

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

4 CHIEF ADMINISTRATIVE OFFICER
5 OF THE OCCUPATIONAL SAFETY AND
6 HEALTH ADMINISTRATION, DIVISION
7 OF INDUSTRIAL RELATIONS OF THE
8 DEPARTMENT OF BUSINESS AND
9 INDUSTRY,

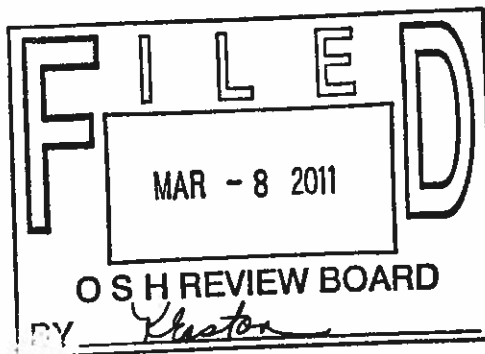
Docket No. LV 10-1432

Complainant,

vs.

10 WALKER SPECIALTY CONSTRUCTION,

Respondent.



11
12
13 **DECISION**

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 8th day of February
16 2011, in furtherance of notice duly provided according to law, MR. JOHN
17 WILES, ESQ., counsel appearing on behalf of the Complainant, **Chief**
18 **Administrative Officer of the Occupational Safety and Health**
19 **Administration, Division of Industrial Relations (OSHA)**; and MR. SHAN
20 DAVIS, ESQ., counsel appearing on behalf of Respondent, **WALKER SPECIALTY**
21 **CONSTRUCTION**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD**
22 finds as follows:

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

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

28 Citation 1, Item 1, charges a violation of 29 CFR

RECEIVED

MAR 10 2011

1 1926.1101(f)(1)(iii). The complainant alleged the respondent employer
2 failed to perform representative 30 minute short-term employee exposure
3 air sampling during the time most likely to produce exposures above the
4 excursion limit as required by the standard. The violation was
5 classified as Serious. The proposed penalty for the alleged violation
6 is in the amount of \$800.00.

7 Citation 1, Item 2, charges a violation of 29 CFR
8 1926.1101(k)(8)(I). The complainant alleged the employer failed to
9 affix asbestos waste container labels to an enclosed work truck. The
10 violation was classified as "Serious". The proposed penalty was
11 assessed in the amount of \$800.00.

12 Complainant presented testimony and documentary evidence with
13 regard to the alleged violations. Mr. Paul Estrada an OSHA Safety and
14 Health Representative ("SHR"), testified as to his inspection and the
15 citations issued to the employer.

16 Citation 1, Item 1, referenced 29 CFR 1926.1101(f)(1)(iii), which
17 provides:

18 "Representative 8-hour TWA employee exposure shall
19 be determined on the basis of one or more samples
20 representing full-shift exposure for employees in
21 each work area. Representative 30-minute short-
22 term employee exposures shall be determined on the
basis of one or more samples representing 30 minute
exposures associated with operations that are most
likely to produce exposures above the excursion
limit for employees in each work area."

23 Mr. Estrada conducted a comprehensive inspection of the employer's
24 worksite located at the Sierra Vista Apartments in Las Vegas, Nevada on
25 or about March 9, 2010 and May 13, 2010. He identified complainant
26 exhibits stipulated in evidence as follows: Exhibit 1, the Investigative
27 Report and packet prepared after the inspection, Exhibit 2, four (4)
28 photographs taken by the SHR during the inspection, and Exhibit 3,

1 labeling requirements required under the standard.

2 Mr. Estrada testified he observed employees of respondent working
3 in and around an asbestos containment area. The employees were engaged
4 in removal and cleanup of asbestos material generally identified as
5 ceiling, wall and tile components. Employees were removing asbestos
6 material from at least three (3) apartments located on the property.
7 Due to fire, the apartments were vacant for some time and renovations
8 were being performed. As a result of damages to the building, the
9 respondent employer, Walker Specialty Construction, was hired to remove
10 damaged drywall, ceiling texture and other building materials to
11 facilitate repairs.

12 Mr. Estrada testified the respondent employees working inside the
13 containment structure were wearing appropriate personal protective
14 equipment (PPE). Air samples were collected and documented in
15 furtherance of the company safety practice guidelines. Mr. Estrada
16 testified the employees collected the asbestos waste material into
17 appropriate disposal bags and each bag was sealed and labeled in
18 accordance with OSHA standards. The bags were then loaded into an
19 enclosed work truck for eventual transportation to a disposal site.

