

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD

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

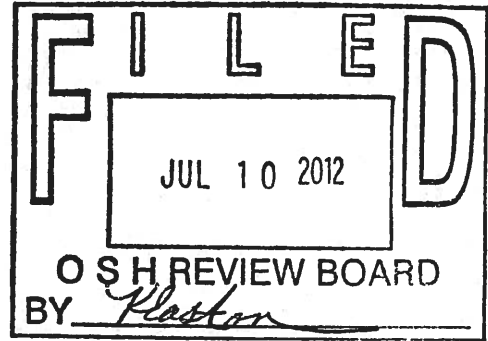
Docket No. RNO 12-1565

Complainant,

vs.

20/20 COMMERCIAL CARE, INC.

Respondent.



11
12 DECISION

13 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
14 **HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of June,
15 2012, in furtherance of notice duly provided according to law, MR.
16 MICHAEL TANCHEK, ESQ., counsel appearing on behalf of the Complainant,
17 **Chief Administrative Officer of the Occupational Safety and Health**
18 **Administration, Division of Industrial Relations (OSHA)**; and MR. DAVID
19 W. DONNELL, ESQ., appearing on behalf of Respondent, **20/20 COMMERCIAL**
20 **CARE, INC.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds
21 as follows:

22 Jurisdiction in this matter has been conferred in accordance with
23 Nevada Revised Statute 618.315.

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

27 Citation 1, Item 1, charges a violation of 29 CFR 1910.23(c)(1).
28 The complainant alleged a respondent employee was performing window

1 washing work without required fall protection on a two foot wide ledge
2 and exposed to a fall of 50 feet. The alleged violation was classified
3 as serious. The proposed penalty for the alleged violation is in the
4 amount of \$4,200.00.

5 Citation 1, Item 2, charges a violation of 29 CFR 1910.132(e). The
6 complainant alleged a respondent employee was engaged in window washing
7 work utilizing a defective safety belt and exposed to a fall hazard of
8 50 feet. The proposed penalty for the alleged violation is in the
9 amount of \$4,200.00.

10 Counsel for the complainant through Compliance Safety and Health
11 Officer (CSHO) Kurt Garrett presented evidence and testimony in support
12 of the violations and proposed penalties. Complainant's Exhibits 1, 2
13 and 3 were subject of a stipulation and admitted in evidence with a
14 reservation for specific objections. Mr. Garrett testified he observed
15 an individual cleaning windows at a height of approximately 50 feet on
16 the Wells Fargo Bank building in Reno, Nevada. The individual, later
17 identified as respondent employee James Castillo, was working off of a
18 ledge initially determined to be approximately two feet in width. He
19 further observed other employees of respondent working outside of the
20 building who confirmed that both employees worked for the respondent
21 20/20 Commercial Care, Inc. Mr. Garrett testified from Exhibit 1, and
22 referenced photographic Exhibit 2, pages 1 through 5. He observed
23 employee Castillo working at a height of approximately 50 feet which he
24 determined by counting the floor window ledges. Mr. Castillo was
25 utilizing one connector of a window washer's belt, which is a two
26 connector system. He testified that for the belt to be effective, both
27 connections must be utilized at all times while washing windows and
28 attached to points on both sides of the window. Mr. Garrett's narrative

1 report at Exhibit 1 specified that the use of both connectors was the
2 building property management policy and contained in the respondent
3 training manual instructions. He observed Mr. Castillo engaged in a
4 process where he would detach one connector and walk without fall
5 protection to the next window approximately five (5) feet away. By
6 doing so the employee would be hooked to one side of the window washing
7 belt while he reached out to clean the windows leaving the other end of
8 the window washing belt unconnected. He identified Exhibit 2,
9 photographs 1 and 2, as depicting employee Castillo engaged in the
10 process described. He testified photograph 2 demonstrates employee
11 Castillo without any safety belt or other fall hazard attachment; and
12 photograph 1 to depict the single belt connection process as testified.
13 Exhibit 2, photograph number 4 depicts the tape measure utilized by the
14 CSHO to establish the roof ledge width from which the employee was
15 working to be 23 inches wide. He testified Mr. Castillo originally told
16 him during the interview that the ledge was approximately three feet
17 wide.

18 CSHO Garrett testified that Mr. Castillo identified himself as a
19 foreman as well as an employee of the respondent on the subject job
20 site. After concluding his interview with Mr. Castillo, Mr. Garrett
21 determined the existence of a violation of 29 CFR 1910.23(c)(1).

