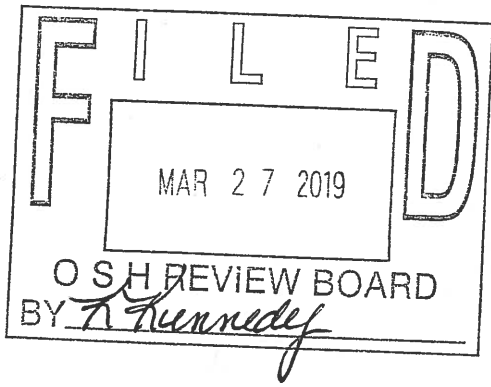


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**NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD**

**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,**

Docket No. LV 18-1935

Complainant,

vs.

**WALKER SPECIALTY
CONSTRUCTION, INC.,**

Respondent,

DECISION OF THE BOARD

This matter came on for hearing before the Nevada Occupational Safety and Health Review Board (OSHA) on October 11, 2018, after notice was duly given according to law. Ms. Salli Ortiz, Esq., appeared on behalf of the complainant, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (State). Mr. Shan Davis, Esq., of Shan Davis & Associates, appeared on behalf of the respondent, Walker Specialty Construction, Inc., (Walker).

Jurisdiction is not contested and is conferred by NRS 618.315. The State's complaint sets forth the allegations which, the State claims, constitute violations of the Nevada Revised Statutes as referenced in Exhibit "A," attached to the complaint. The State's complaint alleges that:

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1 Citation 1, Item 1: REGULATORY

2 Nevada Administrative Code 618.918(1): To maintain his or her
3 license, a contractor must ensure that proper notification of any
4 proposed project for the abatement of asbestos is given in writing to
5 the Enforcement Section.

6 On August 10, 2017, at 939 East Flamingo Road in Las Vegas,
7 Nevada, Walker Specialty Construction employees removed asbestos
8 debris dust from Unit #40 and 57 by wet wiping and HEPA
9 vacuuming all surfaces inside the 1000 square foot apartments. On
10 August 11, 2017, asbestos debris dust was removed by the same
11 methods from Unit #55. This dust was created by damaged popcorn
12 ceiling containing 16% chrysotile asbestos. This removal of asbestos
13 was not included in the Employer's Asbestos Abatement Project
14 Notification Form submitted to OSHA.

15 The Employer was cited previously for the same violation in
16 Inspection #1037469, which became a Final Order on April 20, 2015,
17 and also in Inspection #1149591, which became a Final Order on
18 August 2, 2016.

19 This citation was classified as "REGULATORY" and Notification of Penalty, proposed the
20 fine of TWO THOUSAND, ONE HUNDRED DOLLARS (\$2,100) giving due consideration to the
21 probability, severity and extent of the violation, the employer's history and previous violations, and
22 the employer's size and good faith.

23 The complaint also alleged the violation of:

24 Citation 1, Item 2: REGULATORY

25 Nevada Administrative Code 618.954(2): The completed form must
26 be received by the Enforcement Section at least 10 days before any
27 on-site work is begun at the project.

28 On August 10, 2017, at 939 East Flamingo Road in Las Vegas,
Nevada, Walker Specialty Construction employees removed asbestos
debris dust from Unit #40 and 57 by wet wiping and HEPA
vacuuming all surfaces inside the 1,000 square foot apartments. On
August 11, 2017, asbestos debris dust was removed by the same
methods from Unit #55. This dust was created by damaged popcorn
ceiling containing 16% chrysotile asbestos. The Asbestos Abatement
Project Notification Form was submitted to OSHA by the Employer
on August 8, 2017. Work began on August 9, 2017. This form must
be received by OSHA at least 10 days before any on-site work is
begun, and should not have commenced until August 18th.

This offense was classified as "REGULATORY" and notification of penalty proposed the
fine of TWO HUNDRED TWENTY-FIVE DOLLARS (\$225) given due consideration to the

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1 probability, severity and extent of the violation, the employer's history and previous violations, and
2 the employer's size and good faith.

3 At the outset of the hearing, the State offered for admission into evidence the State's Exhibit
4 packet consisting of 3 exhibits with the entire packet Bate Stamped pages 1 thorough 162. Walker
5 offered for admission into evidence one exhibit Bate Stamped W001-111 which was offered at the
6 beginning of the hearing. Subsequently Walker offered an additional exhibit, Bate Stamped W112.
7 Each of the exhibits were stipulated to be admitted into evidence without objection. Tr. p., 6;2-6.

