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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.**

**HARBER COMPANY INC. dba  
MOUNTAIN CASCADE OF NEVADA,**

**Respondent.**

**Docket No. LV 24- 2243**

**Inspection No. 1671674**

**FILED  
April 14, 2026  
OSH REVIEW BOARD  
By: K Kennedy**

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

This case arose out of a self referral created by OSHA Safety Specialist, Boa Merrell. *See*, State’s Exhibit 1, p. C-4. On May 18, 2023, Ms. Merrell went to the job-site located at northeast corner of Deer Springs Way and Fort Apache Road in Las Vegas, Nevada. *See*, State’s Ex. 1, p. C-15. There, Ms. Merrell witnessed two employees working in a trench with varying depths of from approximately 7 feet to approximately 18 feet. *See*, State’s Ex. 1, pp. C-15, C-16. At the time of the inspection, the excavation did not contain any cave-in protection. *See*, State’s Exhibit 1, pp. C-63, C-64, C-66. As a result of this self-referral, Ms. Merrell conducted an inspection of the reported location. *See*, State’s Exhibit 1, p. C-16. The inspection resulted in the issuance of a citation for violations of 29 CFR 1926.651(j)(2) and 29 CFR 1926.652(a)(1). *See*, State’s Exhibit 1, pp. C-26, C-30.

The matter came before the Nevada Occupational Safety and Health Review Board (the Board) for hearing on December 13, 2024. The hearing was conducted in furtherance of a duly provided notice. *See*, Notice of Hearing dated August 28, 2024 and rescheduled on November 15, 2024. In attendance to hear the matter and deliberate thereon were Board Chairman Jorge Macias,

1 Board Secretary William Spielberg and Board Members Scott Fullerton, Gled Bautista and Tyson  
2 Hollis. *See, Tr.*, p. 2.<sup>1</sup> As there were five members of the Board present to decide the case, with at  
3 least one member representing management and one member representing labor in attendance, a  
4 quorum was present to conduct the business of the Board.

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

9 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety  
10 and Health Administration of the Division of Industrial Relations of the Department of Business  
11 and Industry (hereinafter, the State or Nevada OSHA), appeared on behalf of the Complainant (the  
12 State). *See, Tr.*, p. 6;11-13. Harber Company Inc., dba Mountain Cascade of Nevada (hereinafter,  
13 Harber Company or the Respondent) was represented at the hearing by Perry P. Poff, Esq., Donnell,  
14 Melgoza & Scates, LLC. *See, State's Exhibit 1, p. C-47, see also, Tr.*, p. 6;17-18. Also present was  
15 Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., in his capacity as the Board's legal  
16 counsel. *See, Tr.*, p. 1;1-3.

17 The State issued a Citation and Notification of Penalty (Citation) on August 23, 2023,  
18 alleging violations of 29 CFR 1926.651(j)(2) and 29 CFR 1926.652(a)(1). *See, State's Exhibit 1,*  
19 *pp. C-35-C-46. Citation 1, Item 1,* alleged that the Respondent did not ensure its employees were  
20 protected from excavated or other materials or equipment that could pose a hazard by falling or  
21 rolling into excavations. The spoils piles abutted the edge of the excavation, ran along the  
22 excavation, and were up to approximately 2 feet 5 inches tall. *See, State's Exhibit 1, p. C-67.*  
23 Citation 1, Item 1, charged a serious violation of 29 CFR 1926.651(j)(2), as stated below:

24 The Employer did not ensure employees were protected from excavated or other  
25 materials or equipment that could pose a hazard by falling or rolling into  
26 excavations. The spoils piles abutted the edge of the excavation, ran along  
approximately the entire length of the excavation, and were up to approximately 2  
feet 5 inches tall. An employee performed work in the excavation to install a pipe for

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27 <sup>1</sup>“Tr.” stands for the transcript of the hearing conducted on December 13, 2024, followed by the page  
28 and line number where the matter cited can be found.

1 electrical conduits and placed marking tape above the pipe. A second employee  
2 assisted in placing the marking tape. The employees were exposed to serious injuries  
3 such as bruising, lacerations, contusions, and fractures in the event the spoils pile fell  
4 into the excavation.

