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1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD

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

11 Complainant,

12 vs.

13 PEEK BROTHERS CONSTRUCTION
14 INCORPORATED,

15 Respondent.

Docket No. RNO 23-2185

Inspection No. 1592462



16 **DECISION AND ORDER OF THE BOARD,**
17 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER**

18 This case arose out of a referral concerning the manner in which D.R. Horton was
19 building out a development project commonly known as Tuscany Development, located within
20 the jurisdiction of the City of Fernley, Nevada. *See*, State's Exhibit 1, p. C4. D.R. Horton is
21 known as D.R. Horton America's Builder. *See*, State's Exhibit 1, p. C4. This case began because
22 D.R. Horton (Horton) referred State OSHA to Peek Brothers Construction Incorporated. *See*,
23 State's Exhibit 1, p. C1. Peek Brothers Construction Incorporated (interchangeably referred to
24 also as Peek, or Peek Brothers) is a domestic corporation organized under the laws of the State of
25 Nevada. Horton owned the land upon which the project was being developed. Peek Brothers
26 was under contract through Horton to grade the Project.

27 Upon receipt of the referral, Nevada OSHA conducted an opening conference with Peek
28 Brothers on April 26, 2022. Peek Brothers is located at 2082 Resource Drive, Fernley, Nevada.
The Project they were contracted to grade was located at 0 Cottonwood Lane, Fernley, Nevada.
The Project was inspected on April 26, 2022. The reason for the inspection was a complaint
regarding the handling of asbestos on the Project. *See*, State's Exhibit 1, p. C8.

1 More particularly, Peek Brothers is a horizontal general engineering company that was
2 contracted by D.R. Horton, a new residential construction home builder developing the Tuscany
3 Express Residential Project located at 959 Kathryn Ct., Fernley, Nevada. Located at the end of
4 Tuscany development in an open field, Peek Brothers was directed to demolish a dilapidated
5 farmhouse situated there. Ultimately, it was shown that the dilapidated farmhouse was laden
6 with asbestos. See, State's Exhibit 1, pp. C137-C143, Wise Constructing and Training, Inc.

7 The inspection of the Project resulted in the issuance of a Complaint, consisting of three
8 causes of action as follows: Citation 1, Item 1: SERIOUS. "29 CFR 1926.1101(g)(7)(i): All
9 Class II work shall be supervised by a competent person as defined in paragraph (b) of this
10 section."

11 It is alleged in the Complaint that,

12 [T]he Employer did not have a competent person supervising the Class II work
13 involving demolition of buildings that had asbestos containing materials, trained
14 on the specific work practices and engineering controls set forth in paragraph (g)
of this section which specifically relate to the category of material being removed.

15 Citation 2, Item 1: SERIOUS. "29 CFR 1926.1101(k)(3)(i): Before work in areas
16 containing ACM and PACM is begun; employers shall identify the presence, location, and
17 quantity of ACM, and/or PACM therein pursuant to paragraph (k)(1) of the section."

18 It is alleged that the "Employer did not identify the presence, location, and quantity of
19 ACM and/or PACM before demolition of the farmhouse located at the D.R. Horton Tuscany site
20 in Fernley, Nevada."

21 The third cause of action asserts:

22 Citation 1, Item 3: SERIOUS. 29 CFR 1926.1101(k)(9)(iv)(A): For work with
23 asbestos containing roofing materials, flooring materials, siding materials, ceiling
24 tiles, or transite panels, training shall include, at a minimum, all the elements
25 included in the paragraph (k)(9)(viii) of this section and, in addition, the specific
work practices and engineering controls set forth in paragraph (g) of this section
which specifically relate to that category. Such course shall include "hands-on"
training and shall take at least 8 hours.

26 Here it is alleged that,

27 Employees were demolishing a building that contained Asbestos Containing
28 Materials (ACM) containing greater than 1% asbestos. The sheet flooring (present
in debris) was friable and contained 2% Chrysotile. The transite siding (present in

1 debris) was also classified as friable due to demolition of building contained 10%
2 Chrysotile. Both materials were friable because the material will easily release
3 asbestos fibers with renovation or demolition action, per the survey report, and
4 therefore friable materials are regulated ACM for disturbance and waste handling.
5 The Employer had not provided employees with asbestos training, engineering
6 controls, and proper work practices.

7 In the inspection narrative summarizing the results of the State's inspection of the Project
8 involving Peek Brothers and D.R. Horton, it states that:

9 The employer is demolishing old farm structures that contain asbestos containing
10 materials. The employer did not conduct an asbestos survey before the buildings
11 were demolished to determine if friable asbestos containing materials were
12 present that would need to be abated prior to the demolition....The employer did
13 not identify the presence, location and quantity of ACM and/or PACM before any
14 work began. The site located as 0 Cottonwood Lane, Fernley, Nevada 89408
15 contained a large debris pile consisting of multiple buildings/structures that had
16 been demolished without being inspected for asbestos containing materials.
17 State's Exhibit 1, p. C11.

