

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

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

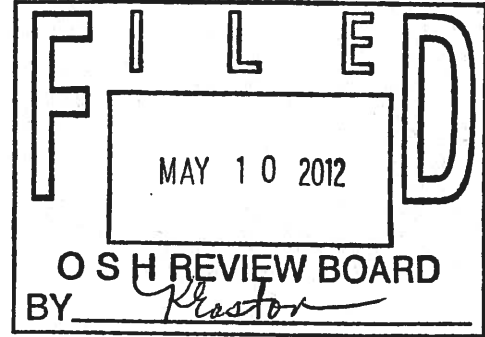
Docket No. LV 12-1540

Complainant,

vs.

Harber Company, Inc.

Respondent.



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13 **DECISION**

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of July,
16 2010, in furtherance of notice duly provided according to law, MR.
17 MICHAEL TANCHEK, ESQ., counsel appearing on behalf of the Complainant,
18 **Chief Administrative Officer of the Occupational Safety and Health**
19 **Administration, Division of Industrial Relations (OSHA)**; and MR. ROBERT
20 D. PETERSON, ESQ., appearing on behalf of Respondent, **Harber Company**;
21 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

22 Jurisdiction in this matter has been conferred in accordance with
23 Nevada Revised Statute 618.315.

24 The complaint filed by the OSHA sets forth allegations of violation
25 of Nevada Revised Statutes as referenced in Exhibit "A", attached
26 thereto. The alleged violation in Citation 1, Item 1, referenced 29 CFR
27 1626.651(j)(2). The alleged violation at Citation 1, Item 2, referenced
28 29 CFR 1926.652(a)(1).

1 In Citation 1, Item 1, citing 29 CFR 1626.651(j)(2), the employer
2 was charged with failing to protect employees from excavated or other
3 materials or equipment that could pose a hazard by falling or rolling
4 into an excavation. The standard requires that protection shall be
5 provided by placing and keeping materials at least two feet from the
6 edge of excavations or by use of retaining devices that are sufficient
7 to prevent materials or equipment from falling or rolling into the
8 excavations by a combination of both if necessary. Complainant alleged
9 that spoils and equipment were at the edge of the excavation which was
10 identified at six feet in depth with Type B soil and exposing the
11 employees to possible serious hazards of materials or equipment falling
12 or rolling into the excavation. The violation was classified as
13 "Serious" and a penalty proposed in the amount of Two Thousand Six
14 Hundred Seventy-Seven Dollars (\$2,677.00).

15 In Citation 1, Item 2, citing 29 CFR 1926.652(a)(1), complainant
16 charged that employees were working in an excavation which was 4 feet
17 9 inches wide, and six feet in depth, composed of type "B" soil, and
18 without shoring, benching or sloping that conformed to the requirements
19 of 29 CFR 1926.652, compel alleged respondent employees were exposed to
20 possible serious hazards of a trench collapse. The standard requires
21 that each employee in an excavation be protected from cave-ins by an
22 adequate protective system designed in accordance with paragraph (b) or
23 (c) of the cited section. The violation was classified as "Serious" and
24 a penalty proposed in the amount of Two Thousand Six Hundred Seventy-
25 Seven Dollars (\$2,677.00).

26 Counsel for the complainant through CSHO Scott Matthews, presented
27 evidence and testimony in support of the violations and appropriateness
28 of penalties. Mr. Matthews testified he conducted a comprehensive