20 SHR Estrada testified that during the walk around inspection he
21 particularly noted that while excursion sampling as required by OSHA
22 standards was conducted by the employees, it occurred only near the end
23 of the work day during cleanup. Mr. Estrada referenced pages 12 and 13
24 of Exhibit 1, which he identified as the two-day, 24 hour, air sample
25 data sheets required under the standard. He testified that in his
26 opinion air sampling should have been conducted throughout the day and
27 not merely at the end of the day during cleanup because he
28 believed other work operations were most likely to produce exposure

1 above the limits for employees and greater potential for more asbestos
2 particulates to be detected in the air. He inquired of the employees
3 working at the job site as to the best sampling time but disputed their
4 reasoning as to why they were sampling at the end of the day rather than
5 during the course of other work. He confirmed the employees had
6 elected, as permitted by the company safety plan, to perform excursion
7 sampling in their discretion at the end of the day. Mr. Estrada
8 testified he determined the referenced standard intended samples be
9 taken throughout the day during work activity based upon his conclusion
10 that such testing would occur best sample a time of highest potential
11 for exposure and therefore provide respondent and employees critical
12 data to guide them in the appropriate protective measures to be
13 undertaken to guard against exposure to the recognized asbestos hazards.

14 SHR Estrada testified as to Citation 1, Item 2 which referenced.
15 29 CFR 1926.1101(k)(8)(I). The standard provides:

16 "Labels shall be affixed to all products containing
17 asbestos and to all containers containing such
18 products, including waste containers. Where
feasible, installed asbestos products shall contain
a visible label."

19 He testified a company work truck was utilized to store the bagged
20 asbestos material which had been collected from each of the apartment
21 units subject of the employee work efforts. He was informed the
22 materials would be hauled from the job site at the end of the work day
23 for disposal at a designated toxic waste facility. He could not locate
24 any labeling or signs on the truck to identify the asbestos material
25 inside. He identified photographs at Exhibit 2 which depicted no
26 signage on the vehicle. Mr. Estrada determined the truck to be a
27 "container" as defined in the referenced standard, and therefore cited
28 a violation of the CFR.

1 Mr. Estrada concluded his direct testimony on the classification
2 of the two violations as "serious" and the penalty calculations. He
3 testified as to the gravity of even minimal exposures to asbestos fibers
4 explaining that asbestos is an identified carcinogen and well recognized
5 to cause serious injury or death, even many years after initial
6 exposure. Because of the high gravity, severity, and probability
7 factors, he confirmed conditions to support the serious classification.
8 SHR Estrada proposed penalties for both violations in accordance with
9 the enforcement manual. He explained the penalty calculation guidelines
10 and credits rendered based upon the company size and other relevant
11 factors.

12 On cross-examination, respondent's counsel directed inquiry to the
13 type of work observed by SHR Estrada, his background, training, and the
14 particular conditions subject of focus during his investigation.

15 Counsel for respondent and complaint stipulated to the admission
16 of respondent's exhibits without objection. The identified and marked
17 exhibits consisted of the following: Exhibit A, a copy of the Complaint;
18 Exhibit B, a copy of 29 CFR 1926.1101(f)(1)(iii); Exhibit C, a copy of
19 Personal Air Monitoring; Exhibit D, a copy of the definition of "Serious
20 Violation"; Exhibit E, 29 CFR 1926(k)(8)(I); Exhibit F, a picture of
21 Walker's waste container; Exhibit G, a pictures of truck and sealed
22 waste container bags; Exhibit H, a copy of Walker's proposal; Exhibit
23 I, a copy of Western Technologies report; Exhibit J, a copy of Walker
24 daily time log and sign-in sheet; Exhibit K, a copy of 29 CFR 1926.1101
25 "Definitions".

26 Counsel directed SHR Estrada's attention to Exhibit I, a copy of
27 the respondent site survey report prepared by Western Technologies Inc.
28 Mr. Estrada testified he did not recall reviewing the asbestos site

1 survey during his inspection, but responded to counsel's questions
2 regarding same. He testified as to the minimal amounts of asbestos
3 reported as detected in each room subject of work. Counsel further
4 directed attention to complainant's Exhibit 1, section 17, page 10, the
5 respondent safety plan. Mr. Estrada read the policy which provided

6 "an excursion sample shall be collected for each
7 work task during the time of the workday when you
8 expect it to be dirtiest or potential for greater
9 exposure. . ."

10 Counsel also requested the SHR review the standard and asked whether
11 there was any directive from the company or in the standard itself
12 regarding a specific time or condition for sampling to be undertaken.
13 SHR Estrada testified there was nothing to so indicate in the standard;
14 and the company safety plan left the matter of timing and conditions for
15 excursion sampling to the discretion of the responsible employees at the
16 site.

17 On continued cross-examination regarding Citation 1, Item 2,
18 counsel directed attention to respondent's Exhibit K, the statutory
19 definition as to waste containers. Mr. Estrada testified there was no
20 particular description of a "waste container" as such. He further
21 testified ". . . I guess waste bags were acting as containers . . ."
22 Counsel asked if two containers were required by the standard or
23 regulations, that is both bags and a truck. SHR Estrada answered the
24 standard requires only a single container.

25 Mr. Estrada testified at Exhibit 1, page 5 of his investigative
26 report, second paragraph that ". . . employees properly disposed of
27 waste in bags and each was labeled asbestos . . ." He further testified
28 on page 5 of Exhibit 1 that ". . . the only deficiency noted was the
excursion sampling being done . . ."

1 At the conclusion of complainants case, respondent counsel
2 presented evidence and testimony in defense of the alleged violations
3 charged in the citations. Mr. Bill Walker identified himself as the
4 owner and safety representative of the respondent employer. He
5 testified as to his ownership of the company, safety consciousness, and
6 heightened personal concern for respiratory safety due to his suffering
7 from a lung disorder caused by exposure to toxic materials. He
8 testified he is aware of the high dangers of even a 1% atmospheric
9 asbestos exposure. Mr. Walker testified that excursion sampling
10 required under the standard makes no reference to "when it is done"
11 during the work day. He testified sampling is best done in the latter
12 part of the work day when the highest fiber concentrations are in the
13 air because the ". . . longer you work asbestos the more it's disbursed
14 into the air . . ." He testified his company policy leaves discretion
15 of the actual air sampling time to his well-trained and certified
16 employees who understand they must protect themselves from exposure when
17 the air is "dirtiest." He testified the employees exposed to the hazard
18 potentials are best able to determine from their experience and training
19 the most appropriate time for air sample testing.

20 At Citation 1, Item 2 Mr. Walker testified that although he was not
21 on the job site, he believed there were paper asbestos warning signs on
22 the storage truck the day of inspection because it is a typical company
23 practice. He testified that he believed his employees removed the paper
24 signs at the end of the work day in preparation for transportation of
25 the materials to the dump site because they would simply blow away if
26 left affixed. Mr. Walker testified it is typical to remove the paper
27 signs from the vehicle prior to transportation to the dump site and then
28 display a placard on the vehicle while operating same. He further

1 testified that the truck was not the **waste container** described in the
2 CFR, and therefore did not legally require labeling. He testified that
3 the sealed bags were **waste containers** and properly labeled all in
4 compliance with the standard.

5 Mr. Gerardo Garcia identified himself as trained and certified in
6 asbestos handling work and the respondent employee in charge of air
7 sampling at the job site on the day of the inspection. He has worked
8 in the asbestos field since 1986. He testified excursion sampling must
9 be done when the air is the dirtiest or when concentrations are expected
10 at the highest level. He testified that he performed the required
11 sampling on the job site when air containment conditions were at the
12 highest levels which was at the end of the day during cleanup. He
13 testified that he did so because that was when the asbestos materials
14 were the most stirred up and fibers and dust in the air at the greatest
15 concentrations. Mr. Garcia also testified the company safety guideline
16 a Exhibit 1, page 10, section 17, requires air sampling when conditions
17 are the worst which he believes based on his training and experience,
18 occurs during final bagging and cleanup at the end of the day. He
19 further testified the air sampling time frame is employee discretionary
20 under company policy because it can depend upon the job site and the
21 work involved.

22 On cross-examination Mr. Garcia testified as to the type of work
23 being performed which included removing damaged areas of the ceiling
24 material and sheetrock, material collection, use of wetting agents to
25 reduce dust, and eventual bagging and labeling. He also testified that
26 Mr. Larry Parks, a Clark County Department of Air Quality
27 representative, was at the jobsite on the morning of the inspection and
28 observed the additional signage was on the company truck. He testified

1 the signs were removed from the truck when Mr. Parks left the site and
2 before the OSHA SHR arrived. On further cross-examination, Mr. Garcia
3 testified that no brooms were utilized to clean up the materials because
4 they create more dust and air contamination. A "wet method" and mop
5 were used after picking up the larger materials by hand. A shovel and
6 vacuum were then utilized to complete the process.