8 A quorum was present as all members of the Board were in attendance at the meeting,
9 including Chairman Steve Ingersoll, Secretary Rodd Weber, member James Halsey, member Sandra
10 Roche and member Frank Milligan.

11 Ms. Ortiz waived opening statement other than to state that this case involves Asbestos
12 Abatement Project Notification Forms. Tr. p., 10;8-11. Mr. Davis waived an opening statement as
13 well. Tr. p., 10;12-13.

14 **I. SUMMARY OF THE CASE**

15 In this case, the State alleges that Walker failed to include the asbestos work it was doing on
16 a clean up project involving the rehabilitation of an apartment house complex situated at 939 and
17 969 East Flamingo Road, Las Vegas, Nevada, in derogation of NAC 618.918(1). In addition, the
18 State complains that Walker commenced work on August 9, 2017, the day after it completed and
19 filed on August 8, 2017, the notice that was, in fact, given the State by Walker, instead of waiting 10
20 days after notice of the project was given before commencing work on the project. *See*, NAC
21 618.954(2).

22 Walker defends by asserting that no asbestos was removed and that the State's proof of
23 asbestos lacks foundation, eviscerating the State's claim that asbestos was removed and that,
24 therefore, NAC 618.918(1) and NAC 618.954(2), were applicable. Walker argues that these
25 regulations should have provided no basis for a citation as asbestos was not involved. Walker
26 defends further on the grounds that it asked for a waiver of the 10 day notice requirement but the
27 State simply ignored the request. Consequently, no citations should have issued and the complaint
28 should have been dismissed.

1 The facts do not support Walker's various claims and defenses. The record is replete with
2 evidence that asbestos was present in the areas worked by the Walker. Additionally, the evidence is
3 clear that from the outset, Walker proceeded from the assumption that asbestos was present.
4 Further, Walker's employees performed the clean up, as if they were removing asbestos. The notice
5 that was given, contained no indication the work involved asbestos removal, and the evidence is
6 also beyond dispute, that Walker commenced asbestos work before the 10 day notice period
7 expired.

8 Finally, Walker's contract was entitled "Asbestos Containing Room Clean Up." The contract
9 was, by its terms, plainly a proposal for a project to abate asbestos. It falls squarely within the
10 express terms of both NAC 618.918(1) and NAC 618.954(2). On its face, the Walker contract
11 required compliance with these two regulations, compliance which the facts reveal was not shown.

12 For these and other reasons, the Board concludes that the Complainant's citations should be
13 affirmed, as elucidated, below.

14 **II. APPLICABLE LAW**

15 The Board is required to review the evidence and recognize legal elements to prove
16 violations under established Occupational Safety and Health law.

17 In all proceedings commenced by the filing of a Notice of Contest, the
18 burden of proof rests with the Administrator. (NAC 618.788(1); NRS
19 618.295. In all proceedings commenced by the filing of the Notice of
20 Contest, the burden of proof rests with the Chief.

21 All facts forming the basis of a complaint must be proved by a
22 preponderance of the evidence. *See, Armor Elevator Co.*, 1 OSHC
23 1409, 1973-74, OSHD ¶ 16,958 (1973).

24 "Preponderance of Evidence" means evidence that enables the trier of fact to determine that the
25 existence of the contested fact is more probable than the nonexistence of the contested fact. *See, In*
26 *re Parental Rights or to M.F.*, 371 P.3d 995, 1001, (Nev., 2016). Findings of Fact must be based
27 upon a preponderance of the evidence, NRS 233B.121(9).

28 To prove a violation of the standard, by a preponderance of the evidence, the secretary must
establish (1) the applicability of the standard, (2) the existence of noncomplying conditions, (3)
employee exposure or access and (4) employer knowledge or a showing that with the exercise of

1 reasonable diligence the employer could have known of the violative condition. *See, Belger*
2 *Cartage Service, Inc.*, 7 O.S.H. Cas. (BNA) ¶ 1233, 1235 (O.S.H.R.C. Mar. 12, 1979). *American*
3 *Recking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261 (D.C., Cir. 2003). A respondent may
4 rebut an allegation by showing: (1) the standard was inapplicable to the situation at issue or, (2) the
5 situation was in compliance or (3) that there was a lack of access to a hazard. *See, Anning-Johnson*
6 *Co.*, 4 OSHC 1193, 1975-1976, OSHD ¶ 20,690 (1976).