1 inspection of the construction site in Las Vegas, Nevada, and testified
2 from his safety narrative and inspection report, complainant's Exhibit
3 1. Photographs of the excavation, equipment, and site conditions were
4 admitted in evidence as complainant's Exhibit 2, pages 1-4. Mr.
5 Matthews measured the trench excavation from the top edge and confirmed
6 the depth as ranging from four (4) to six (6) feet. He noted spoils
7 materials and equipment near the edge of the excavation and identified
8 photographic Exhibit 2, page 1 depicting same. He found no shoring or
9 other "protection" for the excavation at the time of his inspection.
10 He observed and photographed two employees standing on top of a section
11 of pipe installed in the trench depicted in Exhibit 2, page 4. He
12 testified that his investigation of the work being performed by the two
13 employees depicted at Exhibit 2, page 4 was to unhook sections of pipe
14 from a shackle as it was being lowered into the trench by a
15 loader/trackhoe for "setting" in place then connecting to the previous
16 section of pipe already installed. The employees standing on top of the
17 pipe at the time the photograph was taken, appeared to be awaiting the
18 next section of pipe to be lowered and connected. He discussed his
19 observations and safety violation concerns with Mr. Omar Yopez, the
20 foreman and superintendent of respondent as well as the general
21 contractor representative.

22 CSHO Matthews concluded that spoils materials were close to the
23 edge, not "laid back" or pulled away far enough and "posed" a hazard
24 from exposure to materials or equipment falling or rolling into the
25 trench in violation of the cited standard. He further concluded any
26 employees who may work on the floor of the unshored trench could be
27 struck and/or engulfed by loose materials sloughing from the top edge
28 or equipment rolling into the trench in violation of the cited standard.

1 He described the serious injuries or death that might occur in the event
2 of a cave-in or rolling or falling of materials into the trench.

3 Mr. Matthews testified with regard to Citation 1, Item 2. He
4 explained the difference between items 1 and 2. Item 2 differed because
5 the excavation was more than five feet in depth and must be "protected
6 per the standard" yet he observed no shoring or cave-in protection
7 system in place. He identified Exhibit 2, photograph 3, to demonstrate
8 the depth of the trench. He testified that with no sloping, benching,
9 shoring, or other protection in place an employee working on the floor
10 would be exposed to cave-in and engulfment with the high probability for
11 serious injury or death. He further testified that foreman Yepez told
12 him there was no shoring or cave-in protection required by OSHA or
13 necessary so long as no employees worked in the bottom of the trench but
14 rather stood on top of the pipe.

15 Mr. Matthews explained Exhibit 2, Page 2, as a photo depicting a
16 modified front-end loader at the site; and Exhibit 3, page 3 as a job
17 plan of the work process describing installation of the pipe and steps
18 involved.

19 On cross-examination Mr. Matthews admitted the employees standing
20 on the pipe would only be exposed to a depth of approximately three
21 feet, as opposed to that which would occur if they were working on the
22 floor of the trench. He testified that Mr. Yepez believed no shoring or
23 other protection was necessary for the observed work being performed at
24 the time of inspection because there was no exposure to any potential
25 debris breaking up and/or falling or engulfing them as required by the
26 standard. He observed no employees working in the floor of the unshored
27 trench.

28 In concluding cross-examination, Mr. Matthews testified he neither

1 observed nor had any evidence of employee exposure other than the
2 photograph at Exhibit 2, page 4, depicting the two respondent employees
3 standing on a section of the pipe set in the trench.

4 On conclusion of the complainant's case, respondent presented
5 testimony and photographic evidence in defense of the alleged
6 violations. Mr. Omar Yopez testified he was the superintendent of
7 respondent at the job site at the time of the inspection. He identified
8 Exhibit 3, page 3 the work plan describing the process of preparing the
9 excavation and installing the pipe, including shoring, compaction and
10 other practices. He further testified that shoring was in place at all
11 times employees entered or worked on the floor of the trench. He
12 testified that after spoils removal and soil compaction two inspections
13 typically occur in the trench floor, one for quality control and one for
14 quality assurance. After completed and all work done in the floor of
15 the trench, the shoring was removed so the next section of pipe could
16 be lowered into the excavation. Two employees stand on the pipe already
17 set and connected in place then release the new section from the shackle
18 attached to the loader and guide the pipe with aid of the loader bucket
19 for connection to the existing section of pipe. He further testified
20 that at no time, after the shoring was removed, is any employee
21 required, nor did any employees enter or work in the floor of the trench
22 excavation. The employees worked only from on top of the connected pipe
23 set in place. He further explained how the pipe was lowered into the
24 excavation by a "trackhoe" and the bucket used to push the pipe together
25 for the connection. No employee is ever required to be on the floor of
26 the trench under the work process described and depicted in Exhibit 3,
27 page 3. He further testified the width of the trench where the
28 employees were standing on top of the pipe was approximately only three

1 feet with the very large pipe occupying a major portion of the
2 excavation, leaving only room for fill material to be added after the
3 connection was complete. There was no space or need for the employees
4 to stand on the floor of the trench.