5 Citation 1, Item 2, charged a serious violation of 29 CFR 1926.652(a)(1), as stated below:

6 The Employer did not ensure each employee in an excavation was protected from  
7 cave-ins by an adequate protective system. The excavation was not made entirely in  
8 stable rock and the excavation was up to approximately 18 feet in depth. Soil  
9 analysis determined the soil type was Type C, from the ground level to  
10 approximately 2 ½ feet in depth, and Type A, from 2 feet to 20 feet in depth. Cave-  
11 in protection was designed by a registered professional engineer in accordance with  
12 paragraph (b), option (4). Excavation plans established the excavation was 20 feet  
13 long, 12 feet wide, and 25 feet maximum depth, protected from cave-ins using trench  
14 shields, and sloped back to ground level from 8 feet maximum depth with vertical  
15 walls. Additionally, in the excavation where the depth was up to 25 feet, spoil piles  
16 were to be set back 9 feet from the edge of the excavation, and in the trench where  
17 the depth was up to 8 feet, spoil piles were to be set back 4 feet from the edge of the  
18 trench. The cave-in protection that was designed by a registered professional  
19 engineer was not executed per the design. The trench shield was removed to prevent  
20 it from getting stuck when sand slurry was poured into the excavation to encase a  
21 pipe located approximately 18 feet in depth. Spoil piles were abutted along the edges  
22 of the excavation and trench. An employee entered the excavation, after slurry was  
23 poured, to install pipe for electrical conduits and placed marking tape above the pipe.  
24 A second employee assisted in placing the marking tape. The employees were  
25 exposed to serious injuries or death in the event of a cave-in.

26 On August 29, 2023, Mr. Poff, sent the Respondent's notice of intent to contest the Citation.

27 *See*, State's Exhibit 1, pp. C-47 - C-50. On September 15, 2023, the State filed and served its  
28 Complaint. *See*, State's Exhibit 1, pp. C-49 - C-54. On September 21, 2023, Mr. Poff answered the  
Complaint for the Respondent. *See*, State's Exhibit 1, pp. C-55- C-59. Therein, the Respondent  
admitted and/or denied the allegations of the State's Complaint and posited certain affirmative  
defenses. *See, Id.*

At the hearing on the matter, the State offered for admission its Exhibits numbered 1 and 2,  
consisting of a total of 132 pages. *See*, Tr., p. 6;14-16. The Respondent objected to the admission  
of pages C-4, C-15 and C-26 of the State's Exhibit 1. *See*, Tr., pp. 6;22-25, 7;1-4. The Chairman  
admitted the State's Exhibits 1 and 2, allowing the Respondent to continue its objection to when  
these pages are offered into evidence. *See*, Tr., p. 7;10-19.

The State's Exhibit 1, page C-4 was admitted into evidence after Ms. Merrell described her  
observations which were contained in the document. *See*, Tr., p. 17;3-16. The Respondent did not  
object to the admission of the State's Exhibit 1, pages C-15 and C-26. *See*, Tr., pp. 19;12-24,

1 20;1-6. Therefore, there were deemed admitted without objection.

2 The Respondent offered for admission its exhibits A through I consisting of 62 pages. *See*,  
3 Tr., p. 7;20-25. The State objected that the Respondent's Exhibit A contained redundant material.  
4 *See*, Tr., p. 8;3-6. The State's objection was overruled and all of the Respondent's exhibits were  
5 admitted into evidence. *See*, Tr., p. 8;9-13.

6 At the hearing, the State presented the testimony of Ms. Merrell, Angel Baldobinos and Jose  
7 Guzman. *See*, Tr., pp. 14-145. The Respondent's witness was Joe Turner, a registered professional  
8 engineer. *See*, Tr., pp.148-167.

