr., pp. 24;14-23, 127;1-6. On or about April 22, 2018, CSHO Jennifer Cox was on the premises and discovered what she perceived as a situation where an employee did not have a medical fitness evaluation prior to wearing a respirator. Exhibit A, p. 3, Tr., p. 127;1-6. This was reported to State OSHA on April 24, 2018. Exhibit A, p. 3.

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On May 2, 2018, OSHA representative, Kyle Riley commenced an investigation into the referral. Exhibit A, p. 4, Tr., p. 19;4-19. Rinaldo Bullentini was the supervisor of a 13-person crew or department, including Robert Cave. Tr., pp. 123;12, 138;9-10, 143;19-23. 151;6-8. Mr. Cave had been working for the Company for approximately a year and three months at the time Jennifer Cox arrived on the scene and discovered Mr. Cave had been working with a mask in the spray paint booth around hazardous chemicals before being evaluated for fitness to use the respirator by the Company and fit tested for the respirator by the Company.

Mr. Cave came to the Company from Pennsylvania where he had been working as a cabinetmaker there for 20 years. Tr., p. 131;5-7. He was a veteran cabinetmaker with considerable experience, according to Mr. Cave. Tr., pp. 131;5-7, 134;7-22,25, 135;1-2.

Rinaldo Bullentini had been working for the Company for the past 20 years, 15 of which he had the occasion to use a respirator. Tr., p. 145;9-12. He started with the Company right out of high school and has been with the Company ever since. Tr., p. 143;7-13. During those years, Rinaldo Bullentini worked inside the paint booth once every two weeks, where hazardous chemicals were employed in the process of finishing the cabinets. Tr., p. 144;2-11, 15-17 (a couple of times a month).

While working the paint shop, Rinaldo Bullentini had his own respirator which he wore when working in the spray paint shop. Tr., pp. 144;19, 145. He maintained it and stored it when not in use in his office. Tr., p. 144;20-23. He admits, however, that throughout the entire 20 years prior to the inspection on April 22, 2018, by Jennifer Cox, he had never had a medical evaluation to determine whether he was fit to wear a respirator while working in the spray paint booth. Tr., p. 159;5-9. Rinaldo Bullentini was aware that the Company had a respirator training program. Tr., p. 144;16. He had, however, never received any in-house training on the use of the respirator. Tr., p. 147;1- 4.

The Company's respirator training program includes a requirement that employees using respirators to be medically evaluated, annually, for fitness to work while wearing a respirator. Tr., pp. 95;1-6, 96;2-6, 95;7-12. According to the respirator training program, Alex Bullentini, President, was responsible for giving each employee whose duties required wearing a respirator

in the spray booth, a certificate, annually, of fitness after the employee had completed his annual medical evaluation for fitness to use a respirator while working at the Company. Tr., pp. 95;17-22. A respirator mask was not to be issued until after the employee was certified that he had been medically evaluated as fit to wear the respirator while working. Tr., p. 95;23-25. As stated, this certificate was to be issued by the President of the Company, Alex Bullentini. Tr., p. 95;17-22.

Rinaldo Bullentini was given a medical evaluation for fitness to use a respirator. This did not happen until after the inspection by Jennifer Cox of the workplace, Tr., p. 147;1-4, when she discovered employees were using respirators but had not been medically evaluated as fit to wear a respirator while working at the Company. Tr., p. 154;5-9. Rinaldo Bullentini was evaluated after Ms. Cox informed the management that employees required to wear respirators due to their duties in the workplace had to be medically evaluated for fitness to wear a respirator while working on behalf of the Company. As of the date of the hearing on this case, this was the one and only time in 20 years Rinaldo Bullentini had been evaluated for fitness to wear a respirator. Tr., p. 154;5-9.

Coming to the Company from Pennsylvania where he worked as a cabinet maker for around 17-20 years, Tr., p. 134;17-22, Mr. Cave asserted he was familiar with the chemicals used by the Bullentini's at their Company. Tr., p. 130;10-15. He was aware of the characteristics of the chemicals and the gravity of the situation. He knew exposure to some of the chemicals could be lethal and believed the use of these chemicals was a serious business. Tr., p. 144;8-14. The Company never disputed Mr. Cave's characterization of the chemicals' properties or lethal.

Mr. Cave was given his own 3M half-masked tight fitting respirator to be used when inside the spray paint booth. Tr., p. 126;20-22. The mask was not fit tested to him and the Company did not have anyone test his lung capacity when he first was hired by the Company. Tr., p. 137;1-5. He stored the respirator on a shelf when it was not in use together with other equipment in a room at the worksite. Mr. Cave testified that he cleaned the mask and changed

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the filter prior to its use. He did not store it, however, in a bag[2] between use in the paint booth, exposing the mask too whatever might be drifting in the air around his respirator. Tr., pp. 128;23, 129;1-6, 138;1-2, 14-19.

Mr. Cave testified that 2-3 years prior to commencing employment with the Bullentini's Company, was the last time he was medically evaluated for fitness to use a respirator. Tr., p. 140;10-12, 22-24. From the outset of his employment with the Bullentini's Company, he worked the spray paint booth wearing the 3M mask while spraying chemicals he believed were lethal. However, prior to Jennifer Cox's arrival at the worksite, Mr. Cave had not been medically evaluated for fitness to use a respirator throughout this period of employment with the Company, Tr., pp. 126;23-25, 137;1-5, 140;6-9, even though around twice a month, Tr., p. 140;4-5, from the beginning of his work at the Company, he worked inside the spray paint booth using potentially lethal and hazardous chemicals. Tr., p. 141;8-14.

The day after Ms. Cox's appearance at the Company and in response to the admonition by Ms. Cox that in her opinion, a medical evaluation establishing fitness to wear a respirator at work was required before Mr. Cave could work with the respirator in the paint booth, Mr. Cave was medically evaluated for fitness to use the 3M half-masked tight fitting respirator in the spray paint booth. Tr., p. 127;1-6. This was the very first time he was medically evaluated for fitness to wear a respirator since coming to work for the Company, Tr., pp. 126, 139, 140, and the first time in at least three years that he had been evaluated. Tr., p. 140;22-24.

As indicated, Mr. Cave was intimately familiar with all of the chemicals utilized by the Company. He was not trained, however, by the Company about the hazardous chemicals used there. Tr., p. 130;22-23. The Company had a hazardous chemical communication training program, but it was never shown to Mr. Cave. Tr., p. 129;13-23.

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[2]Mr. Bullentini stored his respirator in a bag according to the instructions which came with the respirator. No one from the Company bothered to tell Mr. Cave to read those instructions and to follow them. The Board finds this reflects, adversely, on the Company's claim it took training seriously. *See,* Board Deliberation Transcript, p. 9;9-14.

Mr. Cave was unaware that the Company had a training program for use of respirators. Tr., p. 127;20-21. Mr. Cave was never trained by the Company in the contents of its respirator program. Tr., p. 127;24.

During the course of the investigation of the complaint by Investigator Riley, he asked to be provided training records for the use of respirators and in the use of hazardous chemicals in the workplace. None was provided. Tr., pp. 80;11-15, 22-25, 102;1-6, 105;5-7,148;1-3. There was no record, therefore, that Rinaldo Bullentini or Robert Cave had been trained in the use of respirators, their care and maintenance and the use of fact sheets (hazardous communication program) regarding the hazardous chemicals used or to be used by the Company in the workplace. Mr. Cave self-taught himself about the chemicals, Tr., p. 130;15-20, but was never challenged or questioned about the extent of his knowledge prior to hire. Tr., pp. 81;1-3, 128;9-12, 20, 133;1-5. He was also fully aware that some of the chemicals used by the Company could be fatal. He believed that the use of these chemicals by the Company was a serious business. Tr., p. 141;8-14.

DISCUSSION

Citation 1, Item 1: SERIOUS. 29 CFR 1910.134(e)(1) applies to the Company's workplace. There was no challenge to the application of this regulation to the Company's workplace and the regulation is applicable to Nevada by reason of NRS 618.295(8). 29 CFR 1910.134(e)(1) applies because the use of the chemicals at the Company could prove fatal. Their use was a serious matter, according to Mr. Cave.