7 Here, NAC 618.918(1) provides that for a contractor to maintain "...his or her license, a
8 contractor must...[e]nsure that proper notification of any proposed project for the abatement of
9 asbestos is given in writing to the Enforcement Section." The trigger, here, for the application of
10 this regulation is a "proposed" project involving asbestos. Note the word "proposed." If it is
11 anticipated that a project will entail asbestos, the notice requirement is triggered without proof that,
12 in fact, asbestos is present. That is, simply proposing to remove asbestos means that notice of the
13 proposed asbestos project must be given as the mandatory term "must" is also used in the
14 regulation. Moreover, the use of the term "proposed," connotes prior notice be given, as, again, the
15 trigger is that which is proposed, not that which already exists. Furthermore, since the "notice"
16 which must be given, is that of a proposed project involving asbestos, a reference to asbestos in
17 relation to the proposed project would be expected. A notice which fails to mention asbestos is no
18 notice at all for a regulation requiring notice of a proposed project involving asbestos.

19 NAC 618.954(2) provides that any contractor "...intending to engage in a project for the
20 abatement of asbestos shall notify the Enforcement Section [of OSHA] of the project on a form
21 provided by the Enforcement Section..." Furthermore this form "...must be received by the
22 Enforcement Section at least 10 days before any on-site work is begun at the project." This
23 regulation, in some respects, is more rigorous than NAC 618.918(1). It does not require the
24 presence of asbestos for the notice to be given. If the contractor simply intends to remove asbestos,
25 the notice must be given and no work, no matter what it is, may be commenced until 10 days have
26 elapsed after the notice given to State OSHA.

27 Taking these regulations in concert, a violation of NAC 618.918(1) is shown if the State can
28 prove that at the outset of the project, the respondent simply believed that asbestos exists at the

1 project or that the contractor/employer proposed to remove asbestos and the notice that is given,
2 fails to mention the prospect that asbestos might be present, whether or not asbestos is later proven
3 to be present. As for NAC 618.954(2), the State need only show that the Respondent intended to
4 remove asbestos, whether or not, again, asbestos proved, in fact, to be present. It is enough to show
5 a violation upon proof that the Respondent, at the outset, treated the project as one where asbestos is
6 present and work commenced before the 10 day notice period elapsed.

7 It is well settled that in matters of statutory interpretation, analysis begins with language
8 employed in the statute, itself. *See, Las Vegas v. Walsh*, 121 Nev. 899, 903, 1124 P.3d 201 (2005).
9 It is also well settled that the words employed in a statute are to be given their plain and ordinary
10 meeting. *See, Barrick Goldstrike Mines v. Peterson*, 116 Nev. 541, 545 (2000). *See also, Delores*
11 *v. Employment Security Division*, 416 P.3d 259, 261 (Nev., 2019)(“This court reviews questions of
12 statutory construction and the district court’s legal conclusions *de novo*. In interpreting a statute, this
13 court will look to the plain language of its text and construe the statute according to its fair meaning
14 and so as not to produce unreasonable results.” And, “[i]t is ...[the Board’s] duty ‘to give effect, if
15 possible, to every clause and word of a statute.’” *United States v. Menasche*, 348 U.S. 528, 538-539
16 (1955)(quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). Applying these principles of
17 statutory construction, no other understanding of these pertinent regulations are plausible as set out
18 above.

19 **III. STATEMENT OF FACTS**

20 The facts are straight forward and not in dispute. The job site was a two-building apartment
21 house project located at 939 and 969 East Flamingo Road, Las Vegas, Nevada, Exhibit 2, p. 64,
22 which was being renovated by the new owner. Tr. p, 106;5-21; Exhibit 1, pp. 9, 10; Exhibit 2, pp.
23 64-65. The apartments were being refurbished and another abatement removal contractor, who had
24 been originally retained, lost the work when the new owner took control. Tr. p., 106;1-19, Exhibit
25 1, pp. 9, 10; Exhibit 2, pp. 64-65, 104. The construction crew belonged to the new owner of the
26 apartments, SGFusion, Exhibit 1, p. 9; Exhibit 2, pp. 64, 65; Tr. pp., 15;19-21, 28;9-16, 35;1-6,
27 106;1-19. The owner's crew was doing the renovation work, which resulted in the disturbance of
28 the popcorn ceilings and the moldings causing debris to be left behind. Tr. p., 35;1-6, Exhibit 1, Tr.