### 9 **FINDINGS OF FACTS**

10 Harber Company is a Nevada domestic corporation based in Las Vegas, Nevada. *See*,  
11 State's Exhibit 1, pp. C-1, C-2, C-3. The construction project at issue was an excavation located at  
12 the northeast corner of Deer Springs Way and Fort Apache Road in Las Vegas, Nevada. *See*,  
13 State's Exhibit 1, p. C-5. The excavation consisted primarily of a large rectangular area located in  
14 the middle of the west bound lanes of Deer Springs Way. *See*, State's Ex., 1, pp. C-70, C-71. The  
15 excavation narrowed at its east end. *See, Id.* The east side of the excavation was an approximate  
16 8-foot-wide trench which sloped from ground level to a depth of approximately 7 feet. *See*, State's  
17 Ex. 1, pp. C-78-C-83. The trench continued to slope down to the west side of the excavation. *See*,  
18 State's Ex., 1, pp. C-72, C-73. The deepest part of the excavation, its southwest corner, was  
19 estimated to be 18 feet deep. *See*, State's Ex., 1, pp. C-71, C-83.

20 Harber Company used a professional engineer who had created an Engineered Excavation  
21 Plan (Plan). *See*, Respondent's Exhibits C, D. The Plan expressly called for shielding at certain  
22 elevations of the excavation. *See, Id.* The Plan identified the dimensions of the shielding to be used  
23 to support the vertical walls of the excavation. *See*, Respondent's Exhibit E. Unfortunately, at the  
24 time of the inspection, the vertical walls of the deep end of the excavation were not shored up and  
25 no trench shields were installed. *See*, State's Ex. 1, pp. C-63, C-64, C-66.

26 On the morning of May 18, 2023, Ms. Merrell and her supervisor, Frank Lawrence, were  
27 conducting observations from the public roadway. At the Deer Springs Way job site, they observed  
28 at least one of Harber Company's employees working under what appeared to be unsafe conditions.

1 See, Tr., pp. 15;18-21, 18;1-2. From the vantage point adjacent to the excavation, Ms. Merrell  
2 witnessed the Respondent's employees standing around the perimeter of the excavation. Two  
3 employees were observed inside the excavation. See, State's Ex. 1, pp. C-18, C-61 see also, Tr., p.  
4 16;15-21. A front loader was observed with soil in its bucket within close proximity of the trench.  
5 See, State's Ex. 1, pp. C-15, C-60, C-61. Live traffic was next to the excavation. See, *Id.* There were  
6 five distinct piles of dirt or other material in the immediate proximity to the excavation. See, State's  
7 Ex. 1, pp. C-62, C-69, C-81, C-83.

8 Along the length of the excavation, east to west, conduit was run along the bottom. See,  
9 State's Ex. 1, p. C-75. Next to the conduit, at least one person's foot prints were observed inside the  
10 deep section of the excavation. See, State's Ex. 1, pp. C-75, C-76, C-77, C-84, C-85. The State  
11 alleged that the foot prints were made at a time when no shoring was present because the footprints  
12 were on top of slurry. See, State's Ex. 1, pp. C-15, C-16.

13 Ms. Merrell interviewed several of the Respondent's employees. Angel Baldobinos was the  
14 foreman at the job site. See, State's Ex. 1, pp. C-18. The State photographed Mr. Baldobinos  
15 directing the loader's placement of material into the excavation. See, State's Ex. 1, pp. C-60, C-61.  
16 Mr. Baldobinos told the inspector that Jose Guzman was the only person in the trench at the time  
17 the photographs were taken. See, *Id.* However, Mr. Guzman contradicted this statement.

18 Mr. Baldobinos also told the inspector that shielding was present inside the excavation  
19 before work was started on the day of the inspection. However, the shielding was removed before  
20 the inspectors arrived at the job site. See, State's Ex. 1, pp. C-18, C-19. The shielding was removed  
21 to facilitate the placement of slurry in the excavation. See, *Id.*

22 Mr. Baldobinos failed to inform the inspector that the Respondent had obtained an  
23 Engineered Excavation Plan (Engineering Plan) for this job. See, Tr., pp. 79;17-24, 80;1-12. The  
24 Engineering Plan called for shields to be installed at depths of over 8 feet. See, Respondent's Ex. D.  
25 Further, it required that spoils piles be located at least 4 feet from the side of the excavation. See,  
26 Respondent's Ex. C.

