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NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

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CHIEF ADMINISTRATIVE OFFICER OF
THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION OF THE
DIVISION OF INDUSTRIAL RELATIONS
OF THE DEPARTMENT OF BUSINESS
AND INDUSTRY, STATE OF NEVADA,

Complainant,

vs.

SPECIALTY CONTRACTORS
NORTHWEST, LLC dba PACIFIC
BATH COMPANY

Respondent.

Docket No. LV 22-2146

Inspection No. 1535191

FILED

SEP 25 2024

OSH REVIEW BOARD
BY Kennedy

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

This case arose out of a referral. *See*, State's Exhibit 1, p. 6. An unnamed third person contacted Nevada OSHA to make three allegations regarding risks faced by the Respondent's employees while remodeling a residential bathroom. *See, Id.* The allegations were as follows:

1. Employees performing remodeling work inside customers bathrooms are concerned about exposure to lead, asbestos, fiberglass, and mold. Drywall is often replaced in the bathroom, but no asbestos testing is performed first. Employees are also concerned about lead paint and lead pipes in the walls as well as fiberglass exposure.
2. No Personal Protective Equipment (PPE) is provided to employees performing this work.
3. Heavy objects are expected to be lifted by one employee and if assistance is needed, the employer refuses to provide additional employees. *See, Id.*

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2. No Personal Protective Equipment (PPE) is provided to employees performing this work.
3. Heavy objects are expected to be lifted by one employee and if assistance is needed, the employer refuses to provide additional employees. *See, Id.*

1 During an inspection triggered by this referral, Bianca Bolden reviewed each of the
2 allegations. The inspection resulted in the issuance of one citation for a violation of 29 CFR
3 1101.1926(k)(3)(i). *See*, State's Exhibit 1, pp. 39 - 42. Conversely, Ms. Bolden determined that the
4 balance of the referral's allegations were invalid. *See*, State's Exhibit 1, pp. 7, 8.

5 The matter came before the Nevada Occupational Safety and Health Review Board (the
6 Board) for a hearing conducted in two parts on February 14 and 15, 2024. *See*, 1Tr., p. 1.¹ The
7 hearing was continued until March 13, 2024, to allow the Board Members to complete deliberations
8 and resolve a tie vote.

9 The hearings were conducted in furtherance of a duly provided notice. *See*, Order Vacating
10 Oral Argument on Respondent's Motion to Dismiss and Setting Hearing on the Merits, dated
11 January 23, 2024. In attendance to hear the matter on February 14, 2024, were Board Chairman
12 Rodd Weber, Board Secretary William Spielberg, Board Member Jorge Macias and Board Member
13 Scott Fullerton. *See*, 1Tr., p. 7;10-15. Also present on February 14, 2024, was alternate Member
14 Tyson Hollis. *See Id.* Board Member Frank Milligan was absent on February 14, 2024. *See Id.*
15 Present on February 15, 2024, for the continuation of the matter were Board Chairman Rodd Weber,
16 Board Member Jorge Macias and Board Member Scott Fullerton. *See*, 1Tr., pp. 49;14-24, 50;1.
17 Also present was alternate Member Tyson Hollis. *See Id.* Board Secretary William Spielberg was
18 absent from 9:00 a.m. until 11:30 a.m on the morning of February 15, 2024. *See*, 1Tr., p. 249,10-11.
19 In attendance to complete deliberations on March 13, 2024, were Board Chairman Rodd Weber,
20 Board Secretary William Spielberg, Board Member Jorge Macias and Board Member Scott
21 Fullerton. *See*, 2Tr., p. 3;9-21. Also present on March 13, 2024, was alternate Member Tyson
22 Hollis. *See Id.* As there were, at all relevant times, at least four members of the Board present to
23 decide the case, with at least one member representing management and one member representing
24 labor in attendance, a quorum was present to conduct the business of the Board.

25
26
27 ¹"1Tr." stands for the transcript of the hearings conducted on February 14 and 15, 2024, followed by
28 the page and line number where the matter cited can be found. "2Tr." stands for the transcript of the
deliberations conducted on March 13, 2024, followed by the page and line number where the matter cited
can be found.

1 Nevada has adopted all Federal Occupational Safety and Health Standards which the
2 Secretary of Labor has promulgated, modified or revoked and any amendments thereto. They are
3 then deemed the Nevada Occupational Safety and Health Standards. *See*, NRS 618.295(8).
4 Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised Statutes, NRS
5 618.315.

