

Potential for injury Simple  
is the predominant

- Compl.  
- Plain view  
- Ev' Knowledge  
- No resp. defense  
or witness  
- Impute Ev' Knowledge  
to plain view

NEVADA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW BOARD

Harold Rogers  
'6 known in the industry

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

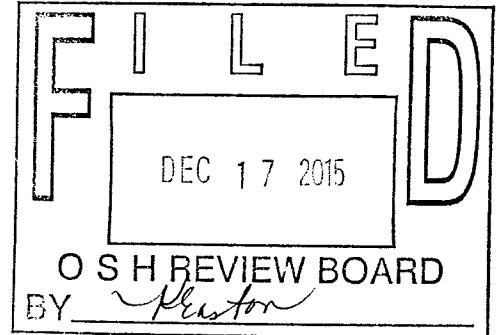
Docket No. RNO 16-1808

Complainant,

vs.

JACKSON QUALITY DRYWALL,

Respondent.



D E C I S I O N

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 9<sup>th</sup> day of November 2015, in furtherance of notice duly provided according to law, SALLI ORTIZ, ESQ., counsel appearing on behalf of the **Chief Administrative Officer of the Occupational Safety and Administration, Division of Industrial Relations (OSHA)**, and MR. SHANE JACKSON appearing on behalf of respondent, **JACKSON QUALITY DRYWALL**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

The complaint filed by OSHA sets forth allegations of violations of Nevada Revised Statutes as referenced in Exhibit "A," attached thereto.

Citation 1, Item 1 charges a violation of 29 CFR 1926.1101(k)(1)(i)

1 which provides in pertinent part:

2 Communication of Hazards: Installed Asbestos  
3 Containing Building Material. Employers and  
4 building owners shall identify TSI and sprayed or  
5 troweled on surfacing materials in buildings as  
6 asbestos-containing, unless they determine in  
7 compliance with paragraph (k)(5) of this section  
8 that the material is not asbestos-containing. If  
9 the employer/building owner has actual knowledge,  
10 or should have known through the exercise of due  
11 diligence, that other materials are asbestos-  
12 containing, they too must be treated as such. When  
13 communicating information to employees pursuant to  
14 this standard, owners and employers shall identify  
15 "PACM" as ACM.

16 At the job site on floors 3-5 of the Alpine Tower,  
17 employees were allowed to disturb and were exposed  
18 to surfacing asbestos containing materials (ACM)  
19 (Fireproofing/ Monokote) that contained 6%-20%  
20 Chrysotile asbestos during the construction of  
21 firewalls. The employer did not verify if the  
22 Monokote contained asbestos prior to starting work.

23 The citation was classified as Serious. The proposed penalty for  
24 the alleged violation was in the amount of \$2,500.00.

25 Citation 1, Item 2 charges a violation of 29 CFR  
26 1926.1101(k)(9)(vii), which provides in pertinent part:

27 Training for employees who are likely to be exposed  
28 in excess of the PEL and who are not otherwise  
required to be trained under paragraph (k)(9)(iii)  
through (iv) of this section, shall meet the  
requirements of paragraph (k)(9)(viii) of this  
section.

29 At the job site, employees exposed to Surfacing  
30 Asbestos Containing Materials that were disturbed  
31 during the installation of firewalls, were not  
32 provided training that met the requirements of  
33 paragraph (k)(9)(viii) including methods for  
34 recognizing asbestos and the presumption that  
35 certain building materials contain asbestos  
36 exposure; the relationship between smoking and  
37 asbestos in producing lung cancer; and the nature  
38 of operations that could result to asbestos.

39 The citation was classified as Serious. The proposed penalty was  
40 in the amount of \$1,000.00.

1 Counsel for the complainant and respondent stipulated to the  
2 admission of documentary evidence identified as complainant's Exhibits  
3 1 through 4. Respondent offered no exhibits for submittal or admission.

4 Complainant presented testimony and documentary evidence to support  
5 the cited violation. Compliance Safety and Health Officer (CSHO) Mr.  
6 Jared Mitchell, testified as to his inspection and the citation issued  
7 to the employer. He referenced Exhibit 1 and testified from his  
8 narrative report at pages 19 through 22. A referral inspection was  
9 conducted on or about February 25, 2015 at the Hard Rock Hotel  
10 construction site located at 50 Highway 50, Stateline, Nevada. An  
11 opening conference was initiated with Mr. David Stoffer, the foreman of  
12 respondent Jackson Quality Drywall and the general contractors on the  
13 site, Bill Dickson Construction Services and C.V.C. Hospitality, Inc.  
14 The inspection was predicated upon a complaint that surfacing Asbestos  
15 Containing Material (ACM) containing Fireproofing/Monokote was being  
16 disturbed and employees of respondent Jackson Quality Drywall were being  
17 exposed to related safety hazards.