27 The next employee interviewed was Mr. Guzman. See, State's Ex. 1, p. C-20. Mr. Guzman  
28 identified himself in the photo. See, State's Ex. 1, pp. C-20, C-60, C-61. Only his hard hat could be

1 seen because he was standing inside of the excavation. *See*, State's Ex. 1, p. C-20. Mr. Guzman  
2 stated that he was standing at a depth of 5 feet. *See Id.* At the time, he was installing a conduit pipe  
3 and laying down orange marking tape for the fiber optic lines. *See, Id.* Mr. Guzman stated that he  
4 had been in the deep end of the excavation before the pipe was installed. *See, Id.* However, the  
5 shielding was in place while he installed the pipe. *See, Id.*

6 Mr. Guzman identified the other person in the excavation as Noah Scharaga, as an  
7 independent contractor. *See, Id.* Mr. Scharaga was inside of the excavation to reposition some of  
8 the sand which had been placed there by the loader. *See*, State's Ex., 1, p. C18. Mr. Scharaga also  
9 aided Harber Company's employees with the project. *See, Id.*, He told the investigator that people  
10 had been in the excavation to set up the conduit so that the fiber optic lines could be installed. *See,*  
11 *Id.* The shielding was removed after this work was completed. *See, Id.* Mr. Scharaga said that he did  
12 not recall anyone going inside the excavation after the shield was removed.<sup>2</sup> *See, Id.*

13 The State also interviewed three of the workers of Mr. Baldobinos' crew, Juan Veladora,  
14 Marcos Perez and Estefan Macias. *See*, State's Ex. 1, pp. C-21, C-22, C-23. All of these employees  
15 stated that they have never witnessed anyone in the trench without shields. *See, Id.*

16 At the hearing, Ms. Merrell testified for the State regarding her observations and employee  
17 interviews. *See*, Tr., pp. 14-81. Further, she explained the calculation of the penalties assessed  
18 against Harber Company. *See, Id.* Starting with Item 1, Ms. Merrell explained that it was viewed  
19 as a serious violation. *See*, Tr., p. 49;1-5. This was because material falling from a height of 18 feet  
20 could cause serious harm. *See, Id.* Ms. Merrell testified regarding the State's calculation of the  
21 penalty for the alleged violation of Citation 1, Item 1. *See*, State's Exhibit 1, pp. C-26, C-27, *see*  
22 *also*, Tr., pp. 49-50. Ms. Merrell testified that the State regarded the severity of the alleged  
23 violation to be medium because the average height of the spoils pile was 2.5 feet, *i.e.*, there was a  
24 limited amount of material at issue. *See*, Tr., p. 49;11-20. The State also determined that there was a  
25 lesser probability or likelihood of an accident, because a limited number of employees were

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27 <sup>2</sup>The assumption is that Mr. Scharaga meant to say that no one went into the deep end of the  
28 excavation. This he admits to being in the shallow end of the excavation at the time the photograph was  
taken. *See*, State's Ex., p. C-25.

1 exposed to the risk and the frequency of that exposure was limited. *See*, Tr., pp. 49;21-24, 50;1-6.  
2 The gravity of the alleged violation is a function of the severity and probability. In this instance, a  
3 lesser probability and a medium severity resulted in moderate gravity. *See*, State's Ex. 1, p. C-26,  
4 *see also*, Tr., p. 50;7-14. The gravity based penalty is the amount assigned before any adjustments.  
5 *See*, Tr., p. 50;7-14. In this case the preliminary penalty amount of \$8,929 was determined. *See*, Tr.,  
6 p. 50;18-20. The penalty was discounted by 30% due to the relatively small size of the company,  
7 *See*, State's Ex. 1, p. C-27, *see also*, Tr., p. 50;21-24.

