



1 Hooks Meng & Clement, appeared on behalf of Olson Precast. *See*, 1Tr., p. 3. Charles R. Zeh,  
2 Esq. The Law Offices of Charles R. Zeh, Esq., was present as legal counsel to the Board.

3 In attendance at the January 28, 2020 and January 29, 2020, hearings were Board  
4 Chairman Steve Ingersoll, Board members James Halsey, Frank Milligan and Lance Semenko.  
5 *See*, 1Tr., p. 2, 2Tr., p. 2. There being four members of the Board present to hear this matter on  
6 those dates with at least one member representing management and one member representing  
7 labor, in attendance, a quorum was present to hear the matter and conduct the business of the  
8 Board. In attendance at the February 10, 2021, hearing were Chairman Steve Ingersoll, Secretary  
9 Rodd Weber and Board Member Frank Milligan. There being three members of the Board present  
10 to hear this matter on February 10, 2021, with at least one member representing management and  
11 one member representing labor, in attendance, a quorum was present to hear the matter and  
12 conduct the business of the Board.

13 In attendance at the August 11, 2021, hearing were Chairman Rodd Weber, Secretary  
14 William Spielberg, Board Members Frank Milligan, Scott Fullerton and Member Jorge Macias.  
15 The new members of the Board had been provided the transcripts of the previous meetings, the  
16 evidence packages and all of the pleadings. Therefore, they were capable of participating in the  
17 deliberations and deciding the matter. *See*, 4Tr., pp. 7;22-24, 8;1-5. There being five members of  
18 the Board present to deliberate on this matter on August 11, 2021, with at least one member  
19 representing management and one member representing labor, in attendance, a quorum was  
20 present to conduct the business of the Board. Jurisdiction in this matter has been conferred in  
21 accordance with Chapter 618 of the Nevada Revised Statutes.

22 On March 16, 2018, the Citation and Notification of Penalty (Citation) was issued to the  
23 Respondent alleging fourteen violations of federal regulations. Citation 1 Item 1 charged a wilful-  
24 serious violation of 29 CFR 1926.501(b)(4)(i), as stated below:

25 Holes: Each employee on walking/working surfaces shall be protected from falling  
26 through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by  
27 personal fall arrest systems, covers, or guardrail systems erected around such  
28 holes.

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2 At the Las Vegas Boulevard - St. Rose Parkway to Silverado Ranch Boulevard  
3 jobsite, Olson Precast Company did not ensure that each employee on a walking  
4 and or working surface was protected from falling through holes more than six feet  
5 above a lower level by personal fall arrest systems, covers, or guardrail  
6 systems erected around such holes.

7  
8 On September 25, 2017, an employee (Decedent/Attendant) suffered fatal injuries  
9 as a result of falling into an open manhole. The employee fell approximately 22  
10 feet, came to rest on top of a new sanitary sewer line, and was pronounced dead at  
11 the scene. The manhole opening was approximately 39 inches in diameter. A total  
12 of three Olson Precast Company employees were exposed to fall hazards of more  
13 than 6 feet in the following instances:

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15 1. The Superintendent was standing 3-4 feet from the open manhole while an  
16 inspection was being performed.

17  
18 2. The Journeyman Commercial Painter/Entrant removed the manhole cover, set  
19 up the tripod above the open hole and participated in the inspection of the  
20 manhole.

21  
22 3. The Decedent/Attendant helped remove the manhole cover, assisted in the set up  
23 of the tripod above the open hole, hoisted sandblast media out of the manhole, and  
24 sat on a bucket near the unguarded hole.

25  
26 Olson Precast Company indicated that a dirt berm, company vehicle, and high  
27 visibility cones were utilized to protect the general public and other employees  
28 from entering the work area. However, Olson Precast Company committed a  
willful violation with plain indifference to employee safety and health when the  
exposed Superintendent identified the open manhole as a fall hazard and did not  
take actions to protect himself and the two employees listed above from falling  
into the open hole. The Superintendent stated that he and the two other employees  
were approximately 3-4 feet away from the open manhole while it was being  
inspected. The Superintendent also stated that the hole was not guarded while the  
Painter/Entrant was mixing the grout for the next phase but that it was only for 5  
minutes. In addition, the Superintendent and the Division Manager for the Special  
Coating Division were aware that removing the sandblast media from the bottom  
of the manhole was a two man operation, consisting of an entrant and attendant.  
The entrant fills the bucket with media and the attendant pulls the bucket of media  
out of the manhole. The Superintendent and the Division Manager both stated that  
the trigger height for fall protection in the construction industry was 6 feet and that  
only one person could connect to the entry tripod. They both also stated that the  
company had completed sandblasting and grouting activities in up to 20 manholes  
prior to the accident. The Division Manager stated that the manhole is only  
covered when employees break for lunch or when they are finished for the day. In  
the event of a fall into the manhole, the Superintendent and the Journeyman  
Commercial Painter/Entrant were exposed to potentially serious injuries or death.  
*See, State's Exhibit 1, pp. 76, 77.*

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30 Aside from Citation 1, Item 1, the Respondent withdrew its contest of the remaining  
31 thirteen citations and agreed to pay the fines assessed thereon. *See, 1Tr., p. 26;1-16, see also,*  
32 *2Tr., pp. 15-17.* This agreement was documented by a Notice of Partial Withdrawal of Complaint

1 dated, February 27, 2020. *See, Id.*

2  
3 On April 4, 2018, the Respondent sent its notice of intent to contest the Citation. *See,*  
4 State's Exhibit 1, p. 169-170.<sup>2</sup> On April 23, 2018, the State filed and served its Complaint on the  
5 Respondent. *See, State's Exhibit 1, pp. 171-188.* On or about May 8, 2018, Dalton L. Hooks. Jr.,  
6 Esq, answered the complaint for the Respondent. *See, State's Exhibit 1, pp. 189-199.* Therein, the  
7 Respondent admitted and/or denied the allegations of the complaint and posited certain  
8 affirmative defenses. *See, Id.* Among the affirmative defenses offered by Olson Precast, there  
9 were a couple of variations of the argument that the wrong regulation was applied. Most relevant  
10 to this Decision were affirmative defenses numbered 3 and 6, as follows:

- 11 • The Citation items issued against the Respondent misapply the cited standards.
- 12 • The standards allegedly violated by the Respondent are inapplicable to the cited  
13 conditions, and other more appropriate standards were not referenced.

14 At the hearings on the matter, the State offered Exhibits 1, 2, 3 and 4, with pages 1 through  
15 457, and a supplemental evidence packet, Exhibit 5 with pages 458-576. Of the State's initial  
16 exhibits 1-4, pages 1-576, excluding 206, 206A and 216, were admitted into evidence. *See, 1Tr.,*  
17 *p. 19;16-18.* As for pages 206, 206A and 216, admission would be granted or denied at the time  
18 each is offered. *See, 1Tr., p. 20;1-3.* Exhibit 5 consists of 18 pages of photographs, none of which  
19 were Bate-stamped but all of which were hand-numbered 1-18. The State's Exhibit 1, pp. 206  
20 206A and 216 were admitted after redacting. *See, 1Tr., p. 70;11-15, see also, 3Tr., p. 7;14-17.*  
21 Pages 4 through 18 of the State's Exhibit 5 was admitted. *See, 3Tr., p. 7;5-8.*

22 The Respondent offered Exhibits B through H with pages numbered 1 through 225, which  
23 included the Expert Report of James W. Stanley, President FDR Safety. The Respondent's exhibits  
24 B through H, pages 8 through 225, were admitted into evidence. *See, 1Tr., p. 20;7-8.*

## 25 FINDINGS OF FACT

26 Olson Precast is a Nevada Corporation with a business address of 2810 N. Nellis Blvd.,

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28 <sup>2</sup>The documents identified in the table of contents for the State's Evidence package as being the  
Respondent's contest letter are not that document. Instead these are the Respondent's agreement to attend  
an informal conference regarding the alleged violations.

1 Suite 100, Las Vegas, NV 89115. *See*, State's Exhibit 1, pp 1, 3. Olson Precast is a precast  
2 concrete contractor. *See, Id.* It was a subcontractor on this job for Las Vegas Paving Corp. (LVP)  
3 *See*, 1Tr., p. 4-10. The project, the site of the fatality, was a 2.9-3.0 mile sewer line that was  
4 being installed with Las Vegas Paving as the General Contractor of the project. The project  
5 included 77 manholes of varying depths to be installed along the 2.9-3.0 mile sewer line. *See*,  
6 1Tr., pp. 32;23-25, 33;1. The site of the fatality was manhole No. 8 located on S. Las Vegas  
7 Blvd., near Johnson Drive. Olson Precast contracted with LVP to install for LVP the manholes the  
8 entire length of the sewer line. *See*, 1Tr., 32;21-25. The incident occurred at manhole No. 8, the  
9 20<sup>th</sup> manhole to be installed. *See*, State's Exhibit 1, p. 68. September 25, 2017, was Russell  
10 Tracy's first day of employment with Olson Precast. *See*, State's Exhibit 1, p. 49. Mr. Tracy was  
11 sent by the union and purportedly was provided safety training by them before being sent to work  
12 for Olson Precast. *See*, 1Tr., 103;1-3. Mr. Tracy met Ralph Jamie at the Olson Precast offices at  
13 about 5:00 a.m that day. *See*, 3Tr., pp. 15;1-4, 16;5-8. The two of them then traveled to the jobsite  
14 on Las Vegas Blvd., in a company truck. *See*, 3Tr., p. 16;9-15. Messrs. Jamie and Tracy arrived at  
15 the jobsite at approximately 7:00 a.m. *See*, 3Tr., p. 17;19-21. When they arrived at the jobsite, the  
16 orange cones and caution tape were already on site. *See*, 3Tr., pp. 30;23-24, 31;1-3.

17 Manhole No. 8 was not immediately accessible to Messrs. Jamie and Tracy because the  
18 area was not level. *See*, 3Tr., p. 18;8-16. LVP brought in a backhoe to flatten out the area so that  
19 Messrs. Jamie and Tracy could safely work in and around the manhole No. 8. *See, Id., see also*,  
20 3Tr., pp. 18;8-16, 23;17-24, 24;1-13. However, there was a slope around the manhole, leading  
21 into the manhole. *See*, Respondent's Exhibit E, p. 45, *see also*, 1Tr., pp. 107;9-24, 108;1-9. After  
22 the area was cleared, Messrs. Jamie and Tracy used manhole hooks to remove the cover. *See*,  
23 1Tr., pp. 72;13-24, 73;1. Messrs. Jamie and Tracy then set up the tripod and the air monitoring  
24 equipment. *See*, 3Tr., p. 24;19-23.

25 Mr. Jamie then provided a detailed explanation of the scope of the work to Mr. Tracy.

26 Mr. Hooks: Okay. To the best of your recollection what did you tell [Mr. Tracy]  
27 about the work that he would be needing to do that day?

28 Mr. Jamie: I properly showed him how to fill out the monitor sheet, the confined  
space sheet. He was familiar with the confined space. [Mr. Tracy] just wasn't  
familiar with our forms. So I properly showed him how to fill them out, showed

1 him what goes where and he was to be monitoring me in the hole when I go in,  
2 remove the sand media from inside the hole.

3 Mr. Hooks: Okay. Did you talk to him about the -- well, did you talk to him about  
4 the work that he was going -- so in addition to the forms did you talk to him about  
5 the work that he was going to be doing?

6 Mr. Jamie: Yes.

7 Mr. Hooks: What did you tell him about that work?

8 Mr. Jamie: I told him after lowering me down into the hole his job was to pull  
9 buckets of media, sandblast media out of the hole and, you know, to throw it  
10 outside, empty the bucket, and then he would bring me back a bucket so I could  
11 keep removing the sand media from the bottom of the manhole. *See*, 3Tr., 28;1-14.

12 After Mr. Jamie provided these instructions, Mr. Tracy lowered him into the manhole. *See*,  
13 3Tr., p. 31;14-16. While in the hole, Mr. Jamie repeatedly filled a bucket with the sand debris  
14 located at the bottom of the hole. When the bucket was full, Mr. Tracy would lower a rope into  
15 the hole into which Mr. Jamie would attach the bucket. Mr. Tracy then brought the bucket to the  
16 surface where he would dispose of the media. *See*, 3Tr., pp. 31;34-24, 32;1-4. This process took  
17 about one and one half hours. *See*, 3Tr., 5-8.