7 Respondent counsel presented testimony and documentary evidence
8 from Mr. Brett Unbedacht who identified himself as a 12-year respondent
9 employee, trained and certified in asbestos work and the operations
10 manager for the Las Vegas Region of Walker Specialty, Inc. He testified
11 that the subject job as very small, having only an approximate \$5,700
12 value. The scope of work was to merely clean up debris and "square up"
13 holes in the ceiling materials for eventual "patchwork" replacement. He
14 testified the company policy for excursion sampling directs that tests
15 occur when the air is the dirtiest. He believes sampling is best
16 conducted at the end of the day during cleanup because of the highest
17 concentration levels at the time. He testified the particular job work
18 was 80% cleanup so that is when sampling should have occurred.

19 Mr. Unbedacht testified that **bags** are the safety **containers** under
20 the OSHA standard and are always treated as such. He testified the bags
21 used at the site were all appropriately tied, labeled and then simply
22 loaded into the truck for eventual transportation. He testified he did
23 not believe the transportation truck was an asbestos "container" under
24 the cited standard.

25 Complainant presented closing argument and asserted that the cited
26 violations were very serious in nature and should be confirmed by the
27 review board.

28 At Citation 1, Item 2, counsel argued that labels needed to be on

1 the truck similar to those on the storage containers in respondent's
2 yard as identified in Exhibit F in evidence. The truck becomes a
3 "container" for the bags similar to the storage bins at the yard.
4 Because the bins were marked (labeled) at the yard, then so should the
5 truck to be OSHA compliant.

6 At Citation 1, Item 1 counsel argued that it does not make sense
7 that air sample tests be done at the end of the day because airborne
8 fibers would seem to be worse when sawing, trimming out and bagging are
9 occurring throughout the work day.

10 Counsel further asserted the appropriateness of the penalties and
11 classifications of "serious" be upheld because the potential for
12 exposure to the recognized hazard was very high and deadly in nature.

13 Respondent presented closing argument and asserted that OSHA has
14 the statutory burden of proof but failed to establish a case to meet
15 that burden by any preponderance of evidence. He argued that
16 complainant's case is based upon opinion and conjecture of what the
17 inspecting SHR and legal counsel believe, feel or think would be the
18 best time for air sampling, notwithstanding the lack of any specific
19 time requirement in the standard and the opinions of three witnesses
20 employed and experienced in the field of asbestos removal. He argued
21 that simply because OSHA **feels** the samples were not taken at the correct
22 time it should not provide a basis for any legal decision to impose a
23 penalty or fine under the standard which does not require a specific
24 time or stage of work to conduct sampling. Each respondent employee
25 testified the company policy leaves the timing for sampling to the
26 discretion of the employees subject to exposure so they can conduct
27 tests on each particular job site depending upon the conditions,
28 circumstances and facts, when the air is "dirtiest . . . or when the

1 potential concentrations would be at the highest level." All employees
2 testified that the dirtiest air time and highest potential
3 concentrations occurred at the end of the day on the subject job site
4 for the type of asbestos work performed based upon the nature of
5 asbestos removal and their experience in the field. Because the
6 employees subject to exposure were trained, certified and understand the
7 health hazards, their testimony should be relied upon to interpret the
8 standard which directs no specific test timing, rather than the
9 conjecture or opinion of the SHR or legal counsel.

10 Counsel submitted that a reading of the standard at Citation 1,
11 Item 2 cannot be construed or expanded to define a transportation truck
12 to be the asbestos "container" requiring labeling, when the undisputed
13 facts show the recognized "containers" under the standard were the bags
14 properly utilized on the site, sealed and labeled. He referenced the
15 statement of the inspecting SHR at Exhibit 1 and his testimony that the
16 storage bags were in fact "containers" under the standard. He further
17 referenced the testimony of SHR Estrada to be that only one container
18 is required, not two, such that labeling both the bags and a truck would
19 be duplicitous and not required by the standard.

20 In reviewing the testimony, exhibits, and arguments of counsel, the
21 board is required to measure same against the elements to establish
22 violations under Occupational Safety & Health Law based upon the
23 statutory burden of proof and competence of evidence.