18 The narrative goes on:

19 Listed on the City of Fernley demolition permit application, located under
20 requirements, an asbestos abatement report was listed as the first item required for
21 the permit...."work was stopped because they (DR Horton) did not have the
22 demolition permit through the City of Fernley. To this day (04/29/2022) DR
23 Horton nor Peek Brothers (sic) have not been issued a demolition permit. One
24 will be provided once the asbestos abatement is complete." *Ibid.*

25 The narrative report states further: "The employer did not inform any of their employees,
26 the farmhouse contained asbestos before demolition work began." *Id.* at C12.

27 The narrative report states: "The employer did not provide training to employees
28 conducting asbestos demolition activities. Employees were demolishing a building that
29 contained Asbestos Contain Materials (ACM) containing greater than 1% asbestos." *Ibid.*

30 The narrative report also states: "No competent person was on-site. The employer did not
31 have a competent person supervising Class II during asbestos demolition activities trained in the
32 specific work practices and engineering controls set forth in paragraph (g) of this section
33 (1926.1101 Asbestos) which specifically relate to the category of material being removed."
34 State's Exhibit 1, pp. C11 and C12.

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1 This matter came on for hearing before the Nevada Occupational Safety and Health
2 Review Board (the Board) on September 13, 2023 and continuing over onto September 14, 2023.
3 The hearing was conducted in furtherance of a duly provided notice. *See*, Notice of Hearing,
4 filed August 15, 2023. In attendance to hear the matter were Board Chairman Rodd Weber,
5 Board Secretary, William Spielberg, and Board members Frank Milligan, Jorge Macias and Scott
6 Fullerton.

7 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety
8 and Health Administration of the Division of Industrial Relations of the Department of Business
9 and Industry (the State), appeared on behalf of the Complainant (the State). Peek Brothers was
10 represented by Nathan J. Aman, an attorney with the law firm of Vilorio, Oliphant, Oster &
11 Aman. 1Tr. p., 39. The Board was represented by its legal counsel, Charles R. Zeh, Esq., The
12 Law Offices of Charles R. Zeh, Esq.¹

13 As indicated, Peek is a horizontal construction company focusing on grading. 2Tr. p.
14 336. It does very little vertical asbestos removal work. To the extent it does asbestos removal
15 work, its focus is upon pipeline removal. 2Tr. pp. 336-240. Travis A. Peek is the President and
16 Director of Peek Brothers, a domestic Nevada corporation. The Secretary is Jennifur E. Peek,
17 she is also the Treasurer. State's Exhibit 1, C2.

18 Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised Statutes.
19 *See*, NRS 618.315. No party disputed Board jurisdiction. As there were five members of the
20 Board present to decide the case, with at least one member representing management and one
21 member representing labor in attendance, a quorum was present for the Board to conduct
22 business.

23 Nevada has adopted all Federal Occupational Safety and Health Standards which the
24 Secretary of Labor has promulgated, modified or revoked and any amendments thereto. They are
25 deemed the Nevada Occupational Safety and Health Standards. *See*, NRS 618.295(8). A

27 ¹"1Tr." stands for the transcript of the hearing conducted on September 13, 2023, followed by the
28 page where the matter cited can be found. "2Tr." stands for the transcript of continuation of the hearing
conducted on September 14, 2023, followed by the page where the matter cited can be found.

1 complaint may be prosecuted for circumstances which arise before or during an inspection of the
2 employer's workplace. *See*, NRS 618.435(1).

3 The State issued a citation and notification of penalty on August 8, 2022. The Complaint,
4 consists of the three citations listed above. Generally, the State believes that in this multi-
5 employer work place setting on this Project, Peek was the employer, Peek failed to explore the
6 prospect of asbestos contained in the farmhouse being demolished, failed to provide training in
7 asbestos for the employees working with asbestos at the farmhouse, exposed employees to
8 asbestos, failed to perform an asbestos survey to locate the presence and quantity of asbestos,
9 failed to secure a demolition permit and failed to provide a competent person to monitor the
10 demolition of the asbestos laden farmhouse.

11 Respondent countered not so much with a challenge to the facts, *i.e.*, Respondent did not
12 dispute that no asbestos survey was conducted before demolition of the farmhouse began, no
13 demolition permit was issued before demolition began, no competent person was present when
14 demolition of the farmhouse began and no training, although there was a bit of equivocation on
15 whether employees who worked on the demolition of the farmhouse were trained. There was
16 also, some dispute over the number of employees exposed, if any, to asbestos during the
17 demolition of the farmhouse. *See*, State's Exhibit 1, p. C17. *See also*, 1Tr. p. 196, 2Tr. pp. 391-
18 395.