18 The work was not incident free. While working at the base of the hole, Mr. Jamie  
19 experienced rocks and dirt falling from above. *See*, 3Tr., pp. 33;10-24, 34;1-2. This occurred  
20 because Mr. Tracy was afraid to stand directly over the entrance to the manhole. *See*, *Id.* Instead,  
21 Mr. Tracy attempted to raise the bucket from a distance, pulling the rope across the rim. This  
22 caused rocks and other debris to fall on Mr. Jamie. *See*, *Id.* Mr. Jamie suggested that Mr. Tracy  
23 could place a plank across the top of the hole, so that he would be less nervous about being close  
24 to the open hole. *See*, *Id.*

25 After being removed from the hole, Mr. Jamie told Mr. Tracy to take a break while he  
26 worked with the Clark County Water Reclamation District inspector, Lorenzo Portillo. *See*, 3Tr.,  
27 p. 34;7-11. Mr. Tracy took his break sitting on a bucket located next to the company truck,  
28 between the compressor and the rear end of the truck between the truck and the hole. *See*, State's  
Exhibit 1, p. 205, *see also*, 3Tr., p. 39;8-15, 42;1-7. It is odd that Mr. Tracy took a break in close  
proximity of the open manhole because he was afraid of it.

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3 Mr. Westfall, the Superintendent for Olson Precast, arrived on site at some time  
4 immediately before or after Mr. Portillo's inspection. *See*, 3Tr., 39;19-23. Mr. Portillo performed  
5 a visual inspection of manhole No. 8 utilizing a flashlight while standing near the unguarded hole.  
6 *See*, State's Exhibit 1., p. 30, *see also*, 1Tr., p. 229;7-13. Messrs. Westfall, Portillo, Jamie and  
7 Tracy all were in close proximity to the unguarded hole during this time period. *See, Id.*

8 After the inspection was completed, the inspector headed to his truck. *See, Id.* Mr. Jamie  
9 walked to the driver's side of a company vehicle to retrieve his tools and get some water. *See, Id.*  
10 Shortly thereafter, Mr. Jamie and Mr. Westfield had a brief discussion near the front of the  
11 company vehicle. *See, Id.* After their conversation, Mr. Westfall started walking back to his truck.  
12 *See*, 3Tr., p. 41;6-8. Mr. Westfall then called out that he believed that Mr. Tracy fell into the  
13 manhole. *See, Id.* Mr. Tracy had fallen approximately 22 feet landing on top of a new sanitary  
14 sewer line. *See*, State's Exhibit 1., p. 30.

15 Manhole No. 8 was a standard manhole consisting of several sections. *See*, Respondent's  
16 Exhibit E, p. 45. The diameter of the precast concrete manhole opening was approximately 39  
17 inches. *See*, State's Exhibit 1, pp. 208, 209. This measurement was taken with the 24 inch wide  
18 cover and the 7 inch wide ring in place. *See*, State's Exhibit 1, p. 30.

19 After the incident, Olson Precast's management personnel were provided with  
20 questionnaires regarding the incident. Mr. Westfall and Mr. Michalsky provided responses  
21 thereto. *See*, State's Exhibit 1, pp. 50-75. In his response, Mr. Westfall offered the following:  
22 First, he expressly admits that he believes that manhole No. 8 was a hole at the time of the  
23 incident. "I consider the open manhole a hole." *See*, State's Exhibit 1, p. 74. This was in response  
24 to the question, "[w]hat methods can be used to protect employees from open holes"? Mr.  
25 Westfall also admitted that the hole was not guarded during and immediately after the September  
26 25, 2017, inspection. *See*, State's Exhibit 1, p. 69.

27 At the January 28, 2020, hearing on the matter, Aldo Lizarraga testified to the condition of  
28 the jobsite at the time of his arrival. Mr. Lizarraga identified State Exhibit 1, p. 201 as a

1 photograph which he took and explained its contents. *See*, 1Tr., pp. 58-60. Three things were  
2 changed from the time of the accident, the cones were moved, the yellow tape added and the  
3 tripod moved. *See*, 1Tr., pp. 58;9-14. 60;5-8. 61;3-10, 97;3-7. Otherwise, the State's photographs  
4 accurately depicted the open manhole, the two berms, the truck and the cones as he understood  
5 they were at the time of the accident.

6 On cross examination, Mr. Hooks challenged Mr. Lizarraga's assertion that the area was  
7 not an excavation.

8 Mr. Hooks: So if a hole refers to an opening with its smallest dimensions not  
9 less than 2 inches in a walking/working surface, does, in your opinion, the  
below-grade gravel surrounding Manhole No. 8 constitute a walking/working  
surface?

10 Mr. Lizarraga: Yes.

11 Mr. Hooks: It's not listed in that definition that you just read, is it?

12 Mr. Lizarraga: What is?

13 Mr. Hooks: The gravel area. That's not a floor or ramp or bridge, is it?

14 Mr. Lizarraga: No.

15 Mr. Hooks: What is it, in your estimation, constitutes a walking/working  
16 surface around the depressed hole around [manhole] No. 8?

17 Mr. Lizarraga: Because [the employees are] walking in that area and they're  
18 also performing work. *See*, 1Tr., p. 113;4-23.

19 Mr. Lizarraga also explained that walking/working surfaces are not limited to the items  
20 enumerated in subsection 1926.500(b) because the definition commences with the phrase,  
21 "including but not limited to."<sup>3</sup> *See*, 1Tr., pp. 156;18-25, 157;1-6.

22 Nick LaFronz, OSHA District Manager, was the State's second witness. *See*, 1Tr., p.  
23 153;10-21. Mr. LaFronz stated that he did not believe that the excavation standard was  
24 appropriate because the manhole was complete. *See*, 1Tr., p. 153;10-21. Further, Mr. LaFronz  
25 explained that none of the hazard associated with excavations were found at the jobsite.