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

26 All facts forming the basis of a complaint must be
27 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD
28 ¶16,958 (1973).

1 To prove a violation of a standard, the Secretary
2 must establish (1) the applicability of the
3 standard, (2) the existence of noncomplying
4 conditions, (3) employee exposure or access, and
5 (4) that the employer knew or with the exercise of
6 reasonable diligence could have known of the
7 violative condition. See Belger Cartage Service,
8 Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
9 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
10 Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
11 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
12 (No. 76-1408, 1979); American Wrecking Corp. v.
13 Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.
14 2003).

15 A respondent may rebut allegations by showing:

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

21 Neither the SHR nor any witnesses testified or provided any
22 evidence that the required air sampling did not occur at the subject job
23 site. However, OSHA alleged the timing of testing procedures should
24 have occurred throughout the course of the work day to better assess the
25 highest asbestos concentrations, rather than during "cleanup" at the end
26 of the day which was elected by the responsible respondent employees.
27 The sworn testimony of three respondent witnesses was that as to the
28 subject job site, and generally, when removing or cleaning up asbestos
in a confined area, it is most appropriate to conduct air sampling under
the standard at the end of the work day during final cleanup and bagging
of the asbestos material. Exhibit A, the company safety directive, left
the actual timing of the testing over the 24-hour /30 minute sampling
period to the discretion of the employees subject to exposure. All
respondent employee witnesses testified that the air was both "dirtiest"
and potentially at the ". . . highest (asbestos) concentrations . . ."
at the end of the day during final clean up and bagging. All respondent

1 employee witnesses testified they were trained and certified in asbestos
2 removal work. Substantial testimonial evidence from witnesses Garcia
3 and Unbedacht confirmed that asbestos removal and cleanup requires the
4 efforts of trained certified personnel due to the high dangers of the
5 airborne particulates that may be stirred up or circulated by work
6 activity. Mr. Walker testified that ". . . the more you work asbestos
7 the more disbursed it becomes . . ." Mr. Garcia with 25 years of
8 experience was responsible for the company air sampling under the
9 standard. He determined that at the subject job site and in accordance
10 with the company safety policy directive, his discretion constrained him
11 to conduct testing at the end of the day when the material was being
12 finally cleaned up, bagged and removed to the storage truck. The cited
13 OSHA standard is silent with regard to the time of day or particular
14 work effort being performed when testing should occur. The facts are
15 undisputed that the required testing was accomplished under the 30
16 minute intervals and verified in the sample data reports, Exhibit 1,
17 pages 12 and 13. These facts, coupled with the unrefuted sworn
18 testimony of three witnesses, do not provide any basis for finding a
19 violation of the cited specific standard at Citation 1, Item 1.

20 The burden of proof is upon the complainant. Enforcement
21 alternatives might have been elected if OSHA Industrial Hygienists
22 (IHs), or Safety and Health Representatives (SHRs) or other qualified
23 OSHA staff had any reasonable belief that concentrations were highest
24 or the conditions were "dirtiest" at some particular time of day. For
25 example, sampling devices could have been safely inserted into the
26 containment area by an IH or SHR while remaining outside the area of
27 exposure. Similarly, an IH could have used an appropriate protective
28 mask to sample the data from the inside. None of these recognized

1 enforcement alternatives were elected to potentially support the OSHA
2 charges that the air was dirtiest or bore the highest concentrations at
3 some different stage of the work effort or time of day.

4 While the board could agree that it may be intuitive and/or logical
5 to surmise that more fibers would be circulated while employees are at
6 work cutting, sawing and working within the containment area, there was
7 no competent evidence to prove or even support this mere logic to
8 confirm a violation. Conversely, the sworn testimony of three
9 witnesses, including the owner was credible and to be given due weight
10 unless impeached. The board must review the evidence and testimony in
11 conformance with the stated terms of the specific standard, the safety
12 plan guidelines, and sworn testimony. To do otherwise would substitute
13 unqualified opinions and conjecture, for evidence. The **plain meaning**
14 of the standard is clear. This board has followed the plain meaning
15 rule when required to interpret standards and law.