22 After completing his inspection and returning to his office and
23 examining the photographs, CSHO Garrett noted that the safety belt
24 utilized by employee Castillo bore a label with an expiration date on
25 the manufacturer's rating tag requiring it be removed from service after
26 November 1988. Based upon the information on the label/tag and his
27 inspection of the belt he concluded there to be a violation of the cited
28 standard for lack of protective capabilities by such a belt to

1 constitute compliance with the fall hazard standards.

2 CSHO Garrett further testified that employee Castillo told him
3 during his interview that he (Castillo) knew he was supposed to have the
4 belt on, but did not. Mr. Garrett testified with regard to citation
5 classifications of serious and the probability, severity and gravity
6 ratings in furtherance of his conclusion that a fall from an approximate
7 50 foot height had a high probability of resulting in serious injury or
8 more likely death.

9 CSHO Garrett testified he considered a defense of employee
10 misconduct before issuing the citation but did not feel it was warranted
11 due to a lack of a meaningful understanding of fall hazard safety
12 demonstrated by Mr. Castillo in his interview answers. He further
13 testified Mr. Castillo appeared "comfortable working without an attached
14 safety belt . . ." which indicated a potential violative course of
15 conduct. Mr. Garrett also considered Mr. Castillo's status as a
16 foreman/supervisory employee to negate excuse of compliance for isolated
17 employee misconduct and therefore made no recommendations for treating
18 the matter as an isolated incident of employee misconduct to relieve the
19 employer from a citation.

20 Respondent counsel conducted cross-examination. Mr. Garrett
21 testified that he did not contact the manufacturer of the safety belt
22 to determine whether the expiration label was based upon specific
23 reasons of safety rather than merely general expiration. Mr. Garrett
24 testified that he cited the belt because it looked worn when he saw it
25 on the site but when he later observed the expiration date label detail
26 in the photos he concluded it was in violation of the standard. He
27 testified that while the observed belt wear could have been "normal wear
28 and tear," his main concern was focused on the printed manufacturers

1 expiration date. The belt was 24 years past its life. When he so
2 informed supervisor Chavez, he (Chavez) never commented about the
3 expiration date but said he does inspect all belts and felt the subject
4 was okay for use.

5 On redirect examination, CSHO Garrett testified that ultraviolet
6 rays have a significant affect on belts and can weaken them, which is
7 one of the reasons safety belts "go out of service". He admitted UV
8 damage cannot be observed by the naked eye.

9 At the conclusion of complainant's case, respondent presented
10 testimony of witness Mr. Ruben Chavez.

11 Mr. Chavez identified himself as the president of respondent and
12 trained in the inspection of safety belts and lanyards. He testified
13 that after CSHO Garrett's inspection he inspected the subject belt and
14 found no damage or defects after examining all parts. He told CSHO
15 Garrett that he inspected the belt and found no defects.

16 On cross-examination Mr. Chavez testified that he does not know how
17 to inspect for UV ray damage.

18 At the conclusion of the case, complainant and respondent presented
19 closing argument.

20 Complainant argued at Citation 1, Item 1, there was no question
21 respondent employee Castillo was working without any recognized fall
22 hazard protection system. He was not properly tied-off even while using
23 the unapproved window washer belt because only one side was connected
24 as depicted in Exhibit 2, photograph 1. In Exhibit 2, photograph 2 no
25 belt was worn at all. At Exhibit 3 Mr. Castillo admitted he was not
26 utilizing appropriate fall safety protection, and not "tied off" while
27 working on the building. Counsel noted Exhibit 2, photograph 4 and
28 argued the ledge was too narrow to even permit effective use of a belt.

1 He further asserted there was no excuse for the respondent under an
2 employee misconduct defense because employee Castillo was a foreman and
3 a long-standing employee of the company who should have been
4 sufficiently trained and compliant to avoid the hazard exposure.

5 Complainant further argued at Citation 1, Item 2, that the belt
6 with the label/tag depicted in the photographic exhibit and observed in
7 use by CSHO Garrett expired in 1988. He further asserted that the
8 testimony of Mr. Garrett established the belt was in a worn condition
9 and that belts can suffer from UV exposure although not visible to the
10 naked eye. Counsel concluded by asserting the burden of proof was met
11 by the unrebutted evidence of the expiration label alone.

12 Respondent argued that at Citation 1, Item 1 the standard requires
13 guardrail protection or the equivalent, yet the respondent was cited
14 referencing facts of violation for employee Castillo not wearing an
15 appropriate safety belt. He asserted the applicable case law requires
16 **citation particularity** to place an employer on legal notice of what it
17 did wrong. He argued the citation to be void on its face and asserted
18 that OSHA cannot cite a guardrail standard for lack of belt use.