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27 <sup>3</sup>Walking/working surface means any surface, whether horizontal or vertical on which an  
28 employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork  
and concrete reinforcing steel but not including ladders, vehicles, or trailers, on which employees must be  
located in order to perform their job duties. *See*, 29 CFR 1926.500(b)



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Ms. Ortiz: You were asked about excavations. Can you tell us, based on your experience, what the typical hazards are of an excavation?

1 Mr. LaFronz: The most common one is cave-ins where the walls may blow out and  
2 bury somebody or they may be struck by the material. Other hazards might be  
excavated material or other nearby materials that could fall or roll into the  
3 excavation. Certainly there's other hazards.

4 Ms. Ortiz: Based on those two you identified, do you think those hazards are  
present in the worksite as it was on the day of the accident?

5 Mr. LaFronz: Um, I don't really think there's a cave-in hazard there.

6 Ms. Ortiz: And why is that?

7 Mr. LaFronz: Because there's nothing to cave in. *See*, 1Tr., p. 203;1-20.

8 Mr. LaFronz testified regarding the State's calculation of the penalty for the alleged  
9 violation of Citation 1, Item 1. *See*, State's Exhibit 1, pp. 77, 78, *see also*, 1Tr., pp. 168-170. Mr.  
10 LaFronz testified that the State regarded the severity of the alleged violation to be high because  
11 the risk was that one of the Respondent's employees could fall more than 20 feet onto a concrete  
12 surface. *See*, 1Tr., p. 168;4-24. The State also determined that the probability was greater because  
13 of the number of employees exposed to the risk and the frequency of that exposure. *See*, 1Tr., pp.  
14 169;9-15, 170;1-3. The gravity of the alleged violation is a function of the severity and  
15 probability. *See*, 1Tr., p. 170;4-8. The gravity based penalty is the amount assigned before any  
16 adjustments. *See*, 1Tr., p. 170;9-12. In this case the preliminary penalty amount of \$7,000 was  
17 determined. *See*, 1Tr., p. 170;13-15. The penalty was subject to a multiplier of ten times because  
18 the State alleged the violation to be willful. *See*, 1Tr., p. 170;16-21. Accordingly, the final  
19 recommended penalty amount was \$70,000. *See, Id.*

20 Mr. LaFronz also explained why the inspection exception located in 29 CFR  
21 1926.500(a)(1) did not apply for several reasons. First, there is an important qualification to this  
22 exception. The regulation states, "prior to the actual start of construction work or after all  
23 construction work has been completed." *See*, 29 CFR 1926.500(a)(1), *see also*, 1Tr., pp. 205;11-  
24 25, 206;1-4. In this instance, Mr. Portillo's inspection lasted just a couple of minutes and was not  
25 final for the installation of manhole No. 8. *See*, 1Tr., p. 233;10-22. Second, the exception would  
26 not apply to the approximate 90 minutes that Messrs. Jamie and Tracy worked in and around the  
27 manhole before the inspection occurred. *See*, 1Tr., pp. 206;16-25, 207;1-3. Third, no inspection

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1 was occurring at the critical moment when Mr. Tracy fell into manhole No. 8. *See*, 1Tr., pp.  
2 218;18-25, 219;1-2.

3 The Respondent's expert witness, Mr. Stanley was subject to *voir dire* after which the  
4 Board determined that it would allow him to testify at the hearing. *See*, 2Tr., pp. 20-53. At the  
5 hearing, Mr. Stanley testified that he believed that 29 CFR 1926.501(b)(7) was the most  
6 appropriate standard.<sup>4</sup> His opinion was based upon the definition of excavation. *See*, 2Tr., 65;13-  
7 19. "Excavation means any man-made cut, cavity, trench, or depression in an earth surface,  
8 formed by earth removal." *See*, 29 CFR 1926.650(b). As Mr. Stanley explained, at the time of the  
9 incident, manhole No. 8 was an excavation because it was a depression in the surface.

10 Mr. Hooks: This is an excavation because what we still have here is a depression  
11 in Earth's surface formed by earth removal; correct?

12 Mr. Stanley: It's depression and also a cavity the way it was done here. It was  
13 excavated. *See*, 2Tr., p. 73;10-15.

14 Mr. Stanley's believed the definition applied even to holes located within a depression. He  
15 explained his understanding of this concept on cross examination.

16 Ms. Ortiz: Okay. And is it fair to say your testimony is that the manhole is still part  
17 of the excavation?

18 Mr. Stanley: Sure it is.

19 Ms. Ortiz: Okay.

20 Mr. Stanley: It's in the excavation.

21 Ms. Ortiz: So it is possible to have a hole inside of an excavation?

22 Mr. Stanley: A hole inside an excavation is still an excavation. Excavation is more  
23 specific. [A] more-specific standard....We call it a hole. It's an opening. It's a  
24 manway. Its a shaft. The standard [29 CFR 1926.650(b)] talks shafts and pits and  
25 caissons. Not anything but that. A specific standard was put into OSHA that  
26 directly relates to those situations. *See*, 2Tr., pp. 99;19-25; 100;5-12.

27 Mr. Stanley was of the belief that any cavity or depression remained an excavation until  
28 the project was complete.

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29 <sup>4</sup>"If a particular standard is specifically applicable to a condition, practice, means, method,  
30 operation, or process, it shall prevail over any different general standard which might otherwise be  
31 applicable to the same condition, practice, means, method, operation, or process." *See*, 29 CFR  
32 1926.20(d)(1)

1 Ms. Ortiz: So are you in your opinion stating that this is simply an excavation because the  
2 project hasn't been finished.

3 Mr. Stanley: I am saying that once it is completely done and paved over, it now  
4 becomes a hole at that point in time. Like in the street but before that during the process it is your  
5 working in an excavation. You're inside excavation. You are working in an excavation. *See*,  
6 2tr., p. 102; 21-25, 103;1.

7 The problem here was that Mr. Stanley was unable to provide any definition of a  
8 completed project, without which the applicability of the standard was a matter of individual  
9 interpretation.

10 Ms. Ortiz: Can you tell me at what point the Federal and Nevada standard says  
11 when it is an excavation is completed is only when the entire project is done?

12 Mr. Stanley: No. It just makes common sense. That's what everybody addresses as  
13 the standard of care – is what – that is the standard in America and in this type of  
14 construction.