8 Mr. Poff questioned Ms. Merrell regarding whether Harber Company should have been  
9 given additional discounts. *See*, Tr., pp. 68-71. Mr. Poff asked why Harber Company did not  
10 receive a good faith adjustment. *See*, State's Exhibit 1, pp. C-26, C-27, *see also*, Tr., p. 68;8-12. Ms.  
11 Merrell explained that good faith discounts are not usually applied to referral cases. *See*, Tr., p.  
12 68;13-17. Good faith reductions are awarded based upon the employers' safety program. *See*, Tr.,  
13 pp. 68;21-25, 69;1-2. In this instance, Harber Company had supplied its written safety program for  
14 trenching and excavations. *See*, State's Exhibit 2, pp. C-97 through C-100. However, the  
15 documentation provided was not specific only to excavations. *See*, Tr., pp. 69;16-24, 70;1-3.

16 Mr. Poff also asked why Harber Company did not receive a history discount. *See*, State's  
17 Exhibit 1, pp. C-26-C-27, *see also*, Tr., p. 70;5-10. Ms. Merrell responded that a history discount  
18 requires an employer inspection within the last five years. There had been no interaction between  
19 OSHA and the Respondent during that time period. *See*, Tr., p. 70;11-20.

20 Mr. Poff also asked why Harber Company did not receive a quick fix discount. *See*, Tr., p.  
21 70;21. It was unavailable because there was no one to prove that the hazard was abated within 24  
22 hours. *See*, Tr., pp. 70;22-25, 71;1-6.

23 Regarding Citation 1, Item 2, Ms. Merrell explained that the State viewed it as a serious  
24 violation. *See*, State's Ex. 1, p. C-30, *see also*, Tr., p. 51;5-8. This was because a cave-in could  
25 result in serious injury or death. *See, Id.* Ms. Merrell testified that the State regarded the severity of  
26 the alleged violation to be high because the likelihood of injury was high should an accident occur.  
27 *See*, Tr., p. 52;9-11. The State also determined that the probability or likelihood of an accident, was  
28 "lesser" because the number of employees exposed to the risk was small and the frequency of that

1 exposure was limited. *See*, Tr., p. 51;12-16. The gravity of the alleged violation is a function of the  
2 severity and probability of injury. In this instance a lesser probability and a medium severity  
3 resulted in moderate gravity determination. *See*, State's Ex. 1, p. C-31, *see also*, Tr., p. 51;17-20. In  
4 this case, the preliminary penalty amount of \$11,162 was determined. *See*, Tr., p. 51;21-23. The  
5 penalty was discounted by 30% as the result of the smaller size of the company, *See*, State's Ex. 1,  
6 p. C-31, *see also*, Tr., p. 51;24, 52;1-2.

7 Mr. Baldobinos testified after Ms. Merrell. He testified that an employee was in the shallow  
8 end of the trench tamping down sand on the morning of the inspection. *See*, Tr., p. 92;16-20.  
9 However, he stated, no employees were in the other part of the excavation. *See*, Tr., p. 92;21-23. He  
10 testified that the employees were always about 10 feet from the deep part of the excavation. *See*,  
11 Tr., p 114;5-19. Upon further questioning, Mr. Baldobinos' admitted that a limited amount of work  
12 was conducted on the deep end of the excavation on the morning of the inspection. *See*, Tr., pp. 96-  
13 97. Thus, the Respondent's employees were below the piles on the morning of May 18, 2023.

14 On cross examination, Mr. Baldobinos explained the sequence in which the conduit was  
15 laid, the slurry poured, the shielding removed and the footprints made in the sand.

16 Mr. Poff: And is it your testimony that while the slurry was poured, the shield was in  
17 there?

18 Mr. Baldobinos: Yes.

19 Mr. Poff: And did the slurry splash all over the shield?

20 Mr. Baldobinos: Like water, splash all over.

21 Mr. Poff: How do you know that the slurry splashed all over?

22 Mr. Baldobinos: Because we ordered it wet, they're gonna be like six inches low  
they can run. And when you don't perform 14 feet high, it's gonna splash.

23 Mr. Poff: And then it's your testimony that the trench shield remained in the deep  
24 end of the trench overnight. At what point, was it the day prior or the morning when  
the actual conduit was installed?