5 Mr. Yepez testified with regard to the process of benching or
6 sloping materials away from the edge of the trench to protect the
7 excavation from any potential for materials, equipment or debris falling
8 into the trench in defense of Citation 1, Item 1. He explained
9 respondent photos Exhibit A-1 and A-2, taken on the same day as the
10 inspection as depicting soils dug out with the backhoe, placed on a
11 slope then moved by the "trackhoe" away from the edge and up so as to
12 "pull" back the materials and avoid the potential for sloughing or
13 falling. He further explained Exhibit 3, Page 3, depicting the job plan
14 process and the equipment utilized for same.

15 Counsel for complainant and respondent presented closing arguments.

16 Complainant argued at Citation 1, Item 1, the photographs in
17 evidence and Mr. Matthews testimony established there were materials
18 that could roll back into the trench due to sloughing. They were not
19 pulled back a sufficient distance in accordance with the standard to
20 satisfy compliance. He argued at Citation 1, Item 2, the evidence shows
21 at Exhibit 2, photograph 1, a long strip of unshored excavation and
22 asserted the testimony of Mr. Yepez did not sufficiently explain why
23 that area was unprotected, by merely testifying that shoring is only
24 added whenever employees are in the trench floor, not when pipe is being
25 installed. He argued there was no evidence that shoring ever existed
26 at the job site in that the CSHO observed none when he arrived there.

27 Respondent argued there was no evidence, testimonial or otherwise,
28 to satisfy the complainant's burden of proof to show a violation of the

1 cited standards. He asserted that OSHA had no idea how the trench
2 process worked and never actually observed the work sequence, starting
3 with the excavation, through shoring, compaction, and pipe installation.
4 He argued the CSHO never observed any employees working on the trench
5 floor at any depth nor any employees going into or coming out of the
6 excavation. He argued protection of the subject trench was not required
7 unless employees were working in the excavation at the depth proscribed
8 in the standards. The work process plan at Exhibit 3, the photographic
9 exhibits, and the credible testimony of Mr. Yopez clearly established
10 there was no employee exposure to the cited hazards because no employees
11 were either working on the floor of the trench or realistically exposed
12 to falling materials while standing on the pipe already set in the
13 excavation. He further argued the evidence demonstrated there were no
14 hazardous conditions at the site. Counsel noted the standard
15 specifically requires at 29 CFR 1926.651(j)(2) that:

16 ". . . employees shall be protected from excavation
17 or other materials or equipment that could **pose** a
hazard by falling or rolling into excavations."

18 He asserted there was no evidence any hazard was **posed** or threatened to
19 support violation of Citation 1, Item 1. The respondent employees
20 observed and photographed were standing high above the floor of the
21 trench on top of the pipe leaving only approximately knee level exposed
22 to sloughing materials. He argued it was unrefuted that the men
23 standing on top of the pipe as depicted in Exhibit 2, page 4, were the
24 only respondent employees in the excavation, and sufficiently high to
25 avoid exposing them to any harmful threat of potential falling
26 materials. He argued the photos showed no equipment or materials that
27 could **pose** any violative threat based on the site conditions and that
28 no protection is required under the cited standard at Citation 1, Item

1 1. The work site conditions demonstrated no potential for serious
2 injury or death. Counsel argued photos A-1 and A-2 showed there were
3 no hazards to the employees. A-1 depicts excavation equipment used for
4 pulling spoils up the hill away from the excavation edge so no harmful
5 material could fall back in the trench. The plan process of Exhibit 3,
6 page 3 corroborated same. He further argued it is uncontroverted that
7 the natural slope was 4 to 1, and the evidence showed, through the
8 testimony of Mr. Yepez and Exhibit A-1, the process of pulling the
9 spoils up and away from the edge was appropriate to satisfy protection
10 under the standard.