15 Under Mr. Stanley's definition, an excavation would remain an excavation until the  
16 project is complete. At that time, Part 1926 of 29 CFR would no longer apply. Thus, the rules for  
17 holes would not apply in most or all outdoor construction projects.

18 Mr. Stanley also believed that the application of the rules for protecting employees in the  
19 case of excavations were quite limited. First, Mr. Stanley advocated that the duty to protect  
20 employees only arises when an employee's body is physically located above the excavation.

21 Mr. Hooks: With respect to what you believe is the correct standard, 1926.501  
22 (b)(7), at that time, which I believe the records show constituted about an hour and  
23 half, would those conditions be violative of the [1926.501 (b)(7)] standard?

24 Mr. Stanley: The answer is no, as long as people stay away from the edge.

25 Mr. Hooks: The edge is defined as?

26 Mr. Stanley: Where the horizontal meets vertical.

27 Mr. Hooks: So literally at the very edge of the hole.

28 Mr. Stanley: Correct.

Mr. Hooks: By toes touching the plane?

Mr. Stanley: Yes, breaking the plane. *See*, 2Tr., p. 77;5-19.

In other words no protection is required until an employee is actually in the zone of danger.

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1 Mr. Stanley further testified that neither 1926.501(b)(7) nor 1926.501(b)(4) require  
2 employers to take any precautions when no employees were present.

3 Mr. Zeh: I believe it's your testimony that 501(b)(4) doesn't apply and that  
4 501(b)(7) applies only if somebody is at the edge.

5 Mr. Stanley: that's correct.

6 Mr. Zeh: So, if they walk away and they leave the hole like that, is there any duty to  
7 provide any kind of protection?

8 Mr. Stanley: In my opinion there is no duty under (b)(7) nor is it a duty under (b)(4).

9 Mr. Zeh: Why?

10 Mr. Stanley: Because there's no hazard if no one's there. And there's no – if it's  
11 open and obvious; this is open and obvious. If you have an open and obvious  
12 hazard, and no one's there, and it's bright daylight and you're aware – you're a  
13 construction worker, and you're aware of your surroundings, the standards don't  
14 address that. *See*, 2Tr., pp 162;21-25, 163;1-11.

15 Based upon certain aspects of Mr. Stanley's testimony, there was some concern that his  
16 opinions were inconsistent with the Board's and the State's understanding of workers' health and  
17 safety law. Accordingly, the Board was not required to agree with Mr. Stanley's conclusions on  
18 the matter. *See*, Wright and Miller, 29 Fed. Prac. & Proc. Evid. § 6270. ("Even where a court has  
19 determined that expert testimony is admissible under Rule 702, the trier of fact retains the power to  
20 determine what weight should be given to that testimony."), *see also*, *U.S. v. 319.88 Acres of Land,  
21 More or Less, Situate in Clark County, Nev.*, 1980, 498 F.Supp. 763 (Where the opinion of an  
22 expert is based on erroneous assumptions of fact or law, the evidence is incompetent and  
23 insufficient to support a verdict.)

24 Mr. Michalsky was the final witness at the hearing. He testified that the employees at  
25 manhole No. 8 were protected by several methods after the removal of the cover, specifically, an  
26 earth berm, cones, caution tape and the truck with the compressor. *See*, 3Tr., pp. 93;4-17, 100;3-  
27 11. The exclusive purpose of the truck was to keep vehicles from hitting employees should one  
28 accidently enter the work area. *See*, 3Tr., pp. 132;17-24, 133;1-24.

Mr. Michalsky was questioned about an illustration of a manhole. *See*, Respondent's  
Exhibit E, p. 45. Mr. Michalsky explained that the project was not complete at the time of the  
accident because the entrance to the manhole was approximately two feet below grade. *See*, 3Tr.,

1 p. 108;3-12. Mr. Michalsky said that the excavation was still ongoing and there was not a flat  
2 walkable surface. *See*, 3Tr., pp. 108;19-24, 109;1-3. Mr. Michalsky testified that the area around  
3 the manhole was not a walkable/workable surface because it was not a paved finished surface. *See*,  
4 3Tr., p. 115;1-18. Mr. Michalsky agreed with Mr. Stanley that the area was an excavation  
5 regardless of whether there was a structure in it. *See*, 3Tr., pp. 119;6-17, 115;2-18.

6 Ms. Ortiz: You were asked if you agreed with Nevada OSHA's reasoning for  
7 saying this is not an excavation. Do you recall that?

8 Mr. Michalsky: Yes.

9 Ms. Ortiz: Can you explain for us why you disagree?

10 Mr. Michalsky: It is an excavation. It's a cavity in the ground. The top still is,  
11 it's not a finished grade yet within the roadway. There's still putting pipeline in  
12 right behind us at that occurrence and it's part of ongoing excavation that the  
13 structure is within.

14 Ms. Ortiz: Okay. And you said that because of that -- those reasonings (sic) that  
15 you also commented there was no asphalt at the top. Is that part of that  
16 reasoning?

17 Mr. Michalsky: Yes. It wasn't within a paved roadway surface, a finished  
18 surface.

19 Ms. Ortiz: Okay. And was ...it accurate to say that you said that if it was that  
20 ...would change it?

21 Mr. Michalsky: If it was within a paved surface, yes, that would change the  
22 situation.

23 Ms. Ortiz: And can you explain to us what you meant by that.

24 Mr. Michalsky: Because if it's a paved surface it's a level walkable surface. *See*,  
25 3Tr., pp. 114;21-24, 115;1-18.

26 Mr. Michalsky's response here was at odds with the definition of a walking/working  
27 surface. In his mind only paved and/or finished surfaces are included in the definition. The  
28 regulation contains no such language. Moreover, it is fairly explicit that it is intended to cover a  
broad range of conditions. "Walking/working surface means **any surface**, whether horizontal or  
vertical on which an employee walks or works..." *See*, 29 CFR § 1926.500 (Emphasis added).  
Further, there would be a significant inconsistency for this important facet of the construction  
regulations to only apply to finished work areas.