6 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety
7 and Health Administration of the Division of Industrial Relations of the Department of Business and
8 Industry, State of Nevada (hereinafter, the State or Nevada OSHA), appeared at the hearing on
9 behalf of the Complainant (the State). Specialty Contractors Northwest, LLC, dba Pacific Bath
10 Company (hereinafter, Specialty Contractors or the Respondent) was represented by David Lee,
11 Esq., and Andrea Cordova, the Respondent's Executive Vice President. *See*, 1Tr., p. 3;11-14.

12 The State issued its Citation and Notification of Penalty (Citation) on March 18, 2021,
13 alleging a violation of 29 CFR 1926.1011(k)(3)(i). *See*, State's Exhibit 1. pp. 39 -42. The citation
14 alleged that the Respondent failed to conduct an asbestos survey prior to cutting and removing
15 drywall in a residential remodel project. *See, Id.*

16 The Complaint set forth one allegation of the violation of Federal regulations. *See*, State's
17 Exhibit 1, p. C28. Citation 1, Item 1, charged an other than serious violation of 29 CFR
18 1926.1011(k)(3)(i), as stated below:

19 Before work in areas containing ACM and PACM is begun; employers shall identify
20 the presence, location, and quantity of ACM, and/or PACM therein pursuant to
paragraph (k)(1) of this section.²

21 Pacific Bath Company failed to conduct an asbestos survey at 3830 Desert Marina
22 Drive which was built in 1984, prior to work being conducted. Employees disturbed
23 building material while cutting the perimeter of the tub's drywall in order to remove
the original tub and complete the installation of a shower for a tub to shower
conversion. Samples of the work area were taken and sent to ALS Laboratory Group
where they came back as non-detect for asbestos.

24 On September 7, 2021, the Respondent sent its Contest Letter. *See*, State's Exhibit 1, pp. 56,
25

26 ²Asbestos includes chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos,
27 actinolite asbestos, and any of these minerals that have been chemically treated and/or altered.
Asbestos-containing material (ACM), means any material containing more than one percent asbestos.
28 PACM means presumed asbestos containing material. *See*, 29 CFR 1926.1101(b).

1 57. On September 24, 2021, the State filed and served its Complaint. On October 8, 2021, Teresa
2 M. Beck, Esq., and Marlys C. McGrew, Esq., answered the Complaint on behalf of the Respondent.
3 *See*, State's Exhibit 1, pp. 65 - 68.

4 At the hearing on the matter, the State offered for admission its Exhibits 1 through and
5 including 5, consisting of 117 pages. *See*, 1Tr., pp. 8;5-24, 9;24, 10;1-7. The State's exhibits were
6 admitted without objection. *See*, 1Tr., p. 10;11-13. The Respondent offered Exhibits 1 through 37
7 consisting of 919 pages. *See*, 1Tr., p. 10;12-18. The Respondent's exhibits were also admitted
8 without objection. *See*, 1Tr., p. 11;9-11. At the duly noticed hearing conducted on October 11, 2023,
9 the State presented the testimony of Bianca Bolden in its case in chief. *See*, 1Tr., pp. 19-128.
10 Further, the State called Crystal Rodriguez as a rebuttal witness. *See*, 1Tr., pp. 200-204. Specialty
11 Contractors presented the testimony of Ms. Cordova. *See*, 1Tr., pp. 133-197.

12 FINDINGS OF FACTS

13 Specialty Contractors is a residential bathroom remodeling company. *See*, State's Exhibit 1,
14 p. 9. Specifically, the Respondent replaces existing residential tubs and/or showers with new
15 products. *See, Id.* The general process is for one of the Respondent's employees to measure the
16 effected area to determine requirements for the renovation. *See*, 1Tr., pp. 25;4-5. That information is
17 then supplied to the installers who do this work. *See*, 1Tr., p. 143;7-12.

18 It is estimated that drywall needs to be replaced in about 40% of the Respondent's projects.
19 *See*, 1Tr., p. 28;9-12. When drywall must be replaced, the Respondent expected its employees to cut
20 into the perimeter of the drywall around the existing bathtub or shower in order to remove the
21 existing fixture. *See*, State's Exhibit 1, p. 9.

22 On June 8, 2021, Ms. Bolden initiated the opening conference with Steven Delicata, the
23 Respondent's Installation Manager. *See*, State's Exhibit 1, pp. 22, 23. Mr. Delicata informed Ms.
24 Bolden the Respondent doesn't know if asbestos is behind a wall prior to exposing the area. *See*,
25 State's Exhibit 1, pp. 10, 72, 73. Mr. Delicata explained that the Respondent did not conduct
26 asbestos surveys because it limited its work to residences built after 1980. *See*, State's Exhibit 1, p.
27 12. On the day of the opening conference, Ms. Bolden conducted a walk around inspection of the
28 Respondent's warehouse located at 7360 Eastgaze Road, Henderson, Nevada. *See*, State's Exhibit 1,

1 p. 22.

2 In order to complete her inspection, Ms. Bolden needed access to one or more of the
3 locations where a bathroom remodel was in process. Therefore, Ms. Bolden requested a list of
4 jobsites where the Respondent's employees were currently working. *See, Id.* The Respondent first
5 provided the address of 11359 Corsia Mist Avenue, Las Vegas, Nevada. *See, Id.* Unfortunately, this
6 property owner would not grant access. *See, Id.* On June 25, 2021, the Respondent met Ms. Bolden
7 at 3830 Desert Marina Drive, Laughlin, Nevada, (3830 Desert Marina) where its employees were
8 converting a tub or a shower. *See, Id.*

9 Ms. Bolden interviewed Josh Stringer at 3830 Desert Marina. *See, State's Exhibit 1, pp. 27 -*
10 *34.* Mr. Stringer stated that cutting sheet rock was often required. *See, 1Tr., p. 29;2-6.* Specialty
11 Contractors never required him to obtain approval from before taking such action. *See, Id.* Mr.
12 Stringer told Ms. Bolden that he had never worked on a job where the Respondent indicated that
13 asbestos was present. *See, 1Tr., pp. 25;23-24, 26;1-2.*

14 Ms. Ortiz: Did he make any comments about asbestos testing?

15 Ms. Bolden: Yes, [Mr. Stringer] did. He said that he wasn't asbestos certified and that he
16 had never seen an asbestos survey for any of the houses that he had been on. *See, Id.*

17 As part of the inspection process, Ms. Bolden obtained sheet rock samples for asbestos
18 testing. *See, State's Exhibit 1, p. 75.* When the report came back from the laboratory, it was found
19 that none of the samples contained ACM. *See, State's Exhibit 2, pp. 76 - 86.*

20 Ms. Bolden testified at the February 14, 2024, hearing. *See, 1Tr., pp. 19-128.* Ms. Bolden
21 stated that the Respondent believed that asbestos testing was never required where the building was
22 built after 1980. *See, 1Tr., pp. 37;9-15, 39;21-24, 40;1-5.*

23 Ms. Ortiz: [I]n your estimation... from the material you gathered, from all the
24 conversations you had, whether it was with the on-site management of the locations
25 that you had permission to test or whether it was your dealings with via e-mail or
26 however else, in your estimation there was no due diligence done other than saying
the building was built prior to 1984 or after 1984. Therefore, we don't have to do
anything. There was nothing else other than that?

27 Ms. Bolden: Correct. And something that came up and how that also additionally
28 was determined with all that they did do for lead, there was so much that they were
able to have -- they had lead certified. There was all this lead training, et cetera that
they were able to submit. They just did not have anything for asbestos. And even the

1 employees said there was nothing they were aware of as well. *See*, 1Tr., 123;4-19

2 Ms. Bolden was informed the Respondent's employees were told to stop work if they
3 encountered anything that they knew or believed to contain asbestos. *See*, 1Tr., p. 36;12-20.

4 However, the Respondent's employees were not provided sufficient training to do this.³ *See*, 1Tr.,
5 pp. 29;7-10, 31;8-16, 156;18-21.

6 Ms. Bolden was asked why the subsection (k)(3)(i) standard applied. *See*, 1Tr., p. 34;17-18.
7 Her response was that the Respondent's employees were potential for asbestos exposure as a result
8 of the nature of the work. *See*, 1Tr., p. 34;19-20. Ms. Bolden explained that the purpose for the
9 standard was to prevent employee exposure. *See*, 1Tr., p. 34;21-24.

10 In further testimony, Ms. Bolden explained that the State believed that the violative conduct
11 occurred throughout the Respondent's Nevada operations. *See*, 1Tr., p. 99;3-20.

12 Ms. Ortiz: So I need you to clarify whether you were talking about the hazard at this
13 location or whether you were talking about a hazardous part of the process of the
employer's?

14 Ms. Bolden: It's a hazard. It's a hazard as part of the [Respondent's] process. So at
15 multiple location (sic), that process is occurring and that's what pretty much was
16 communicated over the inspection process. It just happened to be those location (sic)
that we were able to go out to that were current jobs but they had jobs going on all
over where that same process was occurring.

17 Ms. Ortiz: And how did you determine that they used the same process for all of their
18 locations they were working on?

19 Ms. Bolden: The installation manager communicated what the process was, as well
20 as the employee interviews. They worked on multiple other properties. Those
employees didn't solely only work on that property. They worked at other properties
as well. *See*, 1Tr., p. 99;7-10.

21 Ms. Bolden testified regarding the determination that the violation was found to be other
22 than serious. *See*, State's Exhibit 1, pp. 39, 41, *see also*, 1Tr., p. 38;1-7. This was because of the
23 negative finding of asbestos at 3830 Desert Marina. *See*, 1Tr., p. 38;1-7. The State found that the
24 failure to conduct an asbestos survey would not directly cause an employee to be exposed to
25 asbestos. *See Id.* As the result of the other than serious nature of the violation and its minimal
26

27 ³The Respondent's managers received OSHA 30 training in which they would have received some
28 asbestos information. *See*, 1Tr., p. 137;16-21. However, the installers only are required to receive OHSA 10
training. *See*, 1Tr., 135;9-12.

1 severity, no penalty was assessed. *See*, State's Exhibit 1, pp. 39-42, *see, also*, 1Tr., p. 39;4-13.

2 The Respondent's only witness was Ms. Cordova. *See*, 1Tr., pp. 133-197. Ms. Cordova
3 provided a more nuanced understanding of the rules for asbestos testing. Her belief was that
4 anything built before 1980 is presumed to have asbestos (PACM). *See*, 1Tr., p. 140;5-20. However,
5 no such presumption applies to anything built after 1980,. *See*, 1Tr., pp. 140;21-24, 141;1-8.
6 However, this does not result in a free pass for the employers. Should an employer have reason to
7 believe that there is ACM in materials located in a work area, then testing is required. *See*, 1Tr., p.
8 140;5-20.

9 Ms. Cordova disputed the State's allegation that Specialty Contractors does not conduct any
10 due diligence regarding the potential presence of asbestos in its projects. *See*, 1Tr., pp. 142;20-24,
11 143;1.

12 Mr. Lee: So the idea that you just look at a date and that's all you do is clearly not
13 correct?

14 Ms. Cordova: Absolutely not. With the risk for anything, only taking one thing into
15 account isn't -- doesn't make any sense.

16 Ms. Cordova explained that the Respondent engages in two layers of review before the
17 installers are sent to a residence to conduct a remodel. *See*, 1Tr., pp. 143;4-24, 144;1-17. The first
18 layer is a public records search regarding the property. *See, Id.* The second is an onsite review of the
19 remodel area. *See, Id.* Multiple photographs are taken of the work area as part of the onsite review
20 require. *See*, 1Tr., p. 148;21-24. Those photographs in conjunction with the public records are
21 reviewed by the Respondent's administrative staff before sending installers to any work site. *See*,
22 1Tr., p. 145;15-23.

23 Ms. Cordova testified that she knew of a couple of projects in the Las Vegas area where the
24 Respondent's review process caused it to suspect that ACM was located in a residence built after
25 1981. *See*, 1Tr., pp. 193;22-24, 194;1-17. In those instances asbestos testing was conducted. *See, Id.*
26 Accordingly, the Respondent has in place methods to attempt to determine whether ACM may be
27 present in a residence built after 1981. *See, Id.*

28 Ms. Cordova then testified that it was unremarkable that Mr. Delicata did not know of the
Respondent's property reviews for two reasons. First, because, Mr. Delicata was essentially in

1 training at the time of the State's inspection. *See*, 1Tr., p. 154;1-4 Second, because the Respondent's
2 investigative process is completed before a work order is generated. *See*, 1Tr., pp. 147;4-12.

3 On cross examination, Ms. Cordova was questioned as to why the information regarding the
4 Respondent's due diligence was not supplied to Ms. Bolden before the citation was issued. *See*,
5 1Tr., pp. 188;2-24, 189;1-21. Ms. Cordova's response was that the information was given to the
6 Respondent's legal counsel and not passed on to the State. *See*, 1Tr. 188;2-6.

7 Ms. Ortiz' closing argument began discussing the unusual status of this case where there was
8 a citation for the lack of due diligence, yet not hazard was present.

9 Ms. ORTIZ: This case is an oddity compared to other cases that we normally have in
10 that the argument is vaguely, that there is this statute that sort of applies to the work
11 that's being done but not entirely because no ACM was determined. And the
12 testimony from Ms. Cordova has been extensively that they did conduct due
13 diligence to determine that there was no ACM and, therefore, really this standard
14 wouldn't apply to them. However, there is a lot of dispute and a lot of issues going on
15 here with what they did. The referral specifically states as one of the aspects that their
16 employees exposure to asbestos is one of the issues that is being inspected. *See*, 1Tr.,
17 p. 206;3-18.

18 Chairman Weber commenced the deliberations by informing the other Board Members that
19 he did not believe that the standard of Subsection (k)(3)(i) of 29 CFR 1926.1101 applied because no
20 ACM was found in the location. *See*, 1Tr., pp. 224;22-24, 225;1-2. Board Member Fullerton agreed
21 with Chairman Weber's assessment. *See*, 1Tr., pp. 228;8-17.

22 In contrast, Board Members Macias and Hollis believed that the standard applied. A vote
23 was held and two of the members voted to dismiss the citation. *See*, 1Tr., p. 248;13-24. Two
24 members voted to sustain the complaint. The Board was accordingly deadlocked leaving Member
25 Spielberg to cast the tie breaking vote. However, Member Spielberg had missed part of the
26 testimony of the morning of February 15, 2024. *See*, 1Tr., p. 249;3-11. Accordingly, the transcript
27 was to be provided to the Board Members, including Member Spielberg, to allow him to cast what
28 was anticipated to be the deciding vote in this matter.

29 The Board reconvened to deliberate further on this matter on March 13, 2024. The Board
30 members participating in the deliberations on this date were Tyson Hollis, alternate public member
31 of the Board, who sat in because Frank Milligan was absent for the February 2024 meeting of the
32 Board and did not participate in the hearing on this matter. Mr. Hollis, however, attended the

1 February 2024 meeting of the Board and participated, hearing all of the testimony and reviewing all
2 of the evidence in this matter. Also present on March 13, 2024 to hear this matter were Chairman
3 Rodd Weber, and members Scott Fullerton and Jorge Macias. Secretary William Spielberg was the
4 Board member absent for part of the meeting on this matter during the February 2024, session of the
5 Board. He was, however, supplied a copy of the transcript of the hearing and received all of the
6 exhibits, also, entered into evidence in this matter. He was, therefore, eligible to participate in the
7 continued deliberation of this matter.

8 David Lee, Esq., of the law firm of Lee, Landrum & Ingle, was present on behalf of Pacific
9 Bath. Also Andrea Cordova, Executive Vice-President, participated virtually on behalf of Pacific
10 Bath. No additional evidence was taken concerning this matter during the hearing on this date. The
11 Board members deliberated, discussed and analyzed regulations and the evidence before the Board.
12 The second vote was taken as further explained below.

13 To the extent that any of the Conclusions of Law constitute Findings of Fact, they are
14 incorporated herein.

15 CONCLUSIONS OF LAW

16 The State is obligated to demonstrate the alleged violation by a preponderance of the reliable
17 evidence in the record. Findings must be based upon the kind of the evidence which responsible
18 persons are accustomed to rely upon in serious affairs. *William B. Hopke Co., Inc.* 1982 OSHARC
19 LEXIS 302 * 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ)). The Board's decision must be
20 based on consideration of the whole record and shall state all facts officially noticed and relied
21 upon. 29 CFR 1905.27(b). *Armor Elevator Co.*, 1 OSHA 1409, 1973-1974 OSHD ¶ 16, 958 (1973).
22 *Olin Construction Inc. v. OSHARC and Peter J Brennan, Secretary of Labor*, 525 F.2d 464 (1975).

23 In the case in chief, the burden is on the State to prove by a preponderance of the evidence, a
24 *prima facie* case against the Respondent. *See*, NAC 618.788(1), *see also*, *Original Roofing*
25 *Company LLC v. Chief Administrative Officer of the Nevada OSHA*, 442 P.3d 146, 149 (Nev. 2019).
26 Thus, in matters before the Board of Review, the State must establish: (1) the applicability of a
27 standard being charged; (2) the presence of a non-complying condition; (3) employee exposure or
28 access to the non-complying condition; and, (4) the actual or constructive knowledge of the

1 employer's violative conduct. *Id.* at 149, *see also, American Wrecking Corp. v. Secretary of Labor*,
2 351 F.3d 1254, 1261 (D.C. Cir., 2003). Nevada law adopts Federal OSHA regulations. NRS
3 618.295(8) states: "All federal occupational safety and health standards which the Secretary of
4 Labor promulgates, modifies or revokes, and any amendments thereto, shall be deemed Nevada
5 Occupational Safety and Health Standards."

6 The standard of 29 CFR 1926.1011(k)(3)(i) applies to employers who require its employees
7 to work in areas containing PACM and/or AMC. *See, Id.* Under this regulation, employers are
8 required to provide notice of the presence, location and quantity of the PACM and/or AMC located
9 in the working area.

10 In this instance, the laboratory report generated after the inspection of 3830 Desert Marina
11 showed that neither PACM nor AMC were present. *See, State's Exhibit 2*, pp. 76 - 86. The State's
12 attempt to apply the standard to a situation where the hazard did not exist was problematic. As
13 Chairman Weber explained:

14 I just feel like this particular standard is a technicality that doesn't apply because of those
15 four words, **containing ACM and PACM**. It didn't contain it, and OSHA did not prove it.
16 OSHA has the burden of proof. If OSHA had the burden of proof to prove that the building
17 contained ACM, I would say absolutely, it contained it but it didn't. And OSHA had the
burden of proof to prove that this standard -- there's a standard written, that the standard
applies and all those other, so. *See, 2Tr.*, p. 21;6-14 (Emphasis added).

18 In contrast, the minority believed that subsection (k)(3)(i) of 29 CFR 1926.1101 needed to
19 be read in conjunction with subsection (k)(1) which is expressly mentioned therein. As Board
20 Member Macias explained:

21 I understand that what the other Board members are saying about the standard but it does
22 kind push back and says pursuant to paragraph (k)(1) of this section, (k)(1) of this section
23 says the employer has to identify these things. And it doesn't say has to identify or
24 communicate these things to the employees when, you know, whether or not they found it's
25 hot. You know, they [the employers] just have to identify it. And that's the way I'm looking
at it...I don't feel it's okay to put this and say, well, OSHA tested it and it wasn't hot and,
therefore, you know, they cited under the wrong standard...I feel they should have tested it
before they started work and possibly exposed their employees. And the way I'm reading it,
they were cited under the right standard. *See, 2Tr.*, pp. 18;12-24, 19;1-3.

26 At issue here then, was the interpretation of subsection (k)(3)(i) of 29 CFR 1926.1101.
27 Whether the clear language of that subsection was sufficient to impose a duty on the Respondent,
28 regardless of the presence of PACM or AMC or whether the duty could only be imposed when

1 PACM or AMC was discovered on the work site.⁴

2 The primary tool for statutory interpretation is the plain meaning rule. When the words in a
3 statute are clear on their face, they should be given their plain meaning. *See, Paramount Ins. v.*
4 *Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970). In Contrast, a statute is ambiguous
5 when reasonably informed persons would be capable of understanding it two or more senses. *See,*
6 *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 147, 179 P.3d
7 542, 548 (2008).

8 Under the general rule, subsection (k)(3)(i) of 29 CFR 1926.1101, applies only to instances
9 where the employer engages its employees to work in areas containing ACM and/or PACM. Here,
10 neither ACM nor PACM were present. Accordingly, the standard of subsection (k)(3)(i) of 29 CFR
11 1926.1101, would not apply because none of the material or suspected material was present.

12 However, as Member Macias pointed out, subsection (k)(3)(i) references subsection (k)(1)
13 where employers are “assigned specific information and retention duties.” *See*, 29 CFR
14 1926.1101(k)(1). Under Member Macias’ interpretation, an employer would violate the standard
15 whenever it fails to ascertain whether ACM or PACM is present regardless of whether the material
16 is actually present. *See*, 2Tr., pp. 18;12-24, 19;1-3 Accordingly, the regulation is capable of being
17 understood in more than one sense. *See, Pub. Employees' Benefits Program, supra*. Thus, further
18 review of the principals of statutory construction was required.

19 When interpreting a statute, no part of the statute should be rendered nugatory, nor any
20 language turned to mere surplusage. *See, Paramount Ins. v. Rayson & Smitley*, 86 Nev. 644, 649,
21 472 P.2d 530, 533 (1970) (citation omitted). Further, absurd or unreasonable results should be
22 avoided. *See, Id.*

23 In this instance, both of these principals apply. To read subsection (k)(3)(i) of 29 CFR
24 1926.1101 to apply in all cases, regardless of whether PACM or ACM is present, renders nugatory
25 the phrase “work in areas containing ACM and PACM.” More to the point, it would be nonsensical
26

27 ⁴The rules of statutory construction apply equally for the interpretation of regulations. *See, Silver*
28 *State Elec. Supply Co. v. State ex rel. Dep't of Tax'n*, 123 Nev. 80, 85, 157 P.3d 710, 713 (2007); *Matkulak*
v. Davis, 138 Nev. Adv. Op. 61, 516 P.3d 667, 670 (2022).

1 for the regulation to require employers to identify “the presence, location, and quantity of ACM,
2 and/or PACM” when none exists. Accordingly, subsection (k)(3)(i) of 29 CFR 1926.1101, does not
3 apply to the Respondent in this circumstance. Since the regulation is inapplicable, no analysis of the
4 other elements of a violation was required.

5 ORDER

6 The Board having reconvened and deliberated and reached a decision on this case on March
7 13, 2024, the second vote was taken. It was moved by Scott Fullerton, seconded by Rodd Weber, to
8 dismiss the complaint in this matter against Pacific Bath Company. A vote was taken, the motion
9 was adopted with of 3 in favor 2 against (Hollis and Macias) and one abstention, Frank Milligan,
10 who abstained as he was absent and had not heard case. The State's complaint was dismissed
11 because the Board members determined that the State brought its complaint on the wrong
12 administrative section of the code, 29 CFR 1926.1011(k)(3)(i), had not amended its complaint to
13 plead the correct regulation and, therefore, could not prove the essential elements of the *prima facie*
14 case. Accordingly, the State Occupational Safety and Health Board of Review citation assessed
15 against Specialty Contractors was hereby dismissed with prejudice with both parties assuming their
16 respective fees and cost.

17 This is the Final Order of the Board.

18 IT IS SO ORDERED.

19 On September 11, 2024 the Board convened to consider adoption of this decision, as written
20 or as modified by the Board, as the decision of the Board.

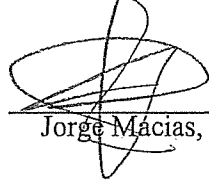
21 Those present and eligible to vote on this question consisted of the 3 current members of the
22 Board, to-wit, Chairman Macias, Scott Fullerton and Tyson Hollis. Upon a motion by Scott
23 Fullerton seconded by Tyson Hollis, the Board voted 3-0-1 (Gled Bautista abstaining as he was not
24 part of the disposition of this matter) to approve this Decision of the Board as the action of the
25 Board and to authorize Chairman Jorge Macias, after any grammatical or typographical errors are
26 corrected, to execute, without further Board review this Decision on behalf of the Nevada
27 Occupational Safety and Health Review Board. Those voting in favor of the motion either attended
28 the hearing on the merits or had in their possession the entire record before the Board upon which

1 the decision was based.

2 On September 11, 2024 this Decision is, therefore, hereby adopted and approved as the Final
3 Decision of the Board of Review.

4 Dated this 25th day of September, 2024.

NEVADA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD

By: 
Jorge Macías, Chairman

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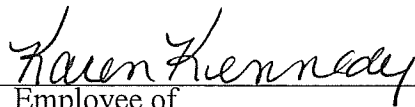
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached document, *Decision and Order of the Board, Findings of Fact and Conclusion of Law, and Final Order*, on those parties identified below by placing an original or true copy thereof in a sealed envelope, certified mail/return receipt requested, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada:

Salli Ortiz, Esq.
DIR Legal
1886 College Parkway, Suite 110
Carson City, NV 89706

David S. Lee, Esq.
Natasha A. Landrum, Esq.
7575 Vegas Drive, Suite 150
Las Vegas, NV 89128

Dated this 25th day of September, 2024.



Employee of
The Law Offices of Charles R. Zeh, Esq.

S:\Clients\OSHA\LV 22-2146, Specialty Contractors Northwest, LLC dba Pacific Bath Company\Decision\Final Decision.R8.wpd