11 Counsel argued the unrefuted testimony of Mr. Yepez and the work
12 plan at Exhibit 3, page 3 established the excavation was protected by
13 shoring from cave-ins at all times while employees were in the
14 excavation or trench, at the depths requiring protection.

15 To find a violation of the cited standards, the board must consider
16 the evidence and measure same against the established applicable law
17 promulgated and developed under the Occupational Safety & Health Act.

18 In all proceedings commenced by the filing of a
19 notice of contest, the burden of proof rests with
the Administrator. N.A.C. 618.788(1).

20 All facts forming the basis of a complaint must be
21 proved by a preponderance of the evidence. Armor
Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958
22 (1973).

23 To prove a violation of a standard, the Secretary
24 must establish (1) the applicability of the
25 standard, (2) the existence of noncomplying
26 conditions, (3) **employee exposure or access**, and
27 (4) that the employer knew or with the exercise of
28 reasonable diligence could have known of the
violative condition. See Belger Cartage Service,
Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
(No. 76-1408, 1979); American Wrecking Corp. v.
Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.

1 2003). (emphasis added).

2 A "serious" violation is established upon a preponderance of
3 evidence in accordance with NRS 618.625(2) which provides in pertinent
4 part:

5 . . . a serious violation exists in a place of
6 employment if there is a **substantial probability**
7 that **death** or **serious physical harm** could result
8 from a condition which exists or from one or more
9 practices, means, methods, operations or processes
10 which have been adopted or are in use at that place
11 of employment **unless the employer did not and could**
12 **not, with the exercise of reasonable diligence,**
13 **know the presence of the violation.** (emphasis
14 added)

15 The board finds insufficient evidence to support a finding of a
16 serious violation of Citation 1, Item 1, referencing 29 CFR
17 1926.651(j) (2). The requirement of the cited standard required specific
18 protection only if materials or equipment "**pose**" a hazard.

19 29 CFR 1926.651(j) (2)

20 "Employees shall be protected from excavated or
21 other materials or equipment that could **pose** a
22 hazard by falling or rolling into excavations.
23 Protection shall be provided by placing and keeping
24 such materials or equipment at least 2 feet (.61 m)
25 from the edge of excavations, or by the use of
26 retaining devices that are sufficient to prevent
27 materials or equipment from falling or rolling into
28 excavations, or by a combination of both if
29 necessary." (Emphasis added)

30 Photographic Exhibit 2, page 4, demonstrated two (2) employees
31 standing on a large drainage pipe in an excavation with their bodies no
32 more than approximately three feet below the top edge of the excavation.
33 The excavated spoils and equipment shown in the photographs do not
34 "**pose**" a potential hazard of materials or equipment falling or rolling
35 into the excavation nor the "**substantial probability**" for serious injury
36 or death to occur. Clearly, the employees could not be engulfed or

1 harmfully struck by the materials depicted at or near the edge, nor were
2 they working at a depth to support the probability for **death** or **serious**
3 **physical harm** to occur. The photographic evidence and testimony neither
4 depicted nor described any materials to **pose** a threat of exposure as
5 cited.

6 The work plan subject of testimony by Mr. Yepez and corroborated
7 by the diagram at Exhibit 3, page 3 demonstrated a work process wherein
8 the loader/trackhoe equipment (see Exhibit 2, page 2) was utilized to
9 pull material away from the edge of the excavation and bring it up on
10 a gradual slope so as to avoid sloughing or the potential for materials
11 falling into the excavation. There was no evidence of any respondent
12 employees working on the floor or at a proscribed depth in the
13 excavation without shoring. Only two (2) respondent employees were
14 observed and photographed standing on top of the pipe having their
15 bodies well above the top edge, and clearly not exposed to any potential
16 hazards to cause serious injury or death as charged. The work site
17 conditions did not "pose" a potential for injury from falling debris as
18 specifically governed by the cited standard.