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1 Mr. Michalsky was questioned about the protections provided at in the proximity of  
2 manhole No. 8 by the truck, cones, berm and tape. *See*, 3Tr., pp. 132-136. However, all of these  
3 purported protections did not serve to physically protect the Respondents and/or other persons.  
4 Instead, all of them were there as warning devices to prevent people from accessing the hazzard.  
5 *See, Id.*

6 Mr. Michalsky provided his opinion that there were no feasible methods to provide fall  
7 protection around the manhole. *See*, 3Tr., pp. 100;17-24, 101;1-14. Mr. Michalsky also claimed  
8 that the use of a lift incorporated into the guardrails would not work because it violated the  
9 manufacturer's instructions for use. *See*, 3Tr., pp. 101;15-24, 102;1-11. However, no testimony  
10 was provided as to whether the Respondent made any effort to bring the job into compliance with  
11 the manufacturer's instructions so that the guardrail lift system could be employed.

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

#### 14 CONCLUSIONS OF LAW

15 In this case, the burden is on the State to prove its *prima facie* case against Olson Precast  
16 by a preponderance of the evidence. *See*, NAC 618.788(1), *see also*, *Original Roofing Company*  
17 *LLC v. Chief Administrative Officer of the Nevada OSHA*, 442 P.3d 146, 149 (Nev. 2019). The  
18 State is obligated to demonstrate the alleged violation by a preponderance of the reliable evidence  
19 in the record. Mere estimates, assumptions and inferences fail this test. Conjuncture is also  
20 insufficient. Findings must be based upon the kind of the evidence which responsible persons are  
21 accustomed to rely in serious affairs. *See*, *William B. Hopke Co., Inc.* 1982 OSHARC LEXIS 302  
22 \* 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ)). The Board's decision must be based on  
23 consideration of the whole record and shall state all facts officially noticed and relied upon. 29  
24 CFR 1905.27(b). *Armor Elevator Co.*, 1 OSHA 1409, 1973-1974 OHSD ¶ 16, 958 (1973). *Olin*  
25 *Construction Inc. v. OSHARC and Peter J Brennan, Secretary of Labor*, 525 F.2d 464 (1975).

26 Pursuant to NAC 618.788, the States carries the burden of proof in demonstrating a  
27 violation of OSHA law by establishing: (1) the applicability of the OSHA regulation; (2)  
28 noncompliance with the OSHA regulation; (3) employee exposure to a hazardous condition; and

1 (4) the employer's actual or constructive knowledge of the violative conduct or consideration. *See*,  
2 *Original Roofing Co., LLC v. Chief Admin. Officer of Occupational Safety & Health Admin.*, 135  
3 Nev. 140, 143, 442 P.3d 146, 149 (2019); *Secretary of Labor v. Atl. Battery Co.*, 16 BNA OSHC  
4 2131, 2135, 1994 WL 682922 (No. 90-1747, 1994).

5 Turning to the citation for the alleged violation of 29 CFR 1926.501(b)(4)(i), the State  
6 provided evidence supporting its *prima facie* case for the alleged violations. The standard applied  
7 because it mandates the use of fall protection equipment around holes more than six feet deep.  
8 Citation 1, Item 1, alleged a violation of 29 CFR 1926.501(b)(4)(i), Fall Protection. It provides:  
9 “...(4) Holes (i) Each employee on walking/working surfaces shall be protected from falling  
10 through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall  
11 arrest systems, covers, or guardrail systems erected around such holes.”

12 The State alleges that the opening within the earth’s surface through which the decedent  
13 fell met the definition of a “hole” as defined at 29 CFR 1910.21(b). There, “hole” “... means a  
14 gap or open space in a floor, roof, horizontal walking-working surface, or similar surface that is at  
15 least 2 inches (5 cm) in its least dimension.” The State then contended that 29 CFR  
16 1926.501(b)(4)(i) applied as the parties were dealing with a hole.

17 Olson and its expert witness, Mr. Stanley, argued that the opening in the earth through  
18 which the decedent fell to his death, was not a hole but an excavation. Olson Precast, thus,  
19 pointed to 29 CFR 1926.502(b)(7)(ii) which addresses fall protection in connection with  
20 excavations. This regulation provides: “Excavations: ...(ii) Each employee at the edge of a well,  
21 pit, shaft, and similar excavation 6 feet (1.8 m) or more in depth shall be protected from falling by  
22 guardrail systems, fences, barricades, or covers.” The term “excavation” means “... any  
23 man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.” 29  
24 CFR 1926.650(b). According to Olson Precast, this was an excavation situation, rather than a  
25 hole situation, and that, therefore, 29 CFR 1926.501(b)(7)(ii) should apply. In fact, Olson Precast  
26 introduced multiple documents and provided significant testimony attempting to prove 29 CFR  
27 1926.501(b)(7)(ii) applied. Accordingly, the Board was required to decide which Regulation, 29  
28 CFR 1926.501(b)(4)(i), “holes,” or 29 CFR 1926.501(b)(7)(ii), “excavations,” applies.



1           When interpreting statutes, the concepts of verticality and the horizontal come into play.  
2 Vertical standards apply to a particular industry or particular conditions, standards and the like.  
3 One could think of the concept of verticality as if it were a silo, cabining with specificity a  
4 situation, condition and the like, walling off all other concerns. Horizontal standards are more  
5 general, applicable to multiple industries. 29 CFR 1910.5(c). When a hazard is covered by both  
6 a vertical and horizontal standard, the vertical obtains based upon the notion, the specific prevails  
7 over the general. 29 CFR 1910.5(c)(1). 29 CFR 1910 is basically a general series of Regulations  
8 as its title indicates. *See*, “OSHA General Industry-29 CFR 1910.” On the other hand, according  
9 to 29 CFR 1910.12 (a),

10           ... [t]he standards prescribed in part 1926 of this chapter are adopted as  
11 occupational safety and health standards under section 6 of the Act and shall  
12 apply, according to the provisions thereof, to every employment and place of  
13 employment of every employee engaged in construction work. Each employer  
14 shall protect the employment and places of employment of each of his employees  
15 engaged in construction work by complying with the appropriate standards  
16 prescribed in this paragraph.