Respirators were required to be worn by Mr. Cave and Rinaldo Bullentini when working in the spray paint booth. They were the only two employees at the Company who worked the spray paint booth using hazardous chemicals. They worked the spray paint booth twice a month, as 10% of the cabinets were run through the spray paint booth. Tr., 133;4-5. Prior to the inspection by CSHO Jennifer Cox, neither Mr. Cave nor Mr. Bullentini, a director of the Company and Mr. Cave's supervisor, had been medically evaluated for fitness to wear a respirator when working in the spray paint booth. Tr., pp. 140;6-9, 154;1-8. Mr. Cave and Rinaldo Bullentini worked in the zone of danger as they were to be medically evaluated before

donning a face mask and commencing its use around hazardous chemicals. *See, RGM Const. Co.,* 17 O.S.H. Cas. (BNA) 1229, 1234 (O.S.H.R.C.), 1995 WL 242609.

Upon these facts and circumstances, the first three elements of a *prima facie* case were clearly established by the State. The regulation applied, there was a violation of the regulation and employees were exposed to hazardous conditions. *See, Original Roofing, supra* at 149. The failure to require a medical evaluation to determine the fitness of Mr. Cave and Rinaldo Bullentini to wear a respirator while working with hazardous chemicals in the spray paint booth at least twice per month are violations of 29 CFR 1910.134(e)(1).

Through counsel, the Company defends on the ground that Mr. Cave had been wearing a respirator for 15 years in "West Virginia" (sic) without incident, Tr., p. 171;19-22, and that should be good enough for purposes of the Company's duty to satisfy 29 CFR 1910.134(e)(1). Whatever Mr. Cave did there, in other words, should be good enough now, according to the Company. Tr., pp. 171;19-25, 172;1-3.

The Company also argues that the State sought to impose more onerous requirements upon the Company than the regulation contains such as a requirement that the Company conduct fitness for work evaluations on an annual basis when the regulation on its face contains no such a requirement. Tr., pp. 164;10-14, 171, 172, 173;2-4. The Company contends that it was being held to a standard consisting of the opinion of one State regulator as to the meaning and application of the regulations, rather than the letter of the law. Tr., p. 168;9-10. The Company argues in the same vein, it was being punished because it did not keep a record of training sessions administered by the Company, Tr., p. 168;20-22, or observe its own training plans. Tr., pp. 164;22-25, 165;1-2. The Company argues it should not have been singled out for the lack of training records, when there is no prescription in the regulations requiring a classroom training atmosphere, Tr., p. 168;20-25, and there is nothing in the regulations requiring an employer to follow its own safety plans. Tr., p. 165;11-15.[3]

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[3]The Board points out here, the Company is not being disciplined for the failure, *per se*, to have training records for its workforce. Similarly, the Board points out, the Company is not, in the Board's opinion, being disciplined, *per se*, for not following its own safety plans. Rather, these failures are cited

The Company claims, further, that Mr. Cave got an annual medical exam and, therefore, argues that his annual physical should count in satisfaction of 29 CFR 1910.1 34(e)(1). These theories, combined, enabled the Company to argue that Mr. Cave's medical evaluation for fitness to wear a respirator he was given during his previous employment in Pennsylvania, a few years ago, should be sufficient, presently, for the Company to satisfy the medical evaluation for fitness to wear a respirator in the workplace since there was no proof of harm. Tr., p. 171;19-25.

The Company's arguments do not pass muster, beginning with the contention that Mr. Cave's claim of fitness for the past 15 years in Pennsylvania, (West Virginia) and the annual physical he gets on his own should satisfy for the Company, now, compliance with 29 CFR 1910.134(e)(1), that the employer shall provide a medical evaluation for fitness to wear a respirator in the workplace before being fit tested or required to use the respirator.

The simple fact of the matter is that 29 CFR 1910.134(e)(1) states that "the employer" shall provide a medical evaluation to determine fitness to use a respirator. The regulation does not, therefore, state that it is sufficient if "a" or "any" employer provided the medical evaluation. The use of the phrase or term "the employer" clearly connotes the employer currently engaging the worker, particularly when the regulation bars the worker from engaging in the workplace

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Footnote 3, continued:

by the Board as evidence of the Company's cavalier attitude towards safety and evidence of the Board's findings of a virtual failure to train its employees in any meaningful and effective way. The Company, the Board finds, left it up to the employees to figure out what was safe to do or not. The Company claims this employment milieu was working because there had been no incidents. Neither Mr. Cave nor Rinaldo Bullentini had any problems with the proper fit of their respirators. The Company is misguided. Tr., p. 166;4-9. State OSHA need not wait for an actual injury to occur before citing an employer for a failure to follow a regulation intended to prevent harm to employees in the first place. *See, Brennan v. Occupational Safety & Health Review Comm'n,* 513 F.2d 1032, 1039 (2d Cir. 1975)(need not prove teetering on the edge of an unguarded floor). It is also true, however, that an employer's failure to observe its own workplace safety program is evidence of a failure to provide safe work and a safe work environment. *See, Northwest Psychiatric Hospital, LLC v. Secretary of Labor,* 2020 OSHD ¶ 33,778, decided March 3, 2020, U.S. Court of Appeals, District of Columbia, Circuit No. 19-1089.

unless and until declared medically fit to use a respirator in "the" workplace. Not any workplace will do. It must be the workplace of the employer and in this case, it is the Company who is the employer in control of the workplace.

By the same token, an annual physical obtained by Mr. Cave will not do, inasmuch as the regulation plainly requires an evaluation for fitness to be procured by the employer with specific reference to an assessment of fitness for purpose to wear a mask in the employer's workplace. There is nothing in this regulation which allows a general physical obtained by an employee on his own to supplant the specific requirement that the employer provide the evaluation for the specific purpose of showing the fitness to use the respirator, prior to even being fit tested. There was no proof, Tr., p. 137;1-5, that Mr. Cave was fit tested, either, as required by the regulation. 29 CFR 1910.134(e)(1).

Mr. Cave's past health history and his annual physical will not do, based upon the plain wording of the regulation which must be applied, here, as it is well settled that in matters of statutory interpretation, such as this, analysis begins with language employed in the statute, itself. *See, Las Vegas v. Walsh,* 121 Nev. 899, 903, 1124 P.3d 201 (2005). It is also well settled that the words employed in a statute are to be given their plain and ordinary meeting. *See, Barrick Goldstrike Mines v. Peterson*, 116 Nev. 541, 545 (2000). *See also, Dolores v. Employment Security Division,* 416 P.3d 259, 261 (Nev., 2019)("This court reviews questions of statutory construction and the district court's legal conclusions *de novo*. In interpreting a statute, this court will look to the plain language of its text and construe the statute according to its fair meaning and so as not to produce unreasonable results.") And, "[i]t is ...[the Board's] duty 'to give effect, if possible to every clause and word of a statute.'" *United States v. Menasche,* 348 U.S. 528, 538-539 (1995) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *Am. Fed'n of Govt. Employees, Local 2782 v. Fed. Labor Relations Authority*, 803 F.2d. 737, 740 (D.C. Cir., 1986).

Applying these principles of statutory construction, no other understanding of 29 CFR 1910.139(e) will do. The Company's tinkering with the language of the regulation does not survive scrutiny.

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Furthermore, the argument ignores the fact that Rinaldo Bullentini, for 20 years, had not been medically evaluated for fitness to utilize a respirator in the spray paint booth. Tr., p. 154;5-9. The failure to evaluate Mr. Bullentini is, itself, a violation of the regulation. Compliance with the regulation is not excused because Mr. Bullentini is a director of the Company or a supervisor. If one works the spray paint booth, using hazardous chemicals, as Rinaldo Bullentini did, a medical evaluation of fitness is required before stepping into the workplace. Rinaldo Bullentini was not medically evaluated and the record shows, he only worked for the Company.

It was also unnecessary for the State to require proof of annual medical evaluations to show a violation of the regulation. The regulation requires the Company to provide "a" medical evaluation. Just one evaluation would do. The proof is abundant that the Company provided none.

This leaves the last element of a *prima facie* case to be considered, namely, that of employer knowledge. Mr. Cave was supervised by Rinaldo Bullentini, a Director of the Company. Tr., p. 143;19-23. Rinaldo Bullentini was quite well-aware of the fact that he, himself, had not been medically evaluated for fitness to utilize a respirator in the spray paint booth. Tr., p. 154;5-9. As Mr. Cave's supervisor, Tr., p. 123;12, he worked with Mr. Cave. He had to have known that Mr. Cave had not been medically evaluated. It was a small company and Mr. Cave was only one of 13 people that Mr. Bullentini supervised.