19 At Citation 1, Item 2, respondent argued the burden of proof
20 required the complainant prove the belt was defective due to UV rays or
21 bore some kind of damage, but failed to do so. He asserted the entire
22 OSHA case is based on a tag or a label which indicates the belt was not
23 to be used past a certain date. He argued there is no evidence of
24 defect or damage or **why** the label is attached, and asserted that maybe
25 it is just so manufacturers can sell more belts. He continued to argue
26 there was no burden of proof met to establish the belt was unsafe or
27 ineffective to prevent a fall hazard, and therefore the violation should
28 be denied. Counsel noted that OSHA never tested the belt but relied

1 solely on a tag or label. There was no evidence of any inspection done
2 by the complainant, but Mr. Chavez testified he examined the belt and
3 found no damage.

4 To find a violation of the cited standards, the board must consider
5 the evidence and measure same against the established applicable law
6 promulgated and developed under the Occupational Safety & Health Act as
7 incorporated by reference in Nevada Revised Statutes.

8 . . . All federal occupational safety and health
9 standards which the Secretary of Labor promulgates,
10 modifies or revokes, and any amendments thereto,
11 shall be deemed Nevada occupational safety and
12 health standards unless the Division, in accordance
13 with federal law, adopts regulations establishing
14 alternative standards that provide protection equal
15 to the protection provided by those federal
16 occupational safety and health standards. (NRS
17 618.295(8))

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

21 All facts forming the basis of a complaint must be
22 proved by a preponderance of the evidence. The
23 decision of the hearing examiner shall be based
24 upon a consideration of the whole record and shall
25 state all facts officially noticed and relied upon.
26 It shall be made on the basis of a preponderance of
27 reliable and probative evidence. 29 CFR 1905.27(b).
28 *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD
¶16,958 (1973). *Olin Construction Company, Inc. v.*
OSHARC and Peter J. Brennan, Secty of Labor, 525
F.2d 464 (1975).

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

1 The board finds a preponderance of evidence to support violations
2 of Citation 1, Item 1 referencing 29 CFR 1910.23(c)(1) and Citation 1,
3 Item 2, referencing 29 CFR 1910.132(e). The board further finds the
4 violations to be appropriately classified as Serious and the proposed
5 penalties properly assessed.

6 Photographic Exhibit 2 in evidence at pictures number 1 and 2,
7 established **non-complying conditions** at the worksite. Employee Castillo
8 was depicted without appropriate safety protection and **exposed** to a fall
9 hazard. In Exhibit 2, photograph 1 he was connected at only one side
10 of his belt. In Exhibit 2, photograph 2, he was shown not wearing any
11 belt or safety protection whatsoever. At Exhibit 3, Mr. Castillo
12 admitted he was not "tied off" while working. Mr. Castillo was a long-
13 standing employee and foreman of respondent. **Employer knowledge** was
14 established constructively, by inference, and supported by the
15 recognized case law.

16 ". . . In general, the **actual or constructive**
17 **knowledge of a supervisory employee will be**
18 **imputed, (to the employer);** and thus constitute a
19 prima facie showing of knowledge. Where
20 supervisory knowledge can be imputed, OSHA need not
21 also show that there were deficiencies in the
22 employer's safety program. *Halmar Corp.*, 18 OSH
23 Cases 1014, 1016-17 (Rev. Comm'n 1997), *aff'd on*
24 *other grounds*, 18 OSH Cases 1359 (2d Cir. 1998)."
25 Rabinowitz, Occupational Safety and Health Law,
26 2008, 2nd Ed., Page 87. (emphasis added)

27 *Division of Occupational Safety and Health vs. Pabco Gypsum*, 105
28 Nev. 371, 775 P.2d 701 (1989). Evidence that a foreman or supervisor
violated a standard permits an inference that the employer's safety
program was not adequately enforced. See *D.A. Collins Construction Co.*
v. Secretary of Labor, 117 F.3d 691, 695 (2d Cir. 1997); *Harry C.*
Crooker & Sons, Inc. V. Occupational Safety & Health Review Commission,
537 F3 79, 85 (1st Cir. 2008). See *Belger Cartage Service, Inc.*, 79

1 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373
2 (No. 76-1948, 1979); *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC
3 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979);
4 *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261 (D.C.
5 Cir. 2003), supra.