17           The Regulations offered up by each party land in Part 1926. They are found in a chapter  
18 of the Regulations marked by verticality. It goes further. 29 CFR 1926.501 comes under the  
19 specific heading of “1926.500-503 M. Fall Protection.” The Regulations then go more specific.  
20 “1926.501 Duty to have fall protection.” The specific Regulations, themselves, fall under the  
21 duty to have fall protection. One addresses fall protection for situations involving “holes,” 29  
22 CFR 1926.501(b)(4)(i). The other also addresses fall protection, but directed at falls in  
23 connection with excavations, 29 CFR 1926.501(b)(7)(ii).

24           Given this structure of the two Regulations in relation to each other and the internal  
25 language of each, this case presents two vertical regulations. One treats falls in holes and the  
26 requisite protections. The other treats falls in excavations and the requisite protections. Since  
27 both are vertical regulations, this is not a situation where one trumps the other or they jointly  
28 apply. Rather, here, two vertical regulations give rise to the situation where it must be  
determined based upon the facts and circumstances, which Regulation is the more appropriate  
one to apply.

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2 This inquiry required the Board to assess what is the most dominant feature or  
3 characteristic of the situation. Is this a “hole” for which subsection (b)(4) of 29 CFR 1926.501  
4 mandates protection or is this an “excavation,” for which subsection (b)(7) of 29 CFR 1926.501  
5 mandates protection? Is this a situation, where there is excavation that took place that just  
6 happened to have a hole in the middle of it? In the alternative, is this a situation where there is a  
7 hole that has some earth that was moved around the hole? Another way to look at the problem is  
8 to analyze what condition presented the greater threat to safety, the presence of a hole or the  
9 excavation work around the hole? In other words, what was the condition from which protection  
10 is really needed? This required the Board to conduct meaningful analysis of the conditions on the  
11 ground, to determine which Regulation should be applied to determine whether the Respondent  
12 may have violated a regulation.

13 In this instance the Board focused upon the permanent nature of the manhole. *See*, 4Tr.,  
14 pp. 18;19-24, 19;1-12. Access to the area required removal of manhole cover and ring. *See*, 4Tr.,  
15 p. 19;19-24. As Board Member Macias explained;

16 I think .... when you’re talking about shoring and you’re talking about a trench box  
17 and excavation, you’re talking about a temporary structure. And with this manhole  
18 it’s a permanent structure that’s going to be there. It’s not going anywhere. It’s  
19 made there for people to continue working in it, continue doing maintenance in it at  
20 future times. *See*, 4Tr., p. 19;3-9.

19 Chairman Weber agreed on this point arguing that excavation was complete at the time of  
20 the accident.

21 But for all intents and purposes the excavation part of it was done. There wasn’t  
22 like a trench. There wasn’t an open trench or an excavation that I saw in any of the  
23 photos. Now, they had scrapes over the dirt vac (sic), around the edge to be able  
24 to get access to the hole and to get down in there which then left this sloped kind  
25 of embankment around the edge a little bit. *See*, 4Tr., p. 20;5-8.

24 Additionally, there was the walking/working surface clause of the regulation. Specifically,  
25 the regulation provides, “each employee on a walking/working surface shall be protected....” Mr.  
26 Jamie’s testimony made it clear that LVP used a backhoe to create a walking/working surface  
27 from which he could be lowered into manhole No. 8. *See*, 3Tr., pp. 18;17-16, 23;22-24, 24;1-10.

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2 Finally, there was the express admission of Mr. Westfall that it was a hole. “I consider the  
3 open manhole to be a hole.” *See*, State’s Exhibit 1, p. 74. Based upon the evidence presented the  
4 State made its *prima facie* case that the standard, 29 CFR 1926.501(b)(4)(i), is applicable.

5 The Respondent violated the standard. The Respondent did not utilize fall preventive  
6 equipment without which any of its employees could fall into the hole for a distance of more than  
7 six feet. That’s exactly what happened. Lacking fall protective equipment, Mr. Tracy fell into the  
8 manhole which was 22 feet deep and fatally impacted upon the lower level. *See*, State’s Exhibit 1,  
9 pp. 61, 206.

10 While the occurrence of an accident is evidence of a violation of the regulatory standard,  
11 it is not *per se* proof that the standard was violated. *See, Koppers Co., Inc.*, 1 OSHRC 666  
12 (O.S.H.R.C. 1972); *Secretary of Labor v. American Roof Slab Company, Inc.*, 1 OSAHRC 481  
13 (O.S.H.R.C.A.L.J. 1972). Instead, the State must offer evidence establishing that circumstances  
14 existed in the workplace which were likely to give rise to the alleged hazard. *See, Pratt &*  
15 *Whitney Aircraft v. Donovan*, 715 F.2d 57, 63-67 (2<sup>nd</sup> Cir., 1983).

16 Here, Olson Precast did not utilize any guardrails, netting or PFAS. *See*, 1Tr., p. 33;4-6,  
17 43;1-5, 1Tr., pp. 114;20-25, 51;13-14. Instead, the Respondent used a tripod, cones, berms and a  
18 truck to guard the hole. *See*, 1Tr., p. 34;4-6, 1Tr., p. 88;19-15. The intent of the Respondent in  
19 using cones, berms, etc., was to protect the general public and other employees. *See*, 1Tr.,  
20 160;10-24. However, no efforts were taken to protect the employees working in and around the  
21 hole. *See, Id.* Accordingly, the standard was violated.

22 The Respondent exposed its employees. Specifically, Messrs. Westfall, Jamie and Tracy  
23 were exposed to the hole without any fall prevention devices employed. *See*, State’s Exhibit 1, p.  
24 30, *see also*, 1Tr., p. 229;7-13. Mr. Tracy was exposed for a period of about an hour and one half.  
25 *See*, State’s Exhibit 1, pp. , *see also*, 3Tr., p. 32;5-8. During this time, he was shaken by the  
26 experience. *See, Id.* The State presented evidence of the employer’s knowledge of the violative  
27 condition.

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2           The knowledge element can be established by demonstrating “that the employer either  
3 knew or with the exercise of reasonable diligence, could have known of the presence of the  
4 violative condition.” *Original Roofing, supra*, at 143 quoting *Pride Oil Well Serv.*, 15 BNA  
5 OSHC 1809, 1814 (No. 86-692, 1992). In this case, the State provided evidence that the  
6 Respondent possessed actual knowledge of the violative condition.