1 pp., 9, 10; Exhibit 2, pp. 64-65. The area of disturbance exceeded 600 square feet of pulling down
2 crown molding and popcorn ceilings. Tr. p., 28;9-16; Exhibit 2, p. 65. The debris to be removed,
3 was friable asbestos material. Tr. p., 46;3-5.

4 Nearing completion of the renovation work, the owner reached out to Walker to clean the
5 units for occupancy. Tr. pp., 15;19-21, 103;19-20, 128;8-11, 128;12-14, Exhibit 1, pp. 9, 10, Exhibit
6 2, pp. 64-65, 104, 105. In fact, there were two contracts between the owner and Walker, one for the
7 apartments, Exhibit W001, and one, Exhibit W002, for the removal of the contents and the cleaning
8 of two dumpsters containing the debris that had been removed from the apartments being renovated.

9 Walker's contract to ready the units for occupancy was for the sum of \$2,220 per unit, Tr.
10 pp., 110;9-13, 121;9-16, Exhibit W001, for apartments that Walker claims were spotless, Tr. p.,
11 114;9-16, when Walker arrived at the job site. Tr. p.,135;9-11. Nonetheless, according to Clemente
12 Contreras, Walker's abatement supervisor, the company, Walker, was hired by the property owner,
13 SGFusion, to clean up the asbestos debris from the popcorn ceilings that SGFusion employees had
14 disturbed. Tr. p., 15;19-21. *See also*, Exhibit 1, pp., 9, 10; Exhibit 2, p., 104. As explained further,
15 Dave Freeman, the owner or principle of SGFusion, Exhibit 2, pp., 65, 66, 104, 105, confirmed that
16 Walker was hired specifically to clean up the asbestos contamination debris in the units after
17 [his]...employees accidentally disturbed the popcorn ceiling, and that this hire took place, the day
18 after Whitney Frances, from Clark County, informed that there was an asbestos problem. Exhibit 2,
19 pp., 64, 65, 104, 105.

20 Specifically, the room cleaning contract was entitled "Asbestos Containing Room Cleanup."
21 Exhibit W001. It states: "Our lump sum Price Per Unit for the Asbestos Containing Room Cleanup
22 Work is: \$2,220.00." *Ibid*. The proposal was based upon "wet wiping and hepa vacuuming all
23 horizontal and vertical surfaces...." *Ibid*. The dumpster cleaning contract, in comparison, was
24 entitled: "Asbestos Containing Dumpster Cleanup." The "...Lump Sum Price for the 2 Asbestos
25 Containing Dumper Cleanup is: \$4,000.00." W002.

26 Both contracts are dated August 8, 2017. W001 and W002. Walker started work at the job-
27 site on August 9, 2017. Exhibit 1, p., 9. According to Walker, the condition of the premises which
28 Walker was going to wet wipe and HEPA vacuum, Tr. p., 72;5-7, was move-in ready and spotless,

1 Tr. p.,114;9-16, even though Walker was charging \$2,220 per apartment to clean for an apartment
2 that was spotless.

3 Walker first arrived at the job site on August 9, 2017. Exhibit 1, pp., 9, 10. Tr. p., 15;15-16.
4 On August 10, 2017, Mr. Contreras had Units 40 and 57 under containment for cleanup. He
5 advised, the units were being wet wiped and HEPA vacuumed. Converse Consultants was
6 conducting a final air clean up on Unit 57. Disturbed popcorn ceiling in Unit 55 was tested for
7 containment on August 11, 2017. The results revealed the presence of 16% asbestos. This unit was
8 cleaned by Walker the next day, August 12, 2017. Exhibit 1, p., 10.