If Mr. Rinaldo Bullentini did not know Mr. Cave had not been medically cleared to wear a respirator, he clearly should have known. Only a minimal inquiry would have revealed that Mr. Cave had not yet been medically cleared. This inquiry should have been made as an employer is not entitled to don a blind eye to that which occurs in the workplace. *See, Martin v. Occupational Safety and Health Review Commission*, 947 F.2d 1483, 1485 (11th Cir., 1991) (employer must exercise reasonable diligence in its vigil over the workplace); *Carlisle Equip. v. Secretary of Labor*, 24 F.3d 790, 793 (6th cir., 1994) (the reasonable diligence required of employers "...implies effort, attention, and action, not mere reliance upon the action of another.").

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Moreover, a failure to exercise reasonable diligence, as here, amounts to a showing the Company had constructive knowledge, if not actual knowledge, of the failure to secure a medical evaluation of Mr. Cave's fitness to wear a respirator while working in the spray paint booth.

There is, however, more proof of knowledge. Rinaldo Bullentini also should have been aware of the contents of the Company's respirator training program. It required an annual evaluation. Tr., p. 95;1-6, 9-12. Unfortunately, Rinaldo Bullentini neither took the time nor made the effort to read and understand the respirator training program. He did not know its contents. Tr., p. 146;20-23. Had he done so, he would have known that he should have required his staff-person, Mr. Cave, to be medically evaluated. Tr., p. 144;16.

Then, Alex Bullentini, the President of the Company, was involved. Tr., p. 95;9-14. He was obliged to issue certificates annually to employees once they were medically cleared to use the respirator. Tr., p. 95;17-22. No respirators were to be issued until a certificate was issued. Tr., p. 95;22-24. Mr. Cave was never issued a certificate card from Alex Bullentini. Tr., p. 127;10-12. Alex Bullentini, the President, must have known that he, himself, had not issued certificates of compliance with the medical evaluation requirements of the Company's own respirator training program.

Finally, on the issue of employer knowledge, though not argued by the State, Mr. Cave's supervisor, Rinaldo Bullentini, clearly knew or should have known that Mr. Cave had not been medically evaluated for fitness to use a respirator when working in the spray paint booth. "Generally, an employer is imputed with a supervisor's knowledge of deviations from OSHA's safety rules to encourage employers to exercise reasonable diligence to ensure OSHA compliance by their employees." *The Original Roofing Co., supra, at* 149. Knowledge is proven by this means, here, because there is no reason why Rinaldo Bullentini's knowledge of the undisputed fact that Mr. Cave was not medically evaluated prior to donning a respirator should not be imputed to the remaining Director's of this small company owned by the rest of the Bullentini family. Employer knowledge is shown because Rinaldo Bullentini was fully aware that Mr. Cave had not been medically evaluated for fitness to use a respirator in the spray paint booth and as a member of the family management team, his knowledge could be imputed to the Company.

Employer knowledge, the last element of a *prima facie* case, is clearly shown. Therefore, the Board of Review finds and concludes as a matter of fact and law that a *prima facie* violation of Citation 1, Item 1: SERIOUS, has been shown.

Finally, with respect to Citation 1, Item 1, the State concedes that typically it reduces a fine being levied by 10 percent for abatement which occurs within 24 hours of the discovery of a potential violation. Tr., p. 121;21-25. In this case, it is beyond dispute that Mr. Cave was medically evaluated for fitness to use a respirator within 24 hours of the discovery of the possible violation by CSHO Cox. Tr., p. 12;21-25. The State's abatement policy, therefore, applies. However, when the State was asked why it was not applied in this case, the State had no answer. Tr., pp. 110;23-25, 113;1-3, 122;5-8. The State's failure to apply the 15 percent discount for good faith abatement was, therefore, arbitrary and capricious. The Board elects to direct that the application of the 15 percent abatement reduction in the amount of $400 be applied to reduce the fine levied for Citation 1, Item 1, to $1542 (15% of $4,000 is $600, with $4,000 being the gravity based fine before the State allowed for other reductions.) Exhibit A, p. 17.

Citation 1, Item 2: SERIOUS. 29 CFR 1910.134(k) states that the training with respect to respirators: "Must be comprehensive, understandable, and recur annually, and more often if necessary." In addition, the regulation requires, *inter alia,* that the employer shall insure the employee can demonstrate knowledge of the items set forth (k)(1)(i) through (vii).

This regulation applies to the workplace because it is beyond dispute respirators were utilized by Rinaldo Bullentini and Mr. Cave in the spray paint booth when administering hazardous chemicals. Tr., p. 24;14-23. The "zone of danger" test was met. *See, RGM, supra* at 1234. It is unnecessary, however, to canvas items (k)(1)(i) through (vii) of the regulation because the standard set by this regulations is one of insurance. The employer is required to ensure each employee can demonstrate the knowledge of items (k)(1)(i) through (vii).

The Company failed to meet this standard. The record is replete with evidence that no training was provided Mr. Cave or even Rinaldo Bullentini, Mr. Cave's supervisor. Tr., pp., 28;2-12, 31;1-8, 100;6-8, 127;19, 21, 24, 129;13, 16, 130;15-18, 22-23, 137;1-5, 147;1, 147;13-

16, 147;13-16, 154;5-9.[4] The inspector, CSHO Riley requested documentation of the training provided to the employees by B&C Cabinets. No record of training was provided. Tr., pp. 80;11-15, 80;22-25, 102;1-6, 105;5-7, 148;1-3. Mr. Cave concedes he was not trained either about respirators, the care and maintenance of respirators, or the deployment of hazardous chemicals. Tr., pp. 127;19, 128;20, 129;13, 129;16, 130;22-23.

Rinaldo Bullentini was equally untrained. Tr., pp. 147;10, 13-16, 149;9. He was aware that the Company had a training program for respirators and a training program concerning hazardous chemicals, but was untrained in either. Tr., pp. 28;2-12, 147;13-16. The respirator training program even required the Company to conduct annual medical evaluations for fitness to use respirators in the spray paint booth, Tr., p. 95;9-12, before issuing a respirator. Tr., p. 95;1-6. The training program for respirators even required the President of the Company, Alex Bullentini, Tr., 95;9-14, to first certify that medical evaluations for fitness to use a respirator in the workplace had been completed and a certificate issued before a respirator should have even been issued. Tr., p. 95;17-22, 23-24,

These deficiencies reveal a failure to provide the "insurance" required by 29 CFR 1910.134(k)(1), the applicability of 29 CFR 1910.134(k)(1) to the workplace, and the potential for harm to employees untrained in the use of a respirator. Each was clearly established. Mr. Cave concedes that some of the chemicals applied in the workplace were lethal if not properly handled. Tr., p. 141;8-14.

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[4]The issue of the absence a record of training is discussed in footnote 2, *infra.* That discussion is equally applicable, here. The absence of a record of training is not mentioned as a violation of any regulation, *per se*. Rather, it is proof, here, as well, of the lack of training, which 29 CFR 1910.134(k)(1) requires. The Company asks rhetorically, the question to prove effective training, "Did you hear any evidence today that the training on the use of respirators was ineffective? I submit the answer to that is no, you didn't hear that evidence. So, you cannot confirm the violation based upon 29 CFR 1910.134(k)." Tr., p.167;20-23. The Company's question begs the point. The Board did not hear any evidence of training in the first place, much less evidence of effective training. Furthermore, employee dissatisfaction is not necessarily required as actual harm is not required to prove a regulation has been violated. *See, Brennan, supra* at 1039.

As with Citation 1, Item 1, the State has shown the first three elements of a *prima facie* violation of 29 CFR 1910.134(k).[5] An employer can hardly state it has provided insurance that its workers can demonstrate knowledge of the items set forth in (k)(1)(i)-(vii), when virtually no training has been provided by the employer whatsoever, there is no record of training being provided, and the employer routinely disregards is own workplace safety standards. 29 CFR 1910.134(k) was clearly violated. Given the use of hazardous chemicals in and about the workplace, 29 CFR 1910.134(k) readily applies. Given the presence of chemicals with lethal properties that are a matter of serious business, the workers were exposed to the hazard against which the regulation was plainly intended to protect.

Turning to employer knowledge, for the same reasons set forth in Citation 1, Item 1, employer knowledge was abundantly established. Rinaldo Bullentini, Mr. Cave's supervisor, was himself untrained, lacking knowledge in the content of the employer's training programs. Mr. Cave concedes he was not trained. Mr. Rinaldo Bullentini must have known that Mr. Cave had not been trained as he, himself, was incapable of providing the training and he, himself, was the supervisor for Mr. Cave. Rinaldo Bullentini's knowledge that Mr. Cave had not been trained and Mr. Bullentini's knowledge of the fact that he had not been trained were imputable to the rest of the Bullentini family who managed the Company. It is, further, inconceivable that for a company this small, management would not have known that Mr. Cave, who was a key employee, had not been trained. Similarly, it is inconceivable that the rest of the Bullentini family management team would not have known that Rinaldo Bullentini had not been trained.