25 Mr. Baldobinos: The day before.

26 Mr. Poff: Do you remember what time or do you have an approximation of what  
27 time?

28 Mr. Baldobinos: Maybe 03:00, afternoon.

1 Mr. Poff: If you could flip to OSHA's C85. Okay. So, we see footprints here in the  
2 slurry, is that correct?

3 Mr. Baldobinos: Yes

4 Mr. Poff: But the footprints are not very deep in the slurry, is that correct?

5 Mr. Baldobinos: Yes.

6 Mr. Poff: What does that mean to you?

7 Mr. Baldobinos: Because we let it cure for a little bit before we can start working. If  
8 we start working right away, we're gonna go down even further.

9 Mr. Poff: So, if you start working the slurry right away, what would happen?

10 Mr. Baldobinos: Oh, you're gonna go down. Tr., pp, 122;13-24, 123;1-18.

11 This explanation was consistent with Mr. Baldobinos' previous statements. Specifically, it  
12 tracks the testimony that the Respondent's employees were in the deep end of the trench early on  
13 the morning of May 18, 2023. It also tracks that the Respondent's employees did not return to that  
14 segment of the job site after the shields were removed.

#### 15 CONCLUSIONS OF LAW

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

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

1 149, *see also*, *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.,  
2 2003).

3 In its *prima facie* case supporting the alleged violation of Citation 1, Item 1, the State  
4 alleged that the standard applied because the Respondent’s employees were in an excavation where  
5 surface encumbrances were present. *See*, State’s Exhibit 1, pp. C-15, C-16, C-61, C-62, C-65. The  
6 average height of these piles of material was approximately 2.5 feet. *See*, State’s Exhibit 1, pp. C-  
7 66, C-67.

8 The State’s evidence showed that the standard was violated through interviews, testimony  
9 and photographs showing Harber Company’s workers were in the excavation in close proximity to  
10 the piles of material, *see* State’s Exhibit 1, pp. C-15, C-16, C-61, C-62, C-67, specifically, because  
11 the piles of material were inside of 2 feet from the open excavation. *See*, State’s Exhibit 1, pp. C-  
12 61, C-62, C-63, C-64. The Respondent argued that the standard did not apply because the materials  
13 on the edge of the excavation were not spoils. They were sand. Tr., p, 126;17-25. This argument  
14 fails because the standard is not limited to spoils. It expressly includes all types of materials. *See*,  
15 29 CFR 1926.651(j)(2)(“Employees shall be protected from excavated or other materials or  
16 equipment that could pose a hazard by falling or rolling into excavations.”)

17 In order to establish employee exposure to a hazard, the State must show either that one or  
18 more employees were in the zone of danger or that it is reasonably predictable either by operational  
19 necessity or otherwise (including inadvertence), that employees have been, are, or will be in the  
20 zone of danger.” *See*, *Stevens Roof Side Remodel, Ltd, Respondent.*, 24 O.S.H. Cas. (BNA) ¶ 1962  
21 at \*5 (O.S.H.R.C.A.L.J. Sept. 20, 2013), *citing Fabricated Metal Products, Inc.*, 18 O.S.H. Cas.  
22 (BNA) ¶ 1072 (O.S.H.R.C. Nov. 7, 1997).

23 The State’s evidence showed that two employees were exposed to the conditions which  
24 violated the standard. The Respondent argued however that no exposure occurred because the  
25 employees were in the shallow end of the trench. This argument was based upon an idea that the job  
26 site should be viewed as two separate excavations. *See*, Tr., pp. 183;4-10, 184;1-7. Harber

27 ///  
28 ///

1 Company's view was that the rectangle was the section to which the shoring requirement applied.  
2 *See, Id.* Conversely, the shallow trench was an open cut not subject to the shielding requirement.  
3 *See, Id.*

4 However, the Respondent's view that two excavations were present is not supported by the  
5 regulations. Specifically, an "[e]xcavation means any man-made cut, cavity, trench, or depression  
6 in an earth surface, formed by earth removal." *See, 29 CFR 1926.650.* In this instance both the  
7 rectangle and the trench are man-made depressions in the earth, formed by earth removal. However,  
8 the definition is ambiguous because it does not exclude the possibility of joint or combined  
9 excavations.