9 Walker submitted one OSHA notification form that was received by OSHA on August 8,
10 2017. Exhibit 1, pp., 10, 49-50; Tr. p., 27;1-3. Aside from identifying the address of the work site,
11 it hardly describes the nature and scope of the project contemplated by Walker's contract to wet
12 wipe and HEPA vacuum multiple rooms laden with asbestos. This is the document which the
13 Complainant found inadequate to satisfy the notice giving function of NAC 618.918(1). Tr. pp., 27,
14 7-11, 75, 76. There is no reference in the form to the work on the rooms, much less, a reference to
15 the removal of asbestos, or the presence of asbestos in the apartments, contrary to the clear
16 references to asbestos removal in the Walker contract.

17 Walker claimed that this form was intended to give notice of work on the two dumpsters.
18 Tr. pp., 105;19-22, 123;20-24. If so, then, Walker gave no notice for the work cleaning the
19 apartments, though Walker acknowledges it is required to give notice of asbestos abatement. Tr. p.,
20 120;20-22. The \$400 check that Walker issued was for clean up of the dumpsters, only. Tr. p.,
21 113;6-7. If so, Walker also failed to pay the \$400 fee that is to accompany an asbestos removal
22 project that involves a project of greater than 160 square feet and less than 1600 square feet. Exhibit
23 2, p. 50.

24 The start date listed on the form says August 18, 2017. Exhibit 2, p. 49; Tr. p., 91;8-14.
25 That is, significantly, the date the work commenced on the dumpsters, Tr. p., 75;24-25, 76;1-6,
26 eliminating any possible question that this form was intended to give notice of anything but the
27 clean up of the dumpsters. Tr. p., 115;21, 23. It also means the dumpster work began after the 10
28 day notice requirement had lapsed according to the date of the notice. Exhibit 2, pp., 59, 60.

1 The citation, itself, references only units 40, 55 and 57. Tr. p., 49;10-14. The scope of the
2 citation and the project greatly exceeded these numbers. The Air Quality inspection form stated that
3 units 19, 40, 53, 55, 57, 86 , 91, 96 and 179 had damaged popcorn ceilings. Exhibit 2, pp., 64, 65.
4 Walker was hired to remove the asbestos debris created by SGFusion workforce. Exhibit 1, p. 9,
5 Exhibit 2, pp., 64, 65, 104, 105.

6 State OSHA's involvement with this project was precipitated by the inspection which was
7 conducted by Whitney Francis, of the Clark County Inspection Department of Air Quality. Exhibit
8 1, pp., 9, 64-66. Mr. Francis' report describes the condition of the premises as of August 7, 2017,
9 the date he inspected the premises. Exhibit 1, p., 64. On August 7, 2017, he found multiple units of
10 the apartment house complex in various stages of renovation, including workers on site performing
11 demolition, flooring, painting, drywall repairs and other miscellaneous activities without the use of
12 containments or water to prevent asbestos emissions. *Ibid.* This activity engaged or disturbed far
13 more than 160 square feet, (NESHAP Project threshold) and more than 10 square feet, the OSHA
14 asbestos threshold. *Ibid.* These are in excess of the regulatory minimum disturbed area for work
15 without asbestos containment procedures being invoked. *See*, Tr. p., 30;21-25, NAC 618.894.

16 Three samples of debris from the renovation work were taken on August 7, 2017. *Ibid.* The
17 test results came back the same day revealing two samples with Chrysotile levels of 10%, a
18 prohibitive level of ACM. Exhibit 2, p., 66, Tr. pp., 30;1-18, 65;4-8. As of August 7, 2017, it was
19 known that asbestos was present on the job site. The Walker clean up contract followed, the next
20 day, W001, with the actual work commencing the day after on August 9, 2017, including work on
21 Unit 55, a Unit that tested positive for asbestos by OSHA (16% asbestos). Exhibit 1, p., 9. The
22 clean up work also included Unit (apartment) 19, a unit that tested positive for ACM (10%
23 Chrysotile) according to Whitney Frances, as of August 7, 2017, the day before Walker submitted
24 its proposal and two days before Walker arrived at the job site to commence work on the apartment
25 units, dealing with the popcorn ceiling debris. Exhibit 1, pp., 9, 10, Exhibit 2, 64, 65.