16 Caminetti v. United States, 242 U.S. 470, 485, 37
17 S.Ct. 192, 194, 61 L.Ed. 442 (1916) (citations
18 omitted). Rodgers v. Rodgers, 110 Nev. 1370, 1373,
19 887 P.2d 269, 271 (1994) (words in statute should
20 be given their plain meaning unless spirit of act
21 is violated.) Sheriff v. Encoe, 110 Nev. 1317,
22 1319, 885 P.2d 596 (1994) (proper construction of
23 statute is legal question rather than factual
24 question). Neal v. Griepentrog, 108 Nev. 660, 664,
25 837 P.2d 432, 434 (1992) (words in statute should
26 be given their plain meaning unless this violates
27 spirit of act).

28 The board finds no evidence that the conditions were anything other
than as reported in the sampling data and taken at the supervising
employee's discretion when the conditions were deemed most potentially
hazardous.

The admitted evidence and testimony established that respondent
employees conducted air sample testing in accordance with the plain

1 written meaning as described under the terms of the standard. 29 CFR
2 1926.1101(f)(1)(iii) provides:

3 "Representative 8-hour TWA employee exposure shall
4 be determined on the basis of one or more samples
5 representing full-shift exposure for employees in
6 each work area. Representative 30-minute short-
7 term employee exposures shall be determined on the
8 basis of one or more samples representing 30 minute
9 exposures associated with operations that are most
10 likely to produce exposures above the excursion
11 limit for employees in each work area."

12 At Citation 1, Item 2, the board finds no definition either in the
13 cited standard or from the evidence submitted that the transportation
14 truck **in this case** could be classified as a "container" and require
15 labeling. To do so would add a second asbestos contamination
16 confinement in addition to the storage bags which were utilized as the
17 "containers" and properly labeled. The standard is not **applicable** to
18 the facts in evidence. If the truck required labeling as a "container",
19 it would expand the standard to require two (2) containers for labeling
20 rather than the appropriate single container (bags) described in the
21 standard. Again, the plain meaning of the cited standard is clear. The
22 testimony of all witnesses, **including** the citing SHR was that the
23 asbestos material was properly bagged, contained and labeled and that
24 ". . . the bags served as containers . . ." as required by the standard.
25 Here the transportation truck could only possibly be considered a
26 "container" under, and the standard applicable, for example asbestos
27 materials were merely vacuumed or shoveled directly from the containment
28 area into the vehicle and then sealed, labeled and stored for eventual
29 transportation to a toxic waste site. That possibility was not subject
30 of any testimony or evidence nor alleged by OSHA.

31 In addition to the foregoing with regard to Citation 1, Item 2,
32 there was substantial testimonial evidence that the subject

1 transportation truck did in fact bear temporary paper labeling as a
2 presumed additional compliance requirement, but removed shortly before
3 the SHR arrived on the site to conduct his inspection. The testimony
4 of Mr. Garcia was that the Clark County Air Quality representative
5 observed labels on the truck the morning of the inspection, but the
6 labels were removed prior to the arrival of the SHR as same would likely
7 blow off during transportation. While the subject testimony may be
8 hearsay, it was supported by Messrs. Walker and Unbedacht as to what is
9 typically done by the company even though the truck is only a
10 transportation vehicle. However additional labeling on the subject
11 truck, while reasonable, prudent and good practice, it is not required
12 for compliance with the cited standard.

13 Based upon the above and foregoing, the board is not required to
14 review the classification of the proposed violations as "Serious" nor
15 the calculation of penalties.

16 The board finds, as a matter of fact and law, there was no
17 preponderance of proof of violations as to Citation 1, Item 1, 29 CFR
18 1926.1101(f)(1)(iii), and Citation 1, Item 2, 29 CFR 1929.1101(k)(8)(I).

19 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
20 **REVIEW BOARD** that no violation of Nevada Revised Statutes did occur as
21 to Citation 1, Item 1, 29 CFR 1926.1101(f)(1)(iii) and Citation 1, Item
22 2, 29 CFR 1926.1101(k)(8)(I). The classification of Citation 1, Item
23 1 and Item 2 as "Serious" and the proposed penalties of EIGHT HUNDRED
24 DOLLARS (\$800.00) each are denied and dismissed.

25 The Board directs counsel for the respondent, **WALKER SPECIALTY**
26 **CONSTRUCTION**, to submit proposed Findings of Fact and Conclusions of Law
27 to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve
28 copies on opposing counsel within twenty (20) days from date of

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

7 DATED: This 8th day of MARCH 2011.

8 NEVADA OCCUPATIONAL SAFETY AND HEALTH
9 REVIEW BOARD

10 By /s/
11 TIM JONES, CHAIRMAN