10 Applying Harber Company's understanding, it argued the standard was not violated because  
11 its employees were in the shallow end, 10 feet from the debris piles. *See, Id.* This argument is  
12 supported, in part, by the photographs because it appears that all of the piles abut the deep end of  
13 the excavation. The photographs tend to support this argument because they show debris piles  
14 abutting the deep end and none on the shallow end. *See, State's Exhibit 1, pp. C-64, C-72.*

15 The State's response was that the conduit was laid for the entire length of the excavation  
16 and dirt was spread over the pipe. *See, State's Ex. 1, pp. C-75-C-78.* It was inconceivable that in the  
17 process of completing the laying the conduit and tape, the Respondent's employees were always 10  
18 feet from a debris pile. *See, Tr., p. 177;21-25.* Further, the Respondent presented no evidence that  
19 the piles were placed above the excavation after the shield was removed. Accordingly, the piles  
20 abutted the deep end of the excavation when the Respondent admits that it had employees in that  
21 end of the excavation. Therefore, the standard was fulfilled because it was reasonably predictable  
22 that Harber Company's employees had been in the zone of danger as set forth in Citation 1, Item 1.

23 The Respondent's knowledge can be established by demonstrating "that the employer either  
24 knew, or, with the exercise of reasonable diligence, could have known of the presence of the  
25 violative condition." *Original Roofing, supra, at 143, quoting Pride Oil Well Serv., 15 BNA OSHC*  
26 *1809, 1814 (No. 86-692, 1992).* Here, Mr. Baldobinos was the foremen on this job. *See, State's*  
27 *Exhibit 1, p. C-18 see also, Tr., p. 87;12-13.* In fact, he was the senior level of management at this  
28 excavation because he was in charge of the entire crew working for this excavation. *See, Tr., p.*

1 90;1-6. Accordingly, the evidence showed the Respondent had direct knowledge of the violative  
2 conduct at issue because its senior management was aware of the job site conditions. In summary,  
3 the State met its burden to prove, by a preponderance of the evidence, that Harber Company had  
4 violated 29 CFR 1926.651(j)(2).

5 In its *prima facie* case of a violation of Citation 1, Item 2, the State alleged that the standard  
6 of 29 CFR 1926.652(a)(1) applied because the Respondent's employees were in an excavation at a  
7 depth in excess of 5 feet. *See*, State's Exhibit 1, pp. C-78 through C-85. The State argued that the  
8 standard was violated because the employer did not ensure that its employees were protected from  
9 cave-ins by an adequate protective system. In this instance, the excavation shielding upon which the  
10 employer had relied to protect its employees had been removed on the morning of the inspection.

11 The State alleged that one or more employees were exposed to the hazard because an  
12 employee entered the excavation, after slurry was poured, to install pipe for electrical conduits and  
13 placed marking tape above the pipe. A second employee assisted in placing the marking tape. The  
14 employees were exposed to serious injuries or death in the event of a cave-in.

15 The Respondent argued that the State failed to establish that any of the Respondent's  
16 employees were in the deep part of the excavation after the shield was removed. *See*, Tr., p. 44;18-  
17 19. Merrell's testimony was that she had only witnessed employees in the shallow section of the  
18 excavation. *See*, Tr., p. 52;14-25, 53;7-9. Further, three witnesses agreed no one worked in the deep  
19 part of the trench after the shield was removed. *See*, State's Ex. 1, pp. C-21, C-22, C-23, C-25, *see*  
20 *also*, Tr., pp. 56 through 58.

21 The State's real problem was timing. It could not show that any employee was in the deep  
22 end of the excavation after the shielding was removed. *See*, Tr., pp. 85;21-25, 86;1-12.

23 Mr. Hollis: There were indications though, like footprints in the deeper parts [of the  
24 excavation]. However, there was no indication that protective systems were not in  
place at the time those footprints were in place[?]