26 IV. ANALYSIS

27 On these facts, facial claims that NAC 618.918(1) and NAC 618.954(2) were violated are
28 well established. Beginning with NAC 618.918(1), inadequate notice claim, any fair reading of the

1 notice that was submitted by Walker for this project fails to relate in any meaningful way the work
2 to the clean up of asbestos contaminated material in the apartments. *See*, Exhibit 2, p., 57. The
3 truth is, Walker claims that the notice was directed only to the clean up of the two asbestos
4 containing dumpsters. Tr. p., 123;20-24. Thus, the \$400 dollar fee was directed only to the clean
5 up of the dumpsters. Tr. pp., 96, 97, 113;6-7. The respondent concedes that the only notice given,
6 was addressed to the dumpsters and not the cleaning of the apartments or units. That is, Walker
7 concedes it never gave notice to State OSHA that it would be performing clean up of a proposed
8 project involving asbestos in relation to the units. Only notice regarding the dumpsters was given.

9 Furthermore, the Walker contract or proposal submitted to clean the units is a patent
10 admission that NAC 618.918(1) and NAC 618.954(2) apply. NAC 618.918(1) is triggered in the
11 presence of a proposal to abate asbestos. NAC 618.954(2) is invoked, as indicated above, where
12 there is the intent to abate asbestos. Walker's proposal to SGFusion was for "Asbestos Containing
13 Room Cleanup." The proposal or contract is an explicit "proposal" to remove asbestos, under NAC
14 618.918(1) and an expression of "intent" that asbestos be removed under NAC 618.954(2). Both
15 regulations are squarely implicated by Walker and apply on all fours. It cannot be gainsaid that
16 Walker is required to observe both regulations.

17 Since NAC 618.954(2) clearly governs, all work on the proposed project was barred until 10
18 days have elapsed after notice of the proposed project is given. It is beyond dispute, however, that
19 Walker began work on the apartment units the day after it gave the only notice it admits it gave,
20 namely, the notice that Walker claims it addressed for the dumpsters. For the dumpster work, in
21 fact, Walker waited 10 days to clean the dumpsters, further connoting that no notice was given
22 regarding the units. Walker started working on the units, however, the day after the dumpster notice
23 was given OSHA. On its face, then, clearly a violation of NAC 618.954(2) was also shown.

24 Walker defends on the grounds that no asbestos was in the units and, therefore, no notice
25 need to be given in the first place. Walker defends, further, on the grounds that it never intended to
26 remove asbestos in the first place. Finally, Walker defends on the grounds that it asked for a waiver
27 of the 10 day rule, the County waived the 10 day rule, and the State simply ignored the request.
28 Consequently, no violation should have been cited.

1 The facts belie Walker's defenses. The record is replete with evidence that asbestos or ACM
2 at prohibited levels was present in the units where Walker was working. *See*, Tr. pp., 21;20-22,
3 30;1-18, 50;22-25, 55;4-8, 66;20-25, 67;1-2, , Exhibit 1, pp., 9, 10, Exhibit 2, pp., 64-66. The
4 presence of asbestos in the units was discovered on the premises at least the day before Walker
5 submitted on August 8, 2017, its proposal to clean the units. Exhibit 2, pp., 64-66.

6 The proposal, itself, is entitled "Asbestos Containing Room Clean Up," with each word
7 capitalized words. W001. Walker claimed, however, that the units were ready for occupancy,
8 spotless, and ready to rent. Tr. pp., 103;19-25, 114;9-16. The price, per unit, of cleaning in the
9 proposal was \$2,220 per unit, W001, a price that seems more than steep, if the rooms were already
10 spotless and ready for occupancy. The description in the report of Whitney Frances from Clark
11 County also establishes otherwise, noting debris from popcorn ceilings. Exhibit 2, pp., 64-65.

12 Walker's own workforce does not support Walker's claim that units were pristine, either.
13 Walker's workers completed daily work sheets that provided a contemporaneous catalog of the
14 work of the day. Tr. p., 116;21-23. For August 10, 2017, the "Project Daily Log" Walker form
15 contained the entry: "...same process as yesterday, treat debris as ACM in double bags, set neg-air
16 machine, decom vacuum, wet wipe, etc. let ready for air clearances...all double bag were disposed in
17 dumpsters on site....: Exhibit 3, p., 137. Then, in the Daily Project Log for August 11, 2017, the
18 Walker report stated in all caps: "STARTED CLEAN UP IN APARTMENT #53. DOUBLE BAGS
19 ALL CONTAMINATED OBJECTS." Exhibit 3, p., 139. The Walker personnel conceded that
20 contaminated materials were present to be removed, or at the very least, believed that the debris and
21 materials being cleaned and removed were contaminated.