6 The requirements of **standard applicability** to prove a violation and
7 **citation particularity** were raised and challenged by respondent.

8 A respondent may rebut evidence by showing:

- 9 1. The standard was **inapplicable** to the situation
10 at issue;
- 11 2. The situation was **in compliance**; or lack of
12 **access to a hazard (exposure)**. See, *Anning-*
Johnson Co., 4 OSHC 1193, 1975-1976 OSHD ¶
13 20,690 (1976). (emphasis added)

14 The Board finds the standard was applicable to the non-complying
15 conditions at the worksite. While the field of window washing and the
16 governing safety standards could benefit from greater clarity, the board
17 must rely on the standards enacted by Congress to apply to various
18 industries and interpret same under the burden of proof to determine
19 whether a violation exists. At Exhibit 2, photograph 2, respondent
20 employee Castillo was depicted wearing no safety protection whatsoever.
21 At Exhibit 2 photograph 1 he was depicted utilizing a window washer
22 belt, which is not recognized protection for the subject fall hazard in
23 accordance with the standards, but further not even properly utilizing
24 the connection points on the belt. The cited standard, 29 CFR
25 1910.23(c) references protection from fall hazards generally identifying
26 work areas of an open sided floor or **platform above ground level** which
27 requires guarding by use of a standard railing **or the equivalent as**
28 **specified in paragraph (e) (3) of this section** on all open sides . . .

29 CFR 1910.23(c) (1) :

1 Every open-sided floor or **platform 4 feet or more**
2 **above adjacent floor** or ground level **shall be**
3 **guarded** by a standard railing (or the equivalent as
4 specified in paragraph (e) (3) of this section) on
5 all open sides except where there is entrance to a
6 ramp, stairway, or fixed ladder. The railing shall
7 be provided with a toeboard wherever, beneath the
8 open sides, . . . (emphasis added)

9 . . . Section 9(a) of the Act requires that the
10 citation "**describe with particularity the nature of**
11 **the violation**" and that it refer to the provision
12 of the Act, standard, regulation, or other alleged
13 to have been violated. The **purpose of the**
14 **requirement is to apprise the employer of the**
15 **alleged violation so that the corrective action can**
16 **be taken and so that the employer can decide**
17 **whether to contest.** *Del Monte Corp.*, 4 OSH Cases
18 2035 (Rev. Comm'n 1977). An **insufficiently**
19 **particular citation may not be vacated unless it**
20 **adversely affected the employer's ability to**
21 **defend.** *Ringland-Johnson, Inc. v. Dunlop*, 551 F.2d
22 1117, 1118, 5 OSH Cases 1137 (8th Cir. 1977);
23 *Brabham-Parker Lumber Co.*, 11 OSH Cases 1201, 1202
24 (Rev. Comm'n 1983); *Louisiana-Pacific Corp.*, 5 OSH
25 Cases 1994 (1977). (emphasis added)

26 The citation and charging allegations were sufficiently **particular**
27 to place the respondent on notice to understand and defend the failure
28 to assure fall hazard protection for its window washer employee Mr.
Castillo. Respondent presented no evidence of an adverse affect on an
ability for defense nor demonstrated any prejudice.

The **applicability** of the cited standard is clear on its face and
plain meaning; however it could also apply under the "equivalency"
provisions of the cited standard and analyzed under the recognized
defensive theory of **alternate means of compliance.**

In reviewing the standard, testimony, evidence and case law,
respondent counsel urges the board to find no applicability of the
subject standard for window washers under the facts and working
conditions in evidence, or no safety protection standard for the
employees whatsoever. The latter would create an absurdity and not

1 comport with any reasonable interpretation of the cited standard nor the
2 spirit and intent of occupational safety and health law. Finding
3 violations of the cited standards based on a lack of fall hazard
4 protection as observed by CSHO Garrett, photographed at Exhibit 2,
5 numbers 1 and 2, and admitted by employee Castillo in Exhibit 3 is well
6 supported by the evidence and satisfies complainant's burden of proof.
7 Further even though use of a safety belt was unrecognized protection
8 under the facts presented, it was not properly connected as shown in
9 Exhibit 2 photograph 1 and therefore fails to satisfy the test for
10 establishing a partial defense through **alternate means of protection** nor
11 provide some evidence in mitigation.