18 CSHO Mitchell testified that during his inspection he observed  
19 employees of respondent, Alvaro Hernandez and Marcial Rojas performing  
20 framing work above the structure ceiling area. They were installing  
21 framing for exhaust ducts above the ceiling. He observed the employees  
22 working and attaching framing to areas with existing fireproofing  
23 (Monokote). He identified the Monokote as a trade name for fireproofing  
24 service material. He further observed a hallway area with a framed  
25 firewall that extended from the ceiling to the deck and made up of  
26 expanded lath material that had been wrapped around beams and columns  
27 secured with powder actuated tool fasteners into both the concrete deck  
28 and structural steel members. He testified the installation of the

1 firewall had disturbed numerous areas of the monokote material. On  
2 inquiry of the respondent foreman he was informed of the disturbed  
3 monokote material. He directed the foreman to instruct employees to  
4 cease working until further examination and investigation of the area  
5 for confirmation of ACM contamination.

6 CSHO Mitchell testified he obtained bulk samples from three  
7 different areas on the 15<sup>th</sup> floor of the structure. Monokote was  
8 removed from an I-beam close to where he observed the employees working.  
9 Additional Monokote was picked up from the area at the top of the  
10 hallway that had been scraped off during construction of the firewall.  
11 Loose debris was taken from a section and an area air sample from the  
12 hallway. The samples were sent to Traveler's Laboratory for testing.  
13 The sample results from the column and I-beam area contained 6% and 8%  
14 chrysotile asbestos. Mr. Mitchell referred to the asbestos sample  
15 reports included in the case file and exhibits in evidence. He  
16 testified and referenced the Exhibit 1 narrative report to confirm his  
17 meetings with the general contractor and Belfor Environmental, Inc.  
18 (BEI) as well as Mr. Gashow, a consultant with Environmental Testing and  
19 Consulting. Additional employer representatives and individuals for the  
20 hotel property were present. They reviewed original asbestos surveys  
21 previously provided to the general contractor. Mr. Mitchell reviewed  
22 and the parties acknowledged that monokote (fireproofing) contained 10%  
23 - 20% chrysotile asbestos and needed to be treated as Regulated Asbestos  
24 Containing Material (RACM) or Asbestos Containing Material (ACM). Mr.  
25 Mitchell reported the information and surveys had been provided to the  
26 responsible parties prior to commencement of construction on the tower  
27 renovation. He testified that during the inspection he obtained  
28 interviews from employees and identified Exhibit 1, page 25, the

1 interview statement from Mr. Hernandez who was working above the ceiling  
2 level. Mr. Hernandez reported he was unaware of ACM asbestos at his  
3 worksite. He further reported to CSHO Mitchell that he had no asbestos  
4 training but had worked 4-6 hours prior to the subject inspection. No  
5 respiratory protection was onsite nor any provided based upon the  
6 investigation.

7 CSHO Mitchell referenced the witness statements at Exhibit 1, page  
8 27 of Mr. Rojas who reported no protection or training for asbestos  
9 containing working conditions. Mr. Mitchell also referenced Exhibit 1,  
10 page 29 the witness statement of Mr. Manuel Marquez, who reported he was  
11 unaware of asbestos, and given a spray bottle to ". . . keep the dust  
12 down." He referenced Exhibit 1, page 30 reporting employee contact with  
13 the fireproofing (ACM). He continued testimony and referenced the  
14 witness statements from other respondent employees, identified as  
15 Ashbridge, Exhibit 1, page 31, Perez, Exhibit 1, page 33, Stalcup,  
16 Exhibit 1, page 35 (employee of Belfor), Mr. Lewis, Exhibit 1, page 39  
17 (C.V.C. Hospitality general contractor).

18 Mr. Mitchell testified under continued direct examination with  
19 regard to the witness statements and details of his findings during the  
20 inspection and specifically referenced Exhibit 1, page 19 through 22.  
21 He testified that he recommended a serious citation be issued to the  
22 respondent for failure to identify ACM prior to allowing employees to  
23 disturb and/or be exposed to asbestos containing materials. He further  
24 recommended a serious citation for the respondent's failure to train  
25 employees in the recognition and hazards of ACMs.

26 Mr. Mitchell identified photographs at Exhibit 1, pages 76-83. He  
27 testified by explaining the existence of the "whitish" materials on I-  
28 beam as the ACM, page 77a. He further testified as to the depiction of

1 the violative materials at page 78a, 81a, and 82a. He explained how  
2 disruption of materials through normal employee work efforts constitute  
3 hazard exposure to ACMs when they become "friable", meaning airborne.

4 CSHO Mitchell testified on his determination of the proof element  
5 of **employer knowledge** as based upon the company asbestos work over 30  
6 years business. He further testified the respondent "bid sheet" at  
7 Exhibit 4, page 1, demonstrated employer knowledge referencing and  
8 quoting ". . . abatement contractor not required . . . respondent to  
9 encapsulate ACM . . . and install fasteners . . . ." Mr. Mitchell

10 further testified the respondent representative on site informed him  
11 that he was "not aware of ACM" yet the bid sheet showed knowledge of the  
12 existence of this material at Exhibit 4. Mr. Mitchell found other  
13 contractor bids for the hotel project all demonