

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
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6 CHIEF ADMINISTRATIVE OFFICER  
7 OF THE OCCUPATIONAL SAFETY AND  
8 HEALTH ADMINISTRATION, DIVISION  
9 OF INDUSTRIAL RELATIONS OF THE  
10 DEPARTMENT OF BUSINESS AND  
11 INDUSTRY, STATE OF NEVADA,

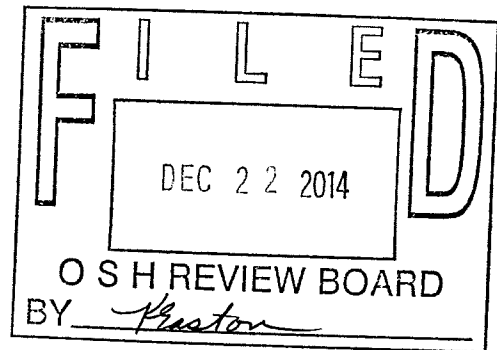
Docket No. RNO 14-1700

Complainant,

12 vs.

13 CAMPBELL CONSTRUCTION CO., INC.,

Respondent.  
14 \_\_\_\_\_/



15 DECISION

16 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
17 **REVIEW BOARD** at a hearing commenced on the 10<sup>th</sup> day of July, 2014, in  
18 furtherance of notice duly provided according to law. MS. SALLI ORTIZ,  
19 ESQ., counsel appearing on behalf of the Complainant, **Chief**  
20 **Administrative Officer of the Occupational Safety and Health**  
21 **Administration, Division of Industrial Relations** (OSHA). MR. TODD SHAW,  
22 corporate president, appearing on behalf of Respondent, **Campbell**  
23 **Construction Co., Inc.**

24 Jurisdiction in this matter has been conferred in accordance with  
25 Nevada Revised Statute 618.315.

26 The complaint filed by the OSHA sets forth allegations of violation  
27 of Nevada Revised Statutes as referenced in Exhibit "A", attached  
28 thereto.

1 Citation 1, Item 1, charges a violation of 29 CFR 1926.652(a)(1),  
2 which provides in pertinent part:

3 Each employee in an excavation shall be protected  
4 from cave-ins by an adequate protective system  
5 designed in accordance with paragraph (b) or (c) of  
6 this section.

7 Complainant alleged that at the construction site, three employees  
8 were working in an excavation that was approximately 9 feet deep, but  
9 not protected from cave-ins by an adequate protection system. The  
10 excavation included a vertical wall of approximately 6 feet before being  
11 sloped back approximately 3 feet. The competent person identified the  
12 soil as Type-B, however the configurations used were not in accordance  
13 with paragraph (b) or (c) for Type-A, Type-B or Type-C soils.

14 Campbell Construction was previously cited for a violation of the  
15 same or equivalent occupational safety and health standard as confirmed  
16 in NV OSHA inspection number 315175836, Citation number 01, Item number  
17 001. The previous violation was confirmed as a final order on January  
18 12, 2012.

19 The current alleged violation is classified as Repeat/Serious. The  
20 penalty proposed is in the amount of \$9,800.00.

21 The parties stipulated to the admission of evidence at complainant  
22 Exhibits 1 through 3 and additionally Exhibit 4 (added at time of  
23 redirect), as well as respondent Exhibits A through D. The parties  
24 further stipulated to certain proof elements of violation, specifically  
25 the **applicability** of the standard, **exposure** of employees, and **employer**  
26 **knowledge**. The stipulation further provided the only contested issue  
27 before the Review Board to be the **existence of non-complying violative**  
28 **conditions**.

Both parties provided a brief opening statement. Counsel for the

1 complainant referenced the stipulations of the parties and sole  
2 requirement for purposes of the hearing, to be proof of the violative  
3 conditions. She asserted the evidence will show there was a 9 foot deep  
4 trench excavation consisting of various soils conditions and vertical  
5 walls without required OSHA protection under the cited standard. The  
6 respondent claims the excavation was in "solid rock" and therefore  
7 exempted from the "cave-in" protection required by the standard.

8       The respondent opening statement confirmed the sole issue to be the  
9 existence of violative conditions. He asserted the complainants case  
10 is based upon a lack of proof of the soil classification made by the  
11 CSHO. The excavation was in stable rock and will be confirmed through  
12 expert engineering testimony to prove no cave-in protection, sloping or  
13 benching were required. Respondent asserts the CSHO was mistaken in the  
14 classification of the soil. CSHO Batton cited the standard without any  
15 testing or proof of the soils conditions. OSHA cannot meet the burden  
16 of proof to establish violations of the cited standard.

17       Counsel for complainant through Compliance Safety and Health  
18 Officer (CSHO) Ms. Chantelle Batton presented evidence and testimony as  
19 to the violation, classification and appropriateness of the penalty. Ms.  
20 Batton identified complainant Exhibits 1 through 3 (and later Exhibit  
21 4 on redirect). Ms. Batton referenced her narrative report at Exhibit  
22 1, pages 8 through 10, the worksheets (OSHES-1B at pages 20-22), and the  
23 photographs taken at the site numbered 45-48. She identified the  
24 previous citation issued to the respondent as the basis for classifying  
25 the serious violation as a "Repeat" at Exhibit 1, pages 49 through 66.

26       Ms. Batton testified she was directed to inspect the subject work  
27 site based upon a referral complaint that employees were working in an  
28 unshored/unprotected excavation at the Sommerset subdivision in Reno,

1 Nevada. During the "walkaround" inspection, CSHO Batton was assisted by  
2 CSHO Riley and accompanied by Mr. Rob Poirier the superintendent of  
3 Campbell Construction. She was informed Campbell Construction was  
4 contracted to install a sewer line for the Dell Webb housing development  
5 located in the Reno Somerset community. Ms. Batton testified she  
6 observed employees working in a trench at a depth of 9-10 feet without  
7 required shoring. Three identified respondent employees were observed  
8 working in the 9 feet deep trench without adequate benching or sloping  
9 on the sidewalls. The 9 foot measurement was taken by the respondent  
10 foreman, Mr. Roberto Martin using a standard steel tape and subject to  
11 photographic exhibits in evidence. A secondary measurement utilizing  
12 the rungs of a ladder measured with a standard steel tape was taken by  
13 Ms. Batton and CSHO Riley to verify the depth of the trench. The length  
14 between each rung was one foot. By observing the rungs of the ladder  
15 in relation to the side walls the CSHOs determined the excavation had  
16 vertical walls 6 feet high before the top 3 feet of soil sloped back to  
17 42 degrees.

18 CSHO Batton testified that Mr. Martin and Mr. Poirier, respectively  
19 the foreman and superintendent of respondent, informed her the soil in  
20 the trench was "Type-B". Mr. Poirier also informed her the respondent  
21 had obtained an ". . . engineered soil analysis report confirming the  
22 soil was Type-B . . .". A Geotechnical Investigation Report provided  
23 to her by Kleinfelder Inc. in 2004 confirmed the Type-B soils analysis  
24 results. It included a recommendation that temporary trench excavations  
25 comply with current OSHA safety requirements for Type B soils.

26 Ms. Batton testified her observations of the actual excavation and  
27 soils materials were that the 6 foot vertical wall contained ". . .  
28 stones, visible cobbles, and clear sloughing." The 3 foot sloped top

1 layer was mostly loose soil with some larger pieces of rock in the mix.  
2 The soils report provided by respondent to CSHO Batton established that  
3 all soils in the area were to be treated as Type B because the area  
4 soils at the site "varied". She referenced page 123 of the soils report  
5 to confirm same. Foreman Martin informed CSHO Batton that based upon  
6 the soils condition he cut slopes differently at various depths. She  
7 referenced Exhibit 1, page 18 of the Martin interview statement.

8 Ms. Batton identified the interview statement at page 17, Exhibit  
9 1, to establish the respondent employees had been ". . . working in the  
10 trench . . . about a week." She testified respondent employees working  
11 in the trench informed her they had no specific excavation training.  
12 Photographic Exhibit 1, page 45a depicted three employees in the trench.

13 Ms. Batton testified photographic Exhibit 1, page 47a depicted the  
14 excavation sidewalls with cobbles and fissures in the "spoils" near the  
15 edge. She testified the ". . . rocks and fissures she observed and  
16 depicted in the photographs . . . confirmed the excavation was not in  
17 stable rock because it (stable rock) does not contain cobbles and  
18 fissures . . .".

19 CSHO Batton identified the two "competent person" employees of  
20 respondent and testified they reported to her the soils conditions to  
21 be Type "B". She testified the trench was not protected in accordance  
22 with the applicable cited OSHA standard. Based upon her observations,  
23 the photographs, interview reports from the competent persons, the  
24 geological data, Kleinfelder report, and confirmation from the  
25 respondent soils engineer, Micky Smith, obtained after the closing  
26 conference, CSHO Batton concluded the inspected excavation was in **varied**  
27 **soils not entirely stable rock**, and therefore required protection in  
28 accordance with the specific terms of the OSHA standards. She could

1 find no evidence, documents or reports to contradict her observations  
2 and conclusions.

3 On cross-examination CSHO Batton testified she had one year of  
4 training with supervisors and took classes on construction, but not  
5 specifically trained on shoring or excavations. She did not classify  
6 the soil at the time of inspection but took samples from the "spoils"  
7 pile. She did no mechanical testing at the site nor was the sample sent  
8 to a laboratory. CSHO Batton testified she performed an analysis of the  
9 soils and determined from all information available the soils were Type  
10 B as reported to her by the two competent persons and described in the  
11 Kleinfelder engineering report.

12 On continued cross-examination CSHO Batton testified she was not  
13 trained on soils classifications nor visual and/or manual mechanical  
14 testing procedures. Ms. Batton admitted she was not aware at the time  
15 of the inspection that OSHA permitted work in an excavation if a  
16 "vertical wall" was in stable rock. She testified that trenches dug  
17 later at the site during the testing procedure demonstrated the soils  
18 varied and ". . . some areas were in stable rock."

19 In direct and re-direct examination, CSHO Batton testified her  
20 observations and the investigative information obtained, including  
21 cobbles and fissures identified in the soils material, caused she and  
22 her supervisor to conclude there was no evidence to support an exception  
23 to the standard. The requirement of the applicable OSHA standard is the  
24 excavation be ". . . **entirely** in stable rock . . .". Based upon the  
25 varied soils observed, the statements from the competent persons and the  
26 Kleinfelder report, she concluded there was no evidence the excavation  
27 was "entirely in stable rock" and therefore required protection in  
28 accordance with the terms of the standard.

1 At the conclusion of complainant's case, respondent presented  
2 testimonial and documentary evidence through Ms. Michelle (Mickey)  
3 Smith. She identified herself as a professional engineer with Wood  
4 Rodgers Geotechnical Services and experienced in soil analyses and  
5 testing in the Reno, Nevada area. Ms. Smith described the area soils  
6 based upon geotechnical mapping and her testing procedures. The testing  
7 did not occur in the excavations subject of citation because they had  
8 been "backfilled". She was accompanied by respondent representatives  
9 and CSHO Carling. Ms. Smith described the recognized protocols during  
10 the test "digs". She found 1-1/2 feet of top Type B soil, but below  
11 that level Type A stable rock. Ms. Smith identified her report at  
12 Exhibit D consisting of four pages. She found bedrock 15-28 inches below  
13 the surface. Exhibit D, page 4 identified Type B soils on the sloped  
14 sides. Ms. Smith testified the soils depicted in the photographs at  
15 Exhibit 1, page 47a did not show "fissures" as identified by CSHO Batton  
16 but merely discoloration. She explained her interpretation of the  
17 photographs in evidence and testified they do not support any finding  
18 of fissures. Ms. Smith testified that in her opinion the excavation  
19 soils tested should be characterized as stable rock. She further  
20 testified the exhibit photographs do not show "cobble" but rather  
21 "pieces of rock" dug out of an excavation. Ms. Smith explained ". . .  
22 you can have rocks within stable rock which is identified as  
23 conglomerate". She testified that Exhibit A reflects the excavation  
24 "boring results". The testing demonstrated "bedrock and stable hard  
25 rock". She testified Exhibit 1, page 13 supported her opinion the cited  
26 trenches in the area were in excavations consisting of stable rock.

27 On re-direct examination, Ms. Smith testified the problem with CSHO  
28 Batton's analysis was that she obtained her samples from the "spoils

1 pile, not the actual excavation". At page 4, Exhibit D, Ms. Smith  
2 explained the claimed confusion of her statement as merely an effort to  
3 help CSHO Batton understand varied soils and why the excavation was in  
4 stable rock.

5 On cross-examination, Ms. Smith testified she never saw the actual  
6 open trench subject of citation, but only observed the worksite area  
7 after the subject excavations had been backfilled. She testified  
8 "stable or hard rock" is equated with "bedrock". Reference to either  
9 is ". . . the same to indicate Type A, the hardest material and exempted  
10 from cave-in protection; Type B requires OSHA protection . . .".

11 At conclusion of the evidence and testimony, complainant and  
12 respondent presented closing argument.

13 Complainant asserted she does not understand why information  
14 provided by the two "competent persons" employed by respondent at the  
15 site should not be believed along with the OSHA observations supported  
16 by photographs to confirm the loose condition of the soils materials.  
17 She argued the evidence clearly demonstrates soils material made up of  
18 "other than stable rock . . . in the open excavation in which employees  
19 were working . . .". It is unrefuted the cited excavation was neither  
20 shored nor protected. It was unrefuted respondent employees were  
21 working in the trench and exposed to potential cave-in hazards without  
22 any protection.

23 The 2004 Kleinfelder geological report which respondent relied upon  
24 reflected soils in the area were ". . . varied and should be treated  
25 overall as Type B . . .". The soils varied greatly from area to area  
26 on this site and included clay and even sandstone.

27 The Smith report, Exhibit D at page 4, included the email exchange  
28 between Ms. Smith and CSHO Batton. It referenced the CSHO question



1 "[i]s it your position that the area where Campbell Construction was  
2 excavating has Type A (bedrock) on the vertical sides and Type B (fill)  
3 on the sloped sides?" The answer from engineer Smith was "yes." That  
4 written exchange alone showed the soils were **varied** in the area so the  
5 excavation "**not entirely in stable rock**", therefore subject to the cave-  
6 in protection standards without exemption.

7 Respondent provided closing statement. Mr. Shaw asserted the  
8 inspected excavations were all in stable rock based upon the evidence,  
9 testimony and observations of even CSHO Carling who participated in the  
10 testing procedure. He argued that respondent "competent persons,"  
11 Martin and Poirier, were referencing Type B as merely the top layer of  
12 soil but there was no question the material underneath was stable rock.  
13 The Type B that CSHO Batton referred to in the geological report only  
14 described the surface materials and not the bedrock nature of the  
15 excavations.

16 The Board in reviewing the facts, documentation, testimony and  
17 other evidence must measure same against the established applicable law  
18 developed under the Occupational Safety & Health Act.

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

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

1 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
2 (No. 76-1408, 1979); *American Wrecking Corp. v.*  
3 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.  
4 2003).

5 A **respondent may rebut** allegations by showing:

- 6 1. That the standard was inapplicable to the  
7 situation at issue;
- 8 2. That the situation was in compliance; or lack  
9 of access to a hazard. See, *Anning-Johnson*  
10 *Co.*, 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690  
11 (1976).

12 A "**serious**" violation is established in accordance with NRS  
13 618.625(2) which provides in pertinent part:

14 . . . a serious violation exists in a place of  
15 employment if there is a substantial probability  
16 that death or serious physical harm could result  
17 from a condition which exists or from one or more  
18 practices, means, methods, operations or processes  
19 which have been adopted or are in use at that place  
20 of employment unless the employer did not and could  
21 not, with the exercise of reasonable diligence,  
22 know the presence of the violation.

23 A "**repeat**" violation is established if based upon a prior violation  
24 of the same standard, a different standard, or general duty clause, if  
25 the present and prior violation is substantially similar.

26 A violation is considered a repeat violation:

27 If, at the time of the alleged repeat violation,  
28 there was a Commission final order against the  
employer for a substantially similar violation.  
*Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (no. 16183,  
1979). A prima facie case of substantial  
similarity is established by a showing that the  
prior and present violations were for failure to  
comply with the same standard. *Superior Electric*  
*Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597,  
1996). *Robert B. Reich, Secretary of Labor, United*  
*States Department of Labor v. D.M. Sabia Company*  
*and Occupational Safety and Health Review*  
*Committee*, 90 F.3d 854 (1996); *Caterpillar, Inc. v.*  
*Alexis M. Herman, Secretary of Labor, and*  
*Occupational Safety and Health Administration,*  
*Respondents and United Auto Workers, Local 974,*  
*Intervenors*, 154 F.3d 400 (1998).

1 A repeated violation may be found based on a prior  
2 violation of the **same standard, a different**  
3 **standard, or the general duty clause**, but the  
4 **present and prior violations must be substantially**  
5 similar. *Caterpillar, Inc.*, 18 OSH Cases 1005,  
6 1006 (Rev. Comm'n 1997), *aff's*, 154 F.3d 400, 18  
7 OSH Cases 1481 (7<sup>th</sup> Cir. 1998); *GEM Indus., Inc.*, 17  
8 OSH Cases 1861, 1866 (Rev. Comm'n 1996). OSHA may  
9 generally establish its prima facie case of  
10 substantial similarity by showing that the prior  
11 and present violations are of the same standard.  
12 The employer may rebut that showing by establishing  
13 that the violations were substantially different.  
14 Where the citations involve different standards,  
15 OSHA must present "sufficient evidence" to  
16 establish the substantial similarity of the  
17 violations. A similar showing must be made if the  
18 citations involve the same standard but the  
19 standard is broadly worded. Repeated violations  
20 are not limited to factually identical occurrences.  
21 Provided that the hazards are similar, minor  
22 differences in the way machines work or in the size  
23 and shape of excavations will usually not lead to  
24 a finding of dissimilarity. In general, the key  
25 factor is whether the two violations resulted in  
26 substantially similar hazards. It is not necessary,  
27 however, that the seriousness of the hazard  
28 involved in the two violations be the same.  
Rabinowitz, Occupational Safety and Health Law, 2<sup>nd</sup>  
Ed. 2008 at pp. 230-231. (emphasis added)

17 The previous confirmed violation to warrant a "Repeat"  
18 classification was unrefuted. The respondent admitted by stipulation  
19 to three of the proof elements required under the complainant's burden  
20 of proof. The stipulated sole element in contention was evidence of  
21 non-complying conditions based upon a lack of proof the excavation  
22 consisted of anything other than stable rock. Support for the stable  
23 rock condition was based upon the testimony and interpretations of  
24 engineer Smith and her written report at Exhibit D. The respondent  
25 defense and rebuttal of prima facia evidence of violation turns on  
26 whether it satisfied the **exception** in the standard 29 CFR 1926.652(a)(1)  
27 which provides "an excavation need not be protected from cave-ins if (i)  
28 excavations are made **entirely in stable rock . . .**". Reliance upon the

1 exception must be supported by credible preponderant evidence to rebut  
2 the prima facia proof of violation.

3 The testimonial evidence by CSHO Batton of observed **varied** soils  
4 in the actual open excavation was credible and corroborated by  
5 additional evidence in the record. The photographs in evidence depicted  
6 soils that, from **plain view**, were **other than stable rock**. The **2004**  
7 **Kleinfelder report** provided by respondent described ". . . **varied soils**  
8 **throughout the area** which should **be treated for OSHA purposes as Type**  
9 **B classification** . . . and the . . . excavations protected  
10 accordingly . . .". The respondent's designated **competent persons**  
11 provided written statements to Ms. Batton when she arrived at the site  
12 that the soils were Type B. The complainant met the burden of proof to  
13 establish a prima facia case of violation.

14 To rebut the prima facia evidence of violation the respondent was  
15 required to prove by preponderant evidence the cited excavations were  
16 **entirely in stable rock** and therefore exempted from required cave-in  
17 protection. However the expert testimony and documentary reports  
18 offered through respondent witness Smith were equivocal, unclear, and  
19 neither convincing, nor preponderant evidence to rebut the evidence of  
20 violation. Exhibit D, page 4, clearly demonstrated Ms. Smith admitted  
21 the excavation was not entirely stable rock by agreeing **the soils**  
22 **varied**. Witness Smith's attempted explanation contradicted the **plain**  
23 **meaning** of her written opinion. Her testimony was not convincing nor  
24 credible to support or prove the defense of exemption based upon the  
25 **entire excavation consisting of stable rock**. The cited standard  
26 specifically provides that for an excavation to qualify for exception  
27 to the cave-in protection standard, it must be **"entirely in stable**  
28 **rock"**. However, Exhibit D, page 4, was evidence to the contrary. It

1 supported complainant evidence of **varied** soils as admitted by Ms. Smith.  
2 Further, the Smith testing was conducted **after** the cited excavations  
3 were backfilled and not in the actual excavations observed and  
4 photographed during the inspection.

5 The testimony of CSHO Carling was that during the excavation  
6 testing he observed **varied soils not entirely stable rock**. His  
7 testimony was credible and corroborated by the Kleinfelder report, the  
8 photographs taken during the initial inspection, respondent employee  
9 interview statements, and CSHO Batton's testimonial observations of the  
10 actual **open** excavation.

11 This Board is sensitive to the impact of a serious violation upon  
12 the respondent or any employer. When it is additionally classified as  
13 **repeat/serious**, the contested case requires strict evidentiary review  
14 to assure fairness to the employer, but also recognition that  
15 occupational safety and health law is focused upon employee safety in  
16 the workplace. While this Board regrets the effects of a repeat/serious  
17 violation on this or any Nevada employer, it must weigh all the facts  
18 and testimony and render a fair and impartial decision based solely upon  
19 the preponderance of evidence. This includes the weight, competence,  
20 and credibility of all evidence presented. In this case, the credible  
21 CSHO testimony, the reports and statements obtained during the  
22 inspection, the Kleinfelder report, and photographs taken of the actual  
23 open excavations all support finding the subject excavation not composed  
24 **entirely of stable rock**. There is no factual or lawful basis to warrant  
25 an exception to the cited excavation protection standard.

26 The Board finds a preponderance of evidence of violation at  
27 Citation 1, Item 1, confirms the classification of repeat/serious and  
28 approves the proposed penalty of \$9,800.00.

1 It is the decision of the Nevada Occupational Safety and Health  
2 Review Board that violations of Nevada Revised Statutes did occur as to  
3 Citation 1, Item 1, 29 CFR 1926.652(a)(1). The classification of  
4 "Repeat/Serious" is appropriate and affirmed. The proposed penalty is  
5 confirmed in the amount of Nine Thousand Eight Hundred Dollars  
6 (\$9,800.00).

7 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**  
8 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION,**  
9 **DIVISION OF INDUSTRIAL RELATIONS,** to prepare and submit proposed  
10 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**  
11 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel  
12 within twenty (20) days from date of decision. After five (5) days time  
13 for filing any objection, the final Findings of Fact and Conclusions of  
14 Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
15 **REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and  
16 Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL**  
17 **SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the  
18 **BOARD.**

19 DATED: This 22nd day of December 2014.

20 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
21 REVIEW BOARD

22 By: /s/  
23 JOE ADAMS, CHAIRMAN  
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