19 The State claimed that eight employees of Peek Brothers were present and exposed to
20 asbestos. State's Exhibit 1, p. C25 (8 employees exposed). Peek Brothers asserted that only three
21 employees worked on the demolition of the farmhouse and the remaining five employees, who
22 were working at the same time as the demolition occurred, worked a considerable distance from
23 the farmhouse being demolished. 2Tr. p. 394. The Respondent also asserted that the State
24 brought the cause of action under Citation 1, Item 2, under the wrong Federal regulation. Peek
25 asserted that Citation 1, Item 2, should be brought, if at all, under 29 CFR § 1926.1101(k)(i) or
26 29 CFR § 1926.1101(k)(2) and, therefore, against D.R. Horton as the owner of the Project and
27 general contractor instead of Peek, who was a sub-contractor of the job. Therefore, since the
28 wrong party was named as the wrong regulation was pled under circumstances that did not

1 pertain to Peek and because Peek had been misled by a representative of the City of Fernley
2 during a pre-construction conference wherein Peek Brothers were told they were "good to go" on
3 the demolition, all three citations should be dismissed against Peek.

4 At the outset of the hearing, the State offered for admission into evidence Exhibits 1
5 through 3, consisting of pages C1 through C167. Peek Brothers reserved its objection to the
6 admissibility of the State's Exhibits until they were actually offered during the course of the
7 hearing. As it turned out, Peek Brothers only objected to the statements contained in the Exhibit
8 packet of the State that were taken from Peek Brothers' employees and management. The
9 objection was on hearsay grounds. The objection was overruled. *See*, 1Tr., p. 76. None of the
10 State's Exhibits were, therefore, objected to or barred from admissibility during the course of the
11 hearing. On behalf of Peek Brothers, Mr. Aman had offered into evidence Exhibits 1 through 5,
12 pages R001 through R107. The State did not offer any objection to the admission of those doc-
13 uments into evidence, many of which were also a part of the State's Exhibit package. 1Tr., p. 40.

14 Respondent sent a notice of its intent to contest the citations on August 29, 2022. *See*,
15 Exhibit 1, p. C48. The State filed and served its Complaint on September 16, 2022. *See*, Exhibit
16 1, pp. C49-C54. Peek Brothers answered the Complaint by a letter addressed to the Chief
17 Administrative Officer. The letter is dated October 1, 2022. The Answer/Letter is from Travis
18 Peek, President. Therein, he stated:

19 When Peek Brothers were asked to bid on this Project, my estimator, Mike
20 Borden, asked John Horn [of D.R. Horton] if we needed to get an abatement
21 assessment done. He was told no. Before we bid on the Project and sent over final
22 numbers, we again asked the question, are you sure we don't need to do an
abatement assessment of the existing building, with numerous others in the room,
he responded no. So in our proposal, we excluded any handling or removal of
hazardous material.

23 The Answer/Letter also stated:

24 During our pre-construction meeting, before we began, we again brought up the
25 question to the City Inspector Dick Minto. Do we need to do an abatement
assessment again? The answer was no. He said we could tear the building down
and haul it off.

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1 The Answer/Letter continues:

2 We are not the owners of the property, we are not the permit holder, and we have
3 never had the permit. D.R. Horton has since sent over an email, which we sent to
4 OSHA, which states that Peek Brothers is not liable and had no knowledge that an
5 assessment had not be done.

6 The hearing then proceeded. The State waived an opening statement. Peek Brothers did
7 not waive its opening statement. Its opening statement turned into a motion for summary
8 judgment seeking dismissal of the Complaint. The standard for deciding a motion for summary
9 judgment is well established. A motion for summary judgment may be granted where there is no
10 genuine dispute over any of the material facts to the case and the moving party is entitled to relief
11 as the matter of law. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

12 Here, Peek asserted as a matter of law they are entitled to relief because the Complaint
13 was brought by the State under the wrong section of 29 CFR 1926.1101(k). The State brought
14 their action pursuant to subsection (k)(3)(i). According to Peek, the problem for the State is that
15 in bringing the action under this subsection of 29 CFR 1926.1101(k), the State leapfrogged over
16 29 CFR 1926.1101(k)(1) and (2). Those sections, coming first in line, should have been applied
17 as they imposed the same kind of requirements upon owners and general contractors as the State
18 now seeks to impose upon Peek Brothers. Coming first in order, D.R. Horton, as owner and
19 general contractor, should be the party at risk or at issue in this matter, not Peek.

20 In addition, Peek asserted there was no genuine dispute over the material fact that Peek
21 had been told by the City of Fernley to proceed, that everything was in order to proceed, that
22 abatement had been completed, that there was no asbestos and that, therefore, they could go
23 forward as explained in an email from D.R. Horton. Accordingly, proceeding under the wrong
24 regulation and imposing duties upon Peek that, in reality, according to Peek Brothers, are duties
25 and responsibilities that in the first instance apply to the owner of the facility and the property,
26 and the general contractor, the case should be dismissed against Peek. *See*, 1Tr., pp. 43 through
27 54.

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1 Quoting Mr. Aman:

2 And, in fact, the owner did convey that so to make Peek Brothers responsible for
3 abatement would be paramount to just ignoring the law. You would have to
4 ignore the law and you would have to set the precedent that any sub-contractor on
5 any Project can not exclude abatement of asbestos at any time. 1Tr., p. 53.

6 Mr. Aman argued in addition:

7 And I'm sorry that my last point was to require Peek, when the evidence shows
8 that they were told by the owner that there was no asbestos, to require Peek to go
9 out and do some asbestos investigation would ignore the law and would require
10 every sub-contractor on every Project across the land, whether there is asbestos or
11 whether there is not asbestos, you don't know, the sub-contractor would always in
12 every single contract would have to include asbestos abatement in their contracts
13 to create any affirmative obligation for Peek Brothers to have to go out and
14 determine if the scope and location of the asbestos. 1Tr., pp. 53, 54.

15 Ms. Ortiz argued in opposition to the motion. She claimed, in part, that granting a motion
16 for summary judgment based upon one email that was issued a month after the citation was
17 already issued and then say that OSHA was wrong in issuing the citation makes no sense. 1Tr.,
18 p. 55. She also argued that just because building owners have responsibility does not absolve the
19 employers themselves for having responsibilities of protecting their own employees from
20 exposure. 1Tr., p. 56. She then concluded by arguing there are material facts that are in dispute,
21 given the size of the evidence packets offered by the parties, in addition to the fact that Peek
22 Brothers is wrong on the law. Therefore, the motion for summary judgment seeking dismissal
23 should be denied.

24 Ms. Ortiz argued further, as the parties continued to go back and forth on the issue:

25 So there is a law, that is what is cited, that says an employer is responsible for
26 doing it [notifying employees of the presence of asbestos and locating it and
27 identifying the location and the amount of asbestos]. It is in the same act as the
28 one that says a building owner has to do it [do the same notification and take care
of the asbestos]. There is nothing between them that says you can either or, it's
two sets of responsibility or different entities that can be on the same job site (sic).
So that we ask you yes absolutely follow the law but the entire law, not just what
they are asking to focus on. 1Tr., pp. 60-65.

Board Chairman then asked Board Counsel for comment. He stated:

But the issue seemed to boil down to what did - what did Peek know? When did
they know it? What's the responsibility of Peek employees (sic) [employers]
what's the owner's responsibility? And what is D.R. Horton's responsibility. I

1 don't think that looking at the size of the exhibit packages I would be comfortable
2 saying that there is no genuine dispute over any of the material facts of the case as
3 to what did Peek know and when they knew it and what they were suppose to do
4 with it. 1Tr., p. 66-67.

5 Chairman Weber then added, "at this point it is a little bit premature for the Board
6 because we haven't really had a chance to go through the evidence pack and see what's there."
7 1Tr., p. 68.

8 The remaining Board members concurred in the observation of the Chairman.
9 Accordingly, member Macias moved to deny the motion for summary judgment. Secretary
10 Spielberg seconded the motion. The motion was adopted unanimously. 1Tr., pp. 69-71.

11 The parties then presented their respective cases beginning with the State.

12 **FINDINGS OF FACT**

13 Despite the length of the two days of hearing, the material facts of this dispute are straight
14 forward and lend themselves to summary discussion. Before getting to them, however, it is
15 pointed out that the conclusion of the State's case, the respondent again moved for dismissal
16 under Rule 41(b), NRCP, on grounds essentially the same as the respondent offered at the outset
17 of the case when the respondent moved to dismiss upon a motion for summary judgment. As
18 before, the Board thought it best to hear the entirety of the respondent's case in defense of the
19 complaint and decided to deny the 41(b), NRCP motion to dismiss. It was accordingly moved by
20 William Spielberg, seconded by Jorge Macias, to deny the motion to dismiss under Rule 41(b),
21 NRCP, and to hear the balance of the case. The motion was unanimously adopted on a vote of 4
22 in favor of denying the motion to dismiss and one against. 1Tr., p. 172.

23 Turning to the material facts, there is no dispute the State proved a facial violation of the
24 each of the three causes of action, Citation 1 Item 1, Citation 2, Item 1 and Citation 1, Item 3.
25 The respondent's legal counsel concedes as much. He stated:

26 Now this goes to—now those facts get applied to the law, the first, second, third
27 cause of action. We can't dispute any portion of those claims except for
28 knowledge. There's no dispute that there was no actual knowledge. The
circumstantial evidence, the facts shows (sic) that nobody knew about it. Nobody
was qualified. Nobody was trained. The contract didn't say. Nobody, you know,
had any idea. 2Tr., p. 455.

1 That is, it is beyond dispute that Peek Brothers did not have a competent person
2 supervising the Class II work involving the demolition of the farmhouse that Peek Brothers
3 employees demolished. *See*, testimony of Troy Peek, 1Tr., pp. 175-199; Travis Peek 2Tr. pp.
4 334-422. There is also no dispute that the farmhouse ultimately was shown to be laden with
5 asbestos. *See*, Wise Consulting and Training report, State's Exhibit 1, pp. C137-C143.