12 When the Secretary has introduced evidence showing
13 the existence of a hazard in the workplace, the
14 **employer may, of course, defend by showing that it**
15 **has taken all necessary precautions to prevent the**
16 **occurrence of the violation.** *Western Mass. Elec.*
17 *Co., 9 OSH Cases 1940, 1945 (Rev. Comm'n 1981).*
18 (emphasis added)

16 A citation may be vacated if the employer proves
17 that: (1) the means of compliance prescribed by the
18 applicable standard would have been **infeasible**
19 under the circumstances in that either (a)
20 implementation would have been technologically
21 impossible or economically infeasible or (b)
22 necessary work operations would have been
23 technologically or infeasible after its
24 implementation; **and** (2) either (a) **an alternative**
25 **method of protection was used** or (b) there was no
26 feasible alternative means of protection. (emphasis
27 added) *Rabinowitz, Occupational Safety and Health*
28 *Law, 2008, 2nd Ed., page 152. Beaver Plant*
Operations Inc., 18 OSH Cases 1972, 1977 (Rev.
Comm'n 1999), rev'd on another ground, 223 F.3d 25,
19 OSH Cases 1053 (1st Cir. 2000); Gregory and Cook
Inc., 17 OH Cases 1189, 1190 (Rev. Comm'n 1995);
Seibel Modern Mfg. & Welding Corp., 15 OSH Cases
1218, 1228 (1991); Mosser Constr. Co., 15 OSH Cases
1408, 1416 (Rev. Comm'n 1991); Dun-Par Engineered
Form Co., 12 OSH Cases 1949 (1986), rev'd on
another ground, 843 F.2d 1135, 13 OSH Cases 1652
(8th Cir. 1988).

1 The board finds no evidence under the facts or governing law to
2 demonstrate either compliance with the plain meaning terms of the cited
3 standard nor any defense of some alternate means of compliance for the
4 violative conduct depicted in Exhibit 2, photograph 1, with only a
5 single point ineffective connection. Even if the board could have done
6 so, it would not relieve the respondent for the violation observed and
7 depicted at Exhibit 2, photographic 2, and corroborated by the
8 un rebutted testimony of CSHO Garrett where no safety belt or any other
9 fall protection means were in use. Further, at Exhibit 3, Mr. Castillo,
10 a foreman/supervisory employee admitted he had been trained to utilize
11 his belt but simply did not use same. (See *Pabco Gypsum, supra* page 8.)

12 At Citation 1, Item 2, the testimony of CSHO Garrett and the
13 photographic Exhibit 2, number 6 clearly demonstrates the belt utilized
14 had expired under the manufacturer's label or tag. Notwithstanding the
15 testimony of Mr. Chavez, had he or supervisory employee Castillo
16 examined the belt before each use as Mr. Chavez testified, a belt
17 labeled with a 1988 expiration date should have been clearly noticed and
18 the belt taken out of service. The standard does not permit utilization
19 of personal protective equipment that is "defective or damaged". The
20 belt expiration date established by the label is prima facie evidence
21 of a "defective" condition sufficient to satisfy the burden or proof by
22 a preponderance.

23 In reviewing the applicable law for classification of violations
24 as "serious" the board notes NRS 618.625 as follows:

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

1 The board finds substantial evidence by a preponderance to support
2 the classification of the violations as "serious". The fall protection
3 standard requires protection from exposure while working at heights of
4 four feet or more above an adjacent floor or ground level. The
5 un rebutted evidence is that the height of employee Castillo's work was
6 approximately 50 feet from the ground level while standing on a 23"
7 window ledge on a high rise building, without any protection whatsoever
8 and improper use of inappropriate protection. The testimony abundantly
9 supports a **substantial probability** that death or serious physical harm
10 could result from a fall under the worksite conditions.

11 Based upon the evidence and testimony, it is the decision of the
12 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of
13 Nevada Revised Statute did occur as to Citation 1, Item 1, 29 CFR
14 1910.23(c)(1). The classification of "Serious" is appropriate and
15 affirmed. The assessed penalty of FOUR THOUSAND TWO HUNDRED DOLLARS
16 (\$4,200.00) confirmed. The board finds a violation of Citation 1, Item
17 2, 29 CFR 1910.132(e). The classification of "Serious" is appropriate
18 and affirmed. The assessed penalty of FOUR THOUSAND TWO HUNDRED DOLLARS
19 (\$4,200.00) confirmed.

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

1 by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
2 **BOARD** shall constitute the Final Order of the **BOARD**.

3 DATED: This 10th day of July, 2012.

4 NEVADA OCCUPATIONAL SAFETY AND HEALTH
5 REVIEW BOARD

6 By /s/
7 JOE ADAMS, Chairman

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