The Board of review finds and concludes that a *prima facie* case was clearly made out by the State that the Company had violated 29 CFR 1910.134(k)(1).

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[5]An employer has a duty of reasonable diligence in the workplace which involves the consideration of several factors including the employer's obligation to have adequate work rules and training programs. *See, Precision Concrete Constr.*, 19 O.S.H. Cas. (BNA) 1404, 1407 (O.S.H.R.C.), 2001 WL 422968. Here, we have the converse, a training program but no training, to the detriment of the Company's workforce.

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The employer's defense, here, was, in part, that no one heard any complaints that Mr. Cave and Mr. Bullentini were improperly fit tested or were having difficulties with their respirators. The theory, here, is apparently that the absence of complaints is construed as evidence of effective training. The Company also defends on the grounds that nothing in the regulation prescribes the form of training, such as a classroom or power point presentation. Tr., pp. 166, 167.

The Board finds that when stacked up against an overwhelming body of evidence that no training was provided, these defenses pale. They cannot withstand the abundance of proof that no training, much less effective training, was provided. The circumstantial evidence of a lack of complaints does not defeat the direct evidence that neither Mr. Bullentini nor Mr. Cave were trained by the Company in the use of a respirator.

Accordingly, the Board of Review finds and concludes that the State proved the elements of Citation 1, Item 2, including the fine in the amount of $2,142, giving due consideration of the probability, severity, and extent of the violation and the employer's history of previous violations, the employer's size and good faith with reference to this violation.

Citation 1, Item 3: SERIOUS. 29 CFR 1910.1200(h)(1) requires employers to provide effective information and training regarding hazardous chemicals in their work area commencing at the time of the employee's initial assignment and thereafter, as new chemicals are introduced to the workplace. First, it is patently clear this regulation applies to the situation at the Company. It is beyond dispute that hazardous chemicals were employed in the workplace that were admittedly lethal in potential impact. Employees were, therefore, exposed by their use to serious injury in the workplace, the severity of which this regulation was intended to prevent.

The regulation was honored in the breach rather than the observance. The Company's hazard communication program developed by the employer was a secret to the employees. According to Rinaldo Bullentini, no training was provided in the content of these programs. Additionally, as indicated, the employer could produce no proof or a record that training had been given to employees in the respirator and communication program developed by the

employer. Tr., p. 105;5-7 (no evidence of training). Mr. Cave, again, concedes no training in either program. He stated he had not even seen the program. Tr., pp. 129;13, 16, 19, 22-23 131;14, 22-23. Training was so far on the back burner, Mr. Cave testified, he had to train himself. Tr., p. 130;15-18. Mr. Bullentini, his supervisor, he had not been trained in the hazcom program. Tr., p. 147;13-16.

Here, the Company provided safety data sheets about the chemicals used in the spray paint booth to Mr. Cave and Mr. Bullentini. The Company claims staff read them and understood their contents, including that some of the chemicals were dangerous and that Mr. Cave and Mr. Bullentini reviewed them regularly. According to the Company, this dissemination of safety data sheets for the employees to read was sufficient to show the Company satisfied the duty to effectively provide information and training about hazardous chemicals in the workplace, because 29 CFR 1910.1200(h)(1), once again, does not require classroom training or a power point presentation to effectively train and communicate. Tr., pp. 168, 169. The defense was, then, what is the training beef, given that Mr. Bullentini and Mr. Cave read and understood these safety data sheets?[6]

This defense is also unavailing. The regulation puts the onus for training on the employer. The Board is obliged to follow this clearly stated language. *See, Barrick, supra* at 545. Hoping employees can read safety data sheets and comprehend the contents on their own is not consonant with the requirement that the employer provide effective training. It is not the duty of employees to teach themselves when it is the employer who is required to provide an effective learning experience. Handing out safety data sheets, without more, and reliance upon self-teaching of the workforce are not consonant with the obligation imposed by the plain wording of the regulation for the employer to provide employees with effective information and training.