6 For Citation 2, Item 1, the evidence shows that the Peek Brothers did not identify the
7 presence, location and quantity of ACM or PACM before demolishing the farmhouse ultimately
8 shown to be contaminated with asbestos. *See*, testimony of Troy Peek, 1Tr. p. 182. *See also*,
9 testimony of John Horn that according to the City of Fernley, Peek Brothers was good to go and
10 had a green light to demolish the farmhouse as there was no asbestos, and that no permit to
11 demolish was needed, and no survey of the premises was needed. 2Tr., pp. 200-204.

12 There was also the letter from a vice-president of D.R. Horton, Tom Warley, absolving
13 Peek of any wrong doing. The letter stated:

14 To whom it may concern: This email is to confirm that Peek Brothers had no
15 knowledge of the presence of asbestos in the existing buildings at Farm View
16 Estates prior to them being demolished. Before D.R. Horton acquired the
17 property, the buildings had burned and during the pre-construction meeting prior
18 to the start of land development activities, Dick Minto, a City of Fernley contract
employee stated no abatement or permit was required to demolish the buildings.
Therefore, Peek Brothers was directed to proceed with the demolition of the
buildings. Regards, Thomas H. Warley Division Vice- President, Land
Acquisition D.R. Horton. State's Exhibit 1, p. C57.

19 The overwhelming body of evidence on this point and for each of the other two causes of
20 action was that Peek did not have to do any of the duties required by the Federal Regulations for
21 which Peek was cited because of the green light Peek was given, and because of practices in the
22 industry. For the multi-employer context, as here, *see*, 1Tr. p. 138, the common practice was for
23 a sub-contractor like Peek Brothers, to never see or be provided a copy of the building permits or
24 surveys of the premises for asbestos. The fact that Peek did not see or even possess a copy of the
25 abatement survey or demolition permit would not have alerted Peek that something was amiss.
26 *See*, 2Tr. pp. 342, 346, 347. And, Peek Brothers was given the green light. 1Tr. p. 204, 2Tr. pp.
27 248-353.

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1 Peek did not sit on its hands to avoid doing what the construction industry might require
2 under these circumstances. Travis Peek inspected the farmhouse before contracting to grade the
3 development including the demolition of the farmhouse. 2Tr., pp. 336-340. He did not enter the
4 farmhouse when working up the contract, but he looked through the windows and based upon his
5 15 plus years of experience in the construction industry, the house had the appearance of a place
6 that had been abated of any asbestos. *Ibid.* He also inquired about the presence of asbestos and
7 was told he need not worry about it. 2Tr. pp. 348-350. Having been led to believe that the
8 farmhouse was free of asbestos, he did not include the cost of an asbestos abatement survey in
9 the contract Travis Peek was preparing for this Project. *See*, Contract, Peek's Exhibit 1.

10 If he thought there was asbestos present in the farmhouse, he would have included a
11 survey in the price of the bid. 2Tr., pp. 350, 353, 359. He didn't. The first Peek learned
12 asbestos might be present on the job site was the day Travis Peek learned by phone the job was
13 being shut down by the City of Fernley because there was no demo permit issued and an asbestos
14 survey had not been completed. 2Tr. p. 387. The job was shut down until the asbestos
15 abatement survey was completed. 2Tr. p. 387. *See also*, Troy Peek's testimony that the first time
16 Peek Brothers learned that asbestos was present was the day the City of Fernley stopped the
17 demolition of the farmhouse. 1Tr. p. 185.

18 The same is true for Citation 1, Item 3. In the face of the presence of asbestos, employers
19 are to matriculate their employees in the rigorous training about asbestos prescribed in paragraph
20 (k)(9)(viii) of 29 CFR § 1926.1101. There were eight employees assigned to the Project by Peek
21 Brothers. They were untrained in asbestos. State's Exhibit 1, p. C17; 1Tr., p. 196; 2Tr. pp. 365,
22 394.

23 On the question of knowledge, what did Peek Brothers know about the presence of
24 asbestos impacting the grading work, specifically, the demolition of the farmhouse, and when, if
25 ever, did Peek Brothers know it? When the State was asked the question if anyone from Peek
26 who was in charge knew of the presence of the hazard of the presence of asbestos, the answer
27 was "unclear." 1Tr. pp. 90, 94 and 98. The answer was the same for each of the three Citations,
28 which shows that there was no actual knowledge of asbestos before commencing work on the

1 Project on the part of Peek Brothers. The State concedes, Peek Brothers lacked actual
2 knowledge.

3 The State claims, however, that Peek Brothers should have known of the presence of the
4 hazard of asbestos in the work place and, therefore, had constructive knowledge that asbestos
5 was present to support each citation. According to the State, constructive knowledge is shown
6 because Peek Brothers holds a Class A contractor's license with the State which included a sub-
7 classification for the removal of asbestos. Through Mr. Sibley, the COSHO for this case, the
8 State claims constructive knowledge is shown because Peek has employees who were trained in
9 asbestos removal. 1Tr., p. 91. The State also relied upon the correspondence from Vice-
10 president Sehorn, who admitted that Peek had employees trained in asbestos work to prove
11 constructive knowledge. 1Tr. pp. 94, 99, 100.