22 The work, also, proceeded as if the job entailed the removal of ACM (asbestos bearing
23 material). Walker deployed negative air, half masks, HEPA vacuums, manual wet methods, critical
24 barriers and face masks. Debris was double bagged. Exhibit 1, p., 49, Tr. pp., 18;4-13, 35;9-14,
25 132;1-5, 137;10-15, Exhibit 3, p., 139. Most significant, Walker presumed the presence of asbestos
26 in the first place. Tr. pp., 79;24-25, 80;1-3, 110;20-24, 112;2-7, 130;1-3, 138;1-3. This
27 presumption places Walker squarely within the requirements of both NAC 618.918(1) and NAC
28 618.954(2), which turn on the intent that asbestos is to be removed or the expectation asbestos was

1 present. Similarly, as indicated, Walker's August 8, 2017 proposal places Walker squarely within
2 the meaning of NAC 618.918(1) and NAC 618.954(2). Walker assumes the presence of asbestos
3 for its jobs and mobilizes its work force from that premise with the equipment and procedures
4 deployed to perform the clean up work. Tr. pp., 35;9-14, 110;20-24, 132;1-5, 137;10-15. Walker
5 also proposed to abate asbestos. W001.

6 Then, when sending out samples, itself, for testing, on August 9, 2017, Clemente Contreras,
7 an abatement supervisor for Walker, listed the sample as an Abatement Class I. This sample was,
8 thus, labeled an Abatement Class I at the start of the job for Walker. Walker concedes that a Class I
9 abatement is the most strict classification. Tr. p., 132;21-25.

10 Clearly, Walker possessed the requisite knowledge and intent to place it squarely under the
11 requirements of NAC 618.918(1) and NAC 618.954(2), when it anticipated, planned for and
12 expected the presence of asbestos, an anticipation, expectation and planning that proved to be
13 correct. But, Walker did not wait 10 days to start work on the units from the date of the one notice
14 which was given. Thus, NAC 618.954(2) was violated. Similarly, the one notice that was given,
15 itself, was inadequate. It was also intended to address, Walker concedes, Tr. pp., 113;6-7, 123;20-
16 24, only the dumpsters. Thus, not only was the notice an inadequate description of the work
17 cleaning the units, Walker intended it to be no notice, at all, violating NAC 618.918(1). The Board,
18 therefore, affirms the citations for both regulations.

19 Finally, as indicated, Walker claims it requested a waiver of the 10 day notification rule and
20 it was ignored by OSHA. Tr. pp., 106;5-21, 136;19-22. Apparently Walker's theory, here, is that
21 the 10 day rule should have been waived, thereby avoiding, altogether, the citations since they
22 should have been inapplicable in the first place.

23 Walker's theory is eviscerated by the facts, also. They show that Walker has no proof it
24 asked the State for a waiver, Tr. pp., 93;23-25, 94;1, 124;8-10, 136;19-22, and cannot recall if a
25 waiver was actually sought for the 10 day rule. Tr. p., 124;1-7.

26 Walker's waiver theory is without support. The Board rejects the claim as a defense to the
27 citations.

28 ///

1 This leaves the penalty or fine assessments to be considered. NRS 618.625(1) provides:
2 “The Division [of Industrial Relations] may assess administrative fines provided for in this chapter
3 [Chapter 618 of the Nevada Revised Statutes], giving due consideration to the appropriateness of
4 the penalty with respect to the size of the employer, the gravity of the violation, the good faith of the
5 employer and the history of previous violations.” NRS 618.645 addresses serious and nonserious
6 violations and provides:

7 Any employer who has received a citation for a serious violation of
8 any requirement of this chapter [Chapter 618], or any standard, rule,
9 regulation or order promulgated or prescribed pursuant to this chapter,
10 must be assessed an administrative fine of not more than \$7,000 for
each such violation. If a violation is specifically determined to be of a
nonserious nature an administrative fine of not more than \$7,000 may
be assessed.

11 Citation 1, Item 1, a violation of NAC 618.918(1), falls into the category of regulatory
12 violation, Tr. p., 41;21-25, under NRS 618.625(1) and, thus, an administrative fine of up to \$7,000
13 may be assessed, whether a serious or nonserious violation. It was, however, Walker’s third
14 violation of this regulation. Tr. p., 34;1-16. The State, nonetheless, discounted the fine, giving due
15 regard to the size of the employer, by a factor of 70 percent. Tr. p., 44;6-10. The State determined
16 that only one person was potentially exposed to the violation. Tr. p., 43;6-12. As a result, the State
17 assessed Walker a fine of \$2,100, despite having been cited two times previously for a violation of
18 NRS 618.918(1). Tr. p., 34; 1-16.

19 As for NAC 618.954(2), Citation 1, Item 2, the State labeled the violation “regulatory,” also
20 and, therefore, another violation which could warrant an assessed fine of up to \$7,000, whether or
21 not a serious offense. The State assessed Walker a fine of \$225 for starting work before the 10 day
22 waiting period of NAC 618.954(2) had expired. The factors considered, here, were the good faith of
23 Walker, a 25 percent reduction, and then, Walker’s size, a 70 percent reduction. Tr. p., 45;4-7.

24 The Board has considered the factors employed by the State when arriving at the level of the
25 fines as assessed. The Board concludes that the State applied and considered all of the factors listed
26 in NRS 618.625(1). The Board further concludes upon its review of the record that the State was
27 neither arbitrary nor capricious in the application of these factors, especially given the substantial
28 discounts in light of the fact that Walker had violated these standards on two other occasions. The

1 Board finds the application of these standards to arrive at the fines assessed to be reasonable.
2 Consequently, the Board also affirms the fines levied by the State for Citation 1, Item 1 and Citation
3 1, Item 2 in the amounts of \$2,100 and \$225, respectively.

4 **V. DECISION**

5 The Board finds as a matter of fact and law that a violation of Citation 1, Item 1, NAC
6 618.918(1), took place. The violation was proven by a preponderance of the evidence in satisfaction
7 of the recognized proof elements for the violation of a regulatory matter under the occupational
8 safety and health law. The violation was appropriately classified and proven as “regulatory” and the
9 proposed penalty was appropriate in the amount of \$2,100.

10 Similarly, the Board finds as a matter of fact and law that a violation of Citation 1, Item 2,
11 NAC 618.954(2), took place. The violation was proven by a preponderance of the evidence in
12 satisfaction of the recognized proof elements for the violation of a regulatory matter under
13 occupational safety and health law. The violation was appropriately classified and proven as
14 “regulatory” and the proposed penalty was appropriate in the amount of \$225.

15 **IT IS SO FOUND, DECIDED AND ORDERED BY THE BOARD**

16 **VI. ORDER**

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

25 On March 14, 2019, the Board convened to consider adoption of this decision, as
26 written or as modified by the Board, as the decision of the Board.

27 Those present and eligible to vote on this question consisted of four of the five current
28 members of the Board, to-wit, Acting Chairman, Rodd Weber, members James Halsey, Sandra

1 Roche and Frank Milligan. Upon a motion by Sandra Roche, seconded by Rodd Weber, the Board
2 voted 4-0, to approve this Decision of the Board as the action of the Board and to authorize the
3 Acting Chairman, Rodd Weber, after any grammatical or typographical errors are corrected, to
4 execute without further Board review of this Decision on behalf of the Board for the Nevada
5 Occupational Safety and Health Review Board.

6 On March 14, 2019, this Decision is, therefore, hereby adopted and approved as the Decision
7 of the Board.

8 The Board directs counsel for the Complainant, Chief Administrative Officer of the
9 Occupational Safety and Health Administration, to submit proposed Findings of Fact and
10 Conclusions of Law to the Nevada Occupational Safety and Health Review Board and to serve
11 copies on opposing counsel within twenty (20) days from the date of decision. After five (5) days
12 time for filing and objection, the final Findings of Fact and Conclusions of Law shall be submitted
13 to the Nevada Occupational Safety and Health Review Board by prevailing counsel. Service of the
14 Findings of Fact and Conclusions of Law signed by the Chairman of the Nevada Occupational
15 Safety and Health Review Board shall constitute the Final Order of the Board.

16 Dated this 27TH day of MARCH, 2019

NEVADA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD

17
18 By: /s/Rodd Weber
19 Rodd Weber, Acting Chairman

20 A handwritten signature in black ink, appearing to be 'R. Weber', is enclosed within a hand-drawn oval.

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