19 At Citation 1, Item 2, referencing 29 CFR 1926.652(a)(1), there was
20 no evidence, testimonial, pictorial or otherwise, to demonstrate any
21 respondent employees worked in the floor, or at proscribed depths, of
22 an unshored trench. Exhibit 3, page 3 described the work process and
23 the utilization of shoring as testified by Mr. Yepez whenever any
24 employees were in the floor of the excavation or at any of the depths
25 ranging from four to eight feet. Complainants photographic Exhibit 1
26 provided some corroboration of Mr. Yepez testimony that shoring had been
27 stored at the edge of the excavation depicting marks and/or indentations
28 in the soil. Further, excavation equipment marks on the soil were

1 evidence that materials had been pulled back away from the edge of the
2 trench by the trackhoe under the process described by Mr. Yepez and
3 shown at Exhibit 2, page 2.

4 There was no evidence or testimony of **non-complying conditions** at
5 the work site. Without **employee exposure** to a cited hazard directly,
6 or through **access**, constructively, there can be no violation under
7 recognized occupational safety and health law.

8 The required element of employee exposure to prove a violation
9 would have to be satisfied directly or through a rule of "access to
10 noncomplying conditions of hazard."

11 Under Occupational Safety and Health Law, there
12 need be no showing of **actual** exposure in favor of
13 a rule of **access** based upon reasonable
14 predictability - (1) the **zone of danger** to be
15 determined by the hazard; (2) **access** to mean that
16 employees either while in the course of assigned
17 duties, personal comfort activities on the job, or
18 while in the normal course of ingress-egress will
19 be, are, or have been in the zone of danger; and
20 (3) the **employer knew** or could have known of its
employees' presence so it could have warned the
employees or prevented them from entering the zone
of danger. Gilles & Cotting, Inc., 3 OSHC 2002,
1975-1976 OSHD ¶ 20,448 (1976); Cornell & Company,
Inc., 5 OSHC 1736, 1977-1978 OSHD ¶ 22,095 (1977);
Brennan v. OSAHRC and Alesea Lumber Co., 511 F.2d
1139 (9th Cir. 1975); General Electric Company v.
OSAHRC and Usery, 540 F.2d 67, 69 (2d Cir. 1976).
(emphasis added)

21 There was no evidence to establish exposure or access to a **zone of**
22 **danger** by a mere photograph of a trench area that was unshored and
23 occupied by no employees; or a picture of employees merely standing on
24 top of a pipe well above the required protective depth. The work
25 process subject of testimony and diagram was supported by the pictorial
26 evidence and testimony. Without **direct exposure** or **access to a zone of**
27 **danger** and then **employer knowledge** of a hazard there could be no
28 violation under occupational safety and health law. There was no

1 evidence that the subject respondent employees, or the work process
2 required any employee, to work in the unshored trench floor or need to
3 step off of the pipe into the floor of the trench to accomplish the work
4 task. The work plan processes and testimony provided unrebutted
5 evidence that the shoring was removed and pipe sections then lowered
6 into the excavation by the loader while the two employees stood on the
7 top section of pipe previously installed. The bucket was utilized to
8 push the new pipe section into the collar connection of the other pipe
9 after the employees released the shackles from the loader. The loader
10 then continued lowering new sections of pipe in the trench which was
11 already compacted and tested for quality assurance and control. There
12 is no shoring required under occupational safety and health law for a
13 trench or excavation where no employees are **working**, required to enter,
14 or have access. The respondent employees here were not exposed to a
15 direct or **posed** hazard.

16 The board finds insufficient facts in evidence to establish non-
17 complying conditions and exposure. There is no preponderance of
18 evidence to satisfy complainants threshold statutory burden of proof of
19 a violation. (NAC 618.788(1)).

20 To **prove** a violation of a standard, the Secretary
21 **must establish** (1) the applicability of the
22 standard, (2) the existence of noncomplying
23 conditions, (3) employee exposure or access, and
24 (4) that the employer knew or with the exercise of
reasonable diligence could have known of the
violative condition. American Wrecking Corp v.
Secretary of Labor, Ibid. page 8.

25 **Serious** violation(s) require competent evidence and proof to be
26 sustained. See, NRS 618.625(2).

27 The board is confronted with a need in the present case to
28 extrapolate violations without required evidence of factual data or

1 essential elements subject of proof by preponderance under occupational
2 safety and health law for determination of any violation.

3 ". . . The Secretary's obligation to demonstrate
4 the alleged violation by a preponderance of the
5 reliable evidence of record **requires more than**
6 **estimates, assumptions and inferences** . . . [t]he
7 Secretary's **reliance on mere conjecture is**
8 **insufficient to prove** a violation . . . [findings
must be based on] 'the kind of evidence on which
responsible persons are accustomed to rely in
serious affairs.'" William B. Hopke Co., Inc., 1982
OSAHRC LEXIS 302 *15, 10 BNA OSHC 1479 (No. 81-206,
1982) (ALJ) (citations omitted). (emphasis added)

9 Based upon the testimony, photographic exhibits, and documentation
10 in evidence, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND**
11 **HEALTH REVIEW BOARD** that no violations of Nevada Revised Statutes did
12 occur as to Citation 1, Item 1, 29 CFR 1926.651(j) (2) nor Citation 1,
13 Item 2, 29 CFR 1926.652(a) (1). The violations are dismissed and the
14 proposed penalty denied.

15 The Board directs counsel for the respondent to submit proposed
16 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**
17 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel
18 within twenty (20) days from date of decision. After five (5) days time
19 for filing any objection, the final Findings of Fact and Conclusions of
20 Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND**
21 **HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings of
22 Fact and Conclusions of Law signed by the Chairman of the **NEVADA**
23 **OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final
24 Order of the **BOARD**.

25 DATED: This 10th day of May, 2012.

26 NEVADA OCCUPATIONAL SAFETY AND HEALTH
27 REVIEW BOARD

28 By /s/
JOE ADAMS, Chairman

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD

3 CHIEF ADMINISTRATIVE OFFICER
4 OF THE OCCUPATIONAL SAFETY AND
5 HEALTH ADMINISTRATION, DIVISION
6 OF INDUSTRIAL RELATIONS OF THE
7 DEPARTMENT OF BUSINESS AND
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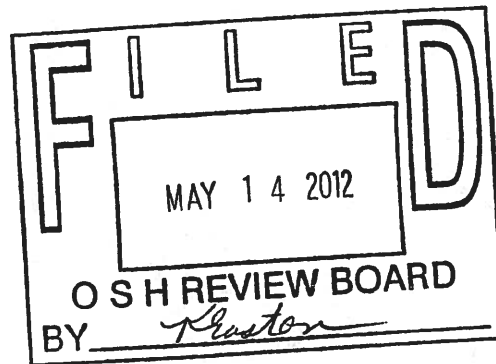
Docket No. LV 12-1540

Complainant,

vs.

HARBER COMPANY, INC.,

Respondent.



11
12 NOTICE OF ERRATA

13 ON THE 10th day of May, 2012, NEVADA OCCUPATIONAL SAFETY AND HEALTH
14 REVIEW BOARD (BOARD), entered the Decision in the subject captioned
15 matter. The Decision contained a typographical error on page 1, lines
16 15-16, as follows:

17 ". . . commenced on the 13th day of July, 2010. . ."

18 The portion of the Decision which contained the error is amended through
19 this *Errata* and corrected to provide at page 1, line 15, the following:

20 ". . . commenced on the 11th day of April, 2012 . . ."

21 In all other respects the Decision entered by the BOARD is confirmed.

22 DATED this 14th day of MAY 2012.

23 NEVADA OCCUPATIONAL SAFETY AND
24 HEALTH REVIEW BOARD

25 By: /s/
26 JOE ADAMS, CHAIRMAN

27 RECEIVED

28 MAY 15 2012

DIR LEGAL
CARSON CITY OFFICE