12 The State relied upon this "proof" that Peek Brothers should have known, for each of the
13 Citations. 1Tr., p. 94. The problem for the State here is a matter of nexus. The State offered no
14 proof that any of the employees who worked the demolition of the farmhouse had any training in
15 asbestos. The State also offered no proof of the training and knowledge required to check the
16 box and be licensed as a Class A license with the sub-classification of asbestos. There is nothing
17 in the record produced by the State that shows the requirements for securing a sub-classification
18 for asbestos. For all the record reveals, there may be none. There is very little about this proof,
19 that reveals that Peek Brothers should have known of the presence of asbestos, triggering
20 compliance with the regulations relied upon by the State to proceed against Peek Brothers with
21 these three causes of action.

22 Peek Brothers also produced no record of training of its employees upon which the State
23 could rely to prove knowledge at either the management or employee level. And, Peek Brothers
24 explained that while Travis or Troy Peek may have engaged in some asbestos removal, they are
25 not a vertical asbestos abatement employer and that they know only of the handling of horizontal
26 asbestos work associated with pipe removal. State's Exhibit, C25-35, Troy Peek testimony, 1Tr.,
27 pp. 185, 187, 188; Travis Peek testimony 2Tr. p. 336.

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1 This leaves the element of exposure. Without proof Peek's employees were exposed to
2 asbestos, there is no claim. See, Conclusions of Law, *infra*. Peek Brothers assigned 8 of their 73
3 employees to grade the Project. It was only after being given by the City of Fernley and D.R.
4 Horton the green light to demolish the farmhouse, that demolition commenced. 2Tr., pp. 346-
5 352, 354.

6 The demolition crew consisted of three employees out of the eight members of the crew.
7 2Tr., pp. 391-395. The remaining five crew members continued working while the demolition
8 took place, but they were not in the immediate vicinity of the demolition work. 2Tr. pp. 394,
9 395. As there was no air monitoring being conducted while the demolition was taking place,
10 1Tr. p. 18, there is no evidence that the five members of the crew were exposed to airborne
11 carriers of asbestos.

12 Of the three members of the demolition crew, one operated the excavator that actually
13 demolished the farmhouse. One operated a water truck and flooded the house with water from a
14 hose the day before demolition commenced, poured water on the house as it was demolished, and
15 then, continued to pour water on the house as it lay flat on the ground after demolition. 2Tr. pp.
16 417-419. Water continued to be poured on the house, until a stop work order was issued because
17 no demolition permit had been obtained by D.R. Horton. 2Tr. p. 417.

18 The third member of the crew stood guard on the Project while it was being demolished
19 to make sure no one was exposed to danger by the demolition. 2Tr. p. 419. This individual was
20 assigned to monitor the farmhouse while it was being demolished because it was an older
21 building. And, older buildings have a propensity to spark, smoke or catch fire due to broken
22 utilities. 2Tr. pp. 418, 419. He did not have to be near the building to monitor the building for
23 these purposes and given that there was no air monitoring of the demolition, there was no
24 showing this third member of the demolition crew came in contact with asbestos as he was far
25 enough from the farmhouse to avoid exposure. 2Tr. pp. 394-396 (at p. 395, observed from a
26 distance), 416, 417.

27 Further, it was not Peek's responsibility to show this employee was not exposed. Rather
28 the burden on proof is on the State to prove exposure as one of the elements of a *prima facie*

1 case. See, "Conclusions of Law," *infra*. The State failed to show exposure to asbestos by this
2 "watchman."

3 As for the other two members of the farmhouse demolition crew, the "water man" and
4 excavator, the "water man" poured water from a water truck. The excavator demolished using an
5 excavator. Both sat inside cabs with air conditioning, encapsulated from asbestos. 2Tr. pp. 391-
6 396, 417, 418, 418.

7 There was no proof any of the three touched any of the debris containing asbestos from
8 the demolition. Given the protective measures taken by Peek, there was no proof by the State
9 that any of Peek's employees assigned the job were exposed to asbestos. Also, while they were
10 working, there was no air monitoring. And, once the job shut down, Peek's employees remained
11 away from the site until all the debris from the rubble of the demolition was carted away by All
12 Eagle. 1Tr., p. 78; State's Exhibit 1, p. C19; 2Tr. pp. 416-418.

13 They remained out of harms way. In short, there was no proof by the State of exposure to
14 the danger of asbestos, the hazardous condition.

15 To the extent any of the following Conclusions of Law also amount to Statements of Fact,
16 they are incorporated herein. To the extent any of the Statements of Fact above constitute
17 Conclusions of Law, they are incorporated in the Conclusions of Law discussion set forth below.

18 CONCLUSIONS OF LAW

19 While the hearing on this case was long and covered multiple theories of the case as both
20 sides pressed their issues, it nevertheless remained ultimately true that the State is obligated to
21 establish the alleged three violations are shown by a preponderance of the reliable evidence in the
22 record. Mere estimates, assumptions and inferences fail this test for proving a citation.