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[6]The record is replete with the assertion that Mr. Cave was highly experienced and came to the Company well trained. Further training was unnecessary. The standard, here, is one of effective training. This is a problem for the Company because the evidence is that the Company took no steps to assure itself that Mr. Cave was properly trained and that this reliance was justified. Mr. Cave testified the Company failed to explore his training. Tr., pp. 81;1-3, 128;6-20, 133;1-5. A failure to train coupled with a failure to determine the extent of training, does not smack of an effort to "ensure" training or to provide "effective training."

Given the overwhelming evidence concerning a lack of training, outlined, above, the Board finds and concludes that the Company's reliance upon self-teaching, without more, is insufficient for the Company to meet the requirements of 29 CFR 1910.1200(h)(1).

Turning to employer knowledge, the same reasons that employer knowledge was found in Citation 1, Items 1 and 2, exist equally here. The Company, through the family management team, knew or should have known that it provided no training, much less effective training in the workplace on this issue. This absence of training is underscored by the Company's nearly complete disregard for its own respirator and hazardous chemical programs. Its workforce was not trained in the procedures it had developed for the workplace. Accordingly, the Board of Review finds and concludes that 29 CFR 1910.1200(h)(1) was violated and the fine of $2,678 was appropriate, giving due consideration to the probability, severity and extent of the violation, the employer's history of previous violations and the employer's size and good faith.

DECISION OF THE BOARD AND ORDER

Based upon the findings of fact and the analysis set out herein and good cause appearing, it was moved by Sandra Roche, seconded by Frank Milligan, to affirm Citation 1, Item 1, a violation of 29 CFR 1910.134(e)(1) but with a 15% abatement adjustment in the fine and that, therefore, B&C Cabinets and Millwork, Inc., dba B&C Cabinets and Millwork, Inc., is fined the sum of $1,542. The vote on the motion was 3 in favor and 0, against;

Based upon the findings of fact and analysis set out herein and good cause appearing, it was also moved by Frank Milligan, seconded by James Halsey, to affirm Citation 1, Item 2 and, that therefore, B&C Cabinets and Millwork, Inc., dba B&C Cabinets and Millwork Inc., is hereby fined the sum of $2,142 for the violation of this regulation. The vote on the motion was 2 in favor and 1 against;

Based upon the findings of fact and analysis set out herein and good cause appearing, it was moved by Frank Milligan, seconded by James Halsey, to affirm Citation 1, Item 3: SERIOUS 29 CFR 1910.1200(h)(1) and, therefore, B&C Cabinets and Millwork, Inc., dba B&C Cabinets and Millwork, Inc., is hereby fined the sum of $2,678 for violation of this regulation. The vote on the motion was 3 in favor and 0 against.

The Board finally orders that counsel for the complainant submit proposed Findings of Fact and Conclusions of Law to the Nevada Occupational Safety and Health Review Board consistent with this Decision and serve copies on opposing counsel within 20 days from the date of this decision. After five days, time for filing any objections, the final Findings of Fact and Conclusions of Law shall be submitted to the Nevada Occupational Safety and Health Review Board by prevailing counsel. Service of the Findings of Fact and Conclusions of Law signed by the Chairman of the Nevada Occupational Safety and Health Review Board shall constitute the Final Order of the Board.

On June 10, 2020, the Board convened to consider adoption of this decision, as written or as modified by the Board, as the decision of the Board.

Those present and eligible to vote on this question consisted of three of the five current members of the Board, to-wit, Chairman Steve Ingersoll, James Halsey and Frank Milligan. Chairman Ingersoll was eligible to vote because he had read the transcript of the hearing, the pleadings and the exhibits offered and admitted into evidence (*e.g.*, the record). *See*, NRS 233B.124 (read the record). Upon a motion by James Halsey, seconded by Frank Milligan, the Board voted 3-0-2, (Weber and Semenko abstaining) to approve this Decision of the Board as the action of the Board and to authorize Chairman Ingersoll, after any grammatical or typographical errors are corrected, to execute, without further Board review, this Decision on behalf of the Nevada Occupational Safety and Health Review Board. Those voting in favor of the motion either attended the hearing on the merits or had in their possession the entire record before the Board upon which the decision was based.

On June 10, 2020, this Decision is, therefore, hereby adopted and approved as the Decision of the Board of Review.

DATED this 8th day of July, 2020.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: _____
Steve Ingersoll, Chairman