25 Ms. Merrell: Like, there were no indications –

26 Mr. Hollis: So, were there indications that there were footprints or some kind of  
27 signs that people were in deeper parts of the trench?

28 Ms. Merrell: Correct.

1 Mr. Hollis: But there was no indications that protective systems weren't in place at  
2 the time those footprints were placed. So, you couldn't tell if there was a shoring  
system in when the footprints were placed?

3 Ms. Merrell: Yeah.

4 Mr. Hollis: They were present?

5 Ms. Merrell: Correct. Yes, correct. I couldn't tell. *See, Id.*

6 The State alleged the Respondent had direct knowledge of the violative condition because  
7 Mr. Baldobinos was the foreman at the excavation. *See, Tr., p. C-18, see also, Tr., p. 87;19-21.* He  
8 testified as to when the shield was removed. *See, Tr., p. 90;7-13.* Therefore, his knowledge of any  
9 employee entering the deep section of the excavation would have been sufficient to prove the  
10 element. Unfortunately for the State, Mr. Baldobinos denied that any employee was in that area  
11 after the shield was removed. *See, Tr., p. 124;16-18.*

12 Mr. Poff: Was any employee ever in the deep portion of this trench without a shield?

13 Mr. Baldobinos: No. *See, Id.*

14 Accordingly, the State's evidence supporting its *prima facie* case of a violation of 29 CFR  
15 1926.652(a)(1) was lacking.

16 **ORDER**

17 It was moved by Board Member Hollis to split the violation. His motion was to uphold  
18 violation of Citation 1, Item 1, with the recommended penalty in the amount of \$6,250, and to  
19 dismiss Citation 1, Item 2, *see, Tr., p. 204;6-17.* The motion was seconded by Board Secretary  
20 Spielberg. *See, Tr., p. 209;12.* The motion was approved upon a vote of four in favor and one in  
21 opposition (Fullerton). *See, Tr., p. 209;13-18.* Accordingly, the State OSHA Board of Review  
22 hereby upholds the citation and fine assessed against Harber Company for Citation 1, Item 1, only  
23 in the amount of \$6,250. The Board dismissed Citation 1, Item 2. *See, Id.*

24 On February 18, 2026 the Board convened to consider adoption of this Decision combined  
25 with the Findings of Fact and Conclusions of law, as written or as modified by the Board, as the  
26 decision of the Board.

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28 ///

1 Those present and eligible to vote on this question consisted of the four current members of  
2 the Board, to-wit, Chairman, Jorge Macias, and members, Tyson Hollis, Gled Bautista and Shannon  
3 Chambers. Upon a motion by Tyson Hollis, seconded by Gled Bautista, the Board voted 4-0 to  
4 approve this Decision of the Board as the action of the Board and to authorize Chairman Jorge  
5 Macias, after any grammatical or typographical errors are corrected, to execute, without further  
6 Board review, this Decision on behalf of the Nevada Occupational Safety and Health Review  
7 Board. Those voting in favor of the motion either attended the hearing on the merits or had in their  
8 possession the entire record before the Board upon which the decision was based.

9 IT IS SO ORDERED.

10 Dated this 14<sup>th</sup> day of April, 2026.

NEVADA OCCUPATIONAL SAFETY AND  
HEALTH REVIEW BOARD

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12  
13 By: /s/ Jorge Macias  
Jorge Macias, Chairman

14  
15 NOTICE: Pursuant to NRS 233B.130, any party aggrieved by this Final Order of the Nevada  
16 Occupational Safety and Health Review Board may file a petition for judicial review to the District  
17 Court within thirty (30) days after service of this order.  
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1 **CERTIFICATE OF SERVICE**

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

7 Salli Ortiz, Esq.  
8 DIR Legal  
9 1886 East College Parkway, Suite 110  
10 Carson City, NV 89706.

11 Perry Poff, Esq.  
12 Donnell, Melgoza & Scates, LLC  
13 3300 Sunset Blvd. Ste. 110  
14 Rocklin, CA 95677

15 Dated this 14<sup>th</sup> day of April, 2026.

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

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