23 Conjecture is also insufficient. Findings supporting a citation must be based upon the kind of the
24 evidence which responsible persons are accustomed to rely in serious affairs. *William B. Hopke*
25 *Co., Inc.* 1982 OSHARC LEXIS 302 * 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ)).

26 The Board's decision must be based on consideration of the whole record and shall state all facts
27 officially noticed and relied upon. 29 CFR 1905.27(b). *Armor Elevator Co.*, 1 OSHA 1409,
28 1973-1974 OHSD ¶ 16, 958 (1973). *Olin Construction Inc. v. OSHARC and Peter J Brennan*,

1 *Secretary of Labor*, 525 F. 2d 464 (1975). A Respondent may then rebut the allegations by
2 showing, 1) the standard was inapplicable to the situation at issue or 2) the situation was in
3 compliance. *S. Colorado Prestress Co. v. Occupational Safety & Health Rev. Comm'n*, 586 F.2d
4 1342, 1349–50 (10th Cir. 1978).

5 The burden is on the State to prove by a preponderance of the evidence, a *prima facie*
6 case against the Respondent. *See*, NAC 618.788(1); *see also*, *Original Roofing Company LLC v.*
7 *Chief Administrative Officer of the Nevada OSHA*, 442 P.3d 146, 149 (Nev. 2019). Thus, in
8 matters before the Board of Review, the State must establish: (1) the applicability of a standard
9 being charged; (2) the presence of a non-complying condition; (3) employee exposure or access
10 to the non-complying condition; and, (4) the actual or constructive knowledge of the employer's
11 violative conduct. *Id.* at 149, *see also*, *American Wrecking Corp. v. Secretary of Labor*, 351
12 F.3d 1254, 1261 (D.C. Cir., 2003).

13 Furthermore, the State must prove by a preponderance of evidence each element of the
14 *prima facie* case for each citation being prosecuted. *See*, *ComTran Group, Inc. v. U.S. Dept. Of*
15 *Labor*, 722 F.3d 1304, 1308 (11th Cir., 2013); *Secretary of Labor v. JPC Group, Inc.*, 2009 WL
16 2567337, Final Order Dated 2009, (O.S.H.R.B.) WL p. 2. A respondent's ability to defeat one
17 element of the *prima facie* case is sufficient to defeat the State's entire claim for relief. That is,
18 all else falls by the wayside, once it is shown that the State has failed to prove at least one
19 element of the *prima facie* case. Peek need not engage in the discussion of the other elements of
20 the *prima facie* case and those various theories of the case as they become irrelevant to the defeat
21 by Peek of the Citations brought against the Company.

22 This is where the State's case founders. Each citation rises and falls on the knowledge of
23 and exposure to asbestos. *See*, Complaint. There isn't a scintilla of evidence adduced by the
24 State that shows employee exposure to asbestos, one of the four elements of a *prima facie* case
25 involving the hazard of asbestos, while not wearing personal protective equipment. Each of the
26 citations must, therefore, be dismissed by reason of a failure of proof of exposure, one of the four
27 essential elements required to support a claim. *ComTran, supra* at 1308; *Original Roofing*
28 *Company, supra* at 149.

1 The facts reveal that the Project was located on a 20 plus acre parcel of land which Peek
2 was contracted to grade. 1Tr., p. 202; 2Tr. pp. 394, 416, 417. The dilapidated farmhouse the
3 source of the asbestos was located on the far end of the development, away from where the
4 grading was taking place. Peek used eight employees on this job, three of whom actually were
5 involved with the demolition of the farmhouse. The record is clear, the other five employees had
6 nothing directly to do with the demolition of the farmhouse and worked some distance from the
7 farmhouse. 2Tr., pp. 391-396, 416, 417. When the debris from the demolished farmhouse was
8 finally removed from the job site, the removal was completed by All Eagle, a sub-contractor not a
9 part of Peek. 1Tr., pp. 78, 82-83; 2Tr. pp. 416, 417.

10 There was no showing that the five employees not directly engaged with the farmhouse
11 were in the vicinity of the farmhouse when it was demolished. 2Tr. pp. 416, 417. And, there was
12 no air monitoring conducted showing that asbestos may have blown in their direction while the
13 farmhouse was taken down and left lying there until it was carted away. 1Tr., p. 78; 2Tr. pp. 415,
14 416.

15 The farmhouse was demolished by an excavator. The day before the farmhouse was
16 demolished, it was flooded with water poured from a hose on the farmhouse by a single
17 employee of Peek. 2Tr., pp. 391-396. As it was being demolished, the farmhouse was also
18 flooded continuously with water and then the day after it was demolished and lying there in
19 pieces, Peek continued to hose down the debris from the demolition. This continued the
20 following day until Peek was informed that there was asbestos present due to the farmhouse, and
21 work was ordered to be halted. 1Tr. pp. 194, 195; 2Tr. p. 387.

22 Immediately after being informed of the prospect of asbestos' presence in the farmhouse,
23 Peek, shut the Project down until an abatement survey was secured. *See*, 2Tr. pp., 417, 418.
24 This revelation marked the first time anyone from Peek knew that asbestos was present at the job
25 site and that it was due to the farmhouse containing friable asbestos. 1Tr., p. 185.

26 The employee assigned to hose down the farmhouse was fully enclosed and capped, the
27 cab insulating him from any asbestos that might be airborne and in his vicinity. 2Tr., p. 394.
28 There was no showing by the State that he actually touched any of the debris that might contain

1 asbestos. 2Tr., pp 391-396. While the building was being demolished, one employee was
2 assigned to stand guard to watch for any debris that might get scattered around the Project as the
3 building was being demolished.

4 The employee working the hose only operated the hose. That is, there is no evidence he
5 ever handled any of the debris from the farmhouse. The operating engineer working the
6 excavator also did not handle any of the debris. He sat, however, in the cab of the excavator, that
7 was enclosed, sealed from the outside and air conditioned. While running the machine, he was
8 completely sealed off from the outside and safe from exposure to friable asbestos or any other
9 debris.

10 As for the five remaining employees who were not directly involved in the demolition of
11 the farmhouse, the State's position is one of speculation, *i.e.*, were these individuals in the
12 vicinity of the farmhouse and could they possibly have been reachable by wind blown debris.
13 The first problem here for the State is that there was, as indicated, no airborne study conducted to
14 justify such a position in the first place.

15 The other problem is one of law. The mere possibility that it might be theoretically
16 possible that an employee might be exposed to a hazardous condition is insufficient to establish
17 proof of exposure. *See, Secretary of Labor v. Peavey Company*, 1994 WL 524122 (1994), WL
18 p. 2; *Secretary of Labor v. Nuprecon*, 2012 WL 525154 (2012), WL p. 3. As stated in *Nuprecon*,
19 the determination is "...whether the Secretary has proven access to the hazard, the 'inquiry is not
20 simply whether exposure is theoretically possible,' but whether it is reasonably predictable
21 'either by operational necessity or otherwise (including inadvertence), that employees have been,
22 are, or will be in the zone of danger.'" *Peavey, supra* at p.2.

23 At best, on these facts, the State has shown it is theoretically possible that the five
24 employees performing the grading work (cutting trees) while the farmhouse was being
25 demolished might conceivably have had wind blown asbestos laden debris showered on them
26 where they were working on grading. But, that is all the State has shown and without an air
27 study, the State could prove no more than a theoretical possibility that wind blown asbestos

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1 debris had been blown on them as these five employees had nothing at all to do with working on
2 the source of the asbestos in the first place.

3 This same logic holds, however, for the three employees engaged with the demolition of
4 the farmhouse containing asbestos. It is speculation that these three individuals were exposed to
5 asbestos. One employee was kept a distance from the demolition. The other two performed their
6 jobs from inside enclosed cabs. Further, there was no airborne monitoring to indicate airborne
7 asbestos debris had blown over any employees. And, all work stopped once asbestos was
8 suspected and no one from Peek returned to work until friable asbestos was removed from the
9 job. Peek never returned to the work site until after All Eagle removed the asbestos and they
10 returned to a clean job site.

11 On these facts, it is only speculation that exposure occurred, and therefore, the State has
12 failed to prove the exposure element of a *prima facie* case. The theoretical possibility of
13 exposure is insufficient grounds to prove any element of a *prima facie* case. Since the State must
14 prove all four elements of the *prima facie* case by a preponderance of the evidence for each cause
15 of action of its complaint, *see, ComTran, supra* at 1308, the State has failed in its burden to prove
16 its claim. All three Citations rise and fall upon whether there was proof of exposure to asbestos
17 and the State only offers speculation to satisfy its burden of proof of exposure to the hazardous
18 condition.

19 Accordingly, it was moved by Jorge Macias, seconded by Frank Milligan, to dismiss the
20 complaint with prejudice, with the State taking nothing thereby. The motion was adopted upon a
21 vote of five in favor of the motion. It was unanimously adopted. The complaint is hereby
22 dismissed with prejudice. 2Tr., p, 481.

23 This is the final order of the Board.

24 IT IS SO ORDERED.

25 On March 13, 2024, the Board convened to consider the 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 five members. On a
28 motion of Scott Fullerton, seconded by Frank Milligan, the Board voted 5-0 to approve this

1 Decision of the Board as the action of the Board and to authorize Chairman Rodd Weber, after
2 any grammatical or typographical errors are corrected, to execute, without further Board review
3 this Decision on behalf of the Nevada Occupational Safety and Health Review Board. Those
4 voting in favor of the motion either attended the hearing on the merits or had in their possession
5 the entire record before the Board upon which the decision was based.

6 On March 13, 2024, this Decision is, therefore, hereby adopted and approved as the Final
7 Decision and Order of the Board of Review.

8 Dated this 29th day of March, 2024.

NEVADA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD



11 By: /s/Rodd Weber
Rodd Weber, Chairman

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13 NOTICE: Pursuant to NRS 233B.130, any party aggrieved by this Final Order of the OSHA
14 Review Board may file a Petition for Judicial Review to the District Court within thirty (30) days
after service of this Order.

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