7           Mr. Westfall said that he and Mr. Michalsky both knew that the trigger height for fall  
8 protection in the construction industry is six feet. *See*, State’s Exhibit 1, pp. 40, 53, 65. Mr.  
9 Michalsky knew that open manholes are dangerous because he stated that the manhole is covered  
10 when the employees go to lunch and when they are finished for the day. *See*, 3Tr., 142;17-24,  
11 143;1-7. Mr. Michalsky explained that this was done because the workers were not there to deter  
12 others from possibly coming near the hole. *See, Id.*

13           Mr. Jamie would also be considered to be Mr. Tracy’s supervisor in this matter. *See, A.P.*  
14 *O'horo Co.*, 14 O.S.H.R.C. 2004, (Jan. 31, 1991) (An employee who has been delegated authority  
15 over other employees, even if only temporarily, is considered to be a supervisor for the purposes  
16 of imputing knowledge to an employer.) Here, Mr. Jamie gave a series of detailed instructions to  
17 Mr. Tracy about the job they were to perform on the morning of August 25, 2017. *See*, 3Tr. 28;1-  
18 4. Mr. Jamie knew that Mr. Tracy was afraid of the open manhole and that his fear was adversely  
19 affecting his work. *See, Id.* Sadly, Mr. Jamie’s proposed solution was to place a board over the  
20 manhole. *See*, 3Tr., 33;10-24, 34;1-2.

21           The Respondent attempted to invoke the defense of infeasibility. *See*, 3Tr., pp. 100-101.  
22 In making this affirmative defense, Olson Precast had the burden to prove that there was no safe  
23 way to protect its employees from the danger presented by manhole No. 8. *See, A.J. McNulty &*  
24 *Co. v. Sec'y of Lab.*, 283 F.3d 328, 334 (D.C. Cir. 2002). In fact, the State was able to provide  
25 information regarding a personal fall arrest system (PFAS) which mounts on a guardrail. *See*,  
26 State’s Exhibit 1, p. 278, *see also*, State’s Exhibit 2, pp. 307-330. The device is known as a  
27 MSA/XTIRPA Manhole Guard System. *See, Id.* Olson Precast seemed to be unaware of the  
28 existence of this device up until the closing conference, long after the date of the incident. *See*,

1 3Tr., pp. 95;18-24, 96:1-14. Thus, the Respondent failed to meet its burden of proof at the outset.

2 Even after learning of the device, the Respondent appears to have dismissed the option  
3 without inquiry. *See*, 3Tr., pp. 101;15-24, 102;1-11. To wit, the device requires a hard and level  
4 surface. *See*, State's Exhibit 2, p. 325. However, the Respondent made no effort to create a  
5 workable surface at manhole No. 8. *See*, 3Tr., pp. 18-24. Accordingly, the defense of infeasibility  
6 was not available to Olson Precast.

7 The Board also considered whether the citation was to be considered willful. The standard  
8 for finding an employer's conduct to be willful requires one of two states of mind, either an  
9 intentional disregard of, or plain indifference to OSHA's requirements. *A.E. Staley Mfg. Co. v.*  
10 *Sec'y of Lab.*, 295 F.3d 1341 (D.C. Cir. 2002). None of the Board Members believed that Olson  
11 Precast acted with intentional disregard to health and safety mandates. *See*, 4Tr., pp. 23-25.

12 The indifference prong was more problematic. As Board Member Macais explained:  
13 I don't believe it to be willful. I believe if it was willful or anything to that extent that they  
14 wouldn't have provided a fence. They wouldn't have provided the tripods. I believe that  
15 they believed that they were protecting their employees for the type of work that they  
16 were doing. So I believe it was a citation, a serious citation but I do not believe it was  
17 willful. *See*, 4Tr., pp. 23;19-24, 24;1.

18 Board Member Milligan agreed with this assessment. *See*, 4Tr., p. 24, 2-1.

19 Board Member Milligan moved to uphold the citation as a serious but not a willful violation of 29  
20 CFR 1926.501(b)(4)(i). *See*, 4Tr., p. 24;14-18. The motion was seconded by Member Spielberg.  
21 *See*, 4Tr., pp. 24;24, 25;1. The motion was adopted upon a vote of 4 in favor of the motion and 1  
22 against the motion. *See*, 4Tr., p. 25;4-23. Chairman Weber opposed the motion because he  
23 believed the Respondent's conduct was sufficient for the violation to be considered willful. *See*,  
24 *Id.* Olson Precast was accordingly assessed the fine of \$7,000.

25 On November 13, 2024 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 the 3 current members of  
28 the Board, to-wit, Chairman Jorge Macias, Board Secretary William Spielberg and Board  
Member, Scott Fullerton. Tyson Hollis and Gled Bautista were ineligible to vote. Upon a motion  
by William Spielberg, seconded by Scott Fullerton, the Board voted 3-0-2. (Tyson Hollis and

1 Gled Bautista abstaining as they were not members of the Board or in attendance when the matter  
2 was decided), to approve this Decision of the Board as the action of the Board and to authorize  
3 Chairman Jorge Macias, after any grammatical or typographical errors are corrected, to execute,  
4 without further Board review, this Decision on behalf of the Nevada Occupational Safety and  
5 Health Review Board.

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

8 Dated this 26<sup>th</sup> day of November, 2024.

NEVADA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

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By: /s/Jorge Macias  
Jorge Macias, Chairman

NOTICE: Pursuant to NRS 233B.130, any party aggrieved by this Final Order of the Nevada Occupational Safety and Health 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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**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 *Decision of the Board*, 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 East College Pkwy., Suite 110  
Carson City, NV 89706.

Dalton Hooks, Esq.  
Hooks Meng & Clement  
2820 West Charleston Blvd., Suite C-23  
Las Vegas, NV 89102

Ms. Meredith Tracy  
8916 Ochoa Street  
Las Vegas, NV 89143

Dated this 4<sup>th</sup> day of December, 2024.

/s/Karen Kennedy  
Employee of  
The Law Offices of Charles R. Zeh, Esq.

S:\Clients\OSHA\LV 18-1939, Olson Precast Co\LV 18-1939 ADA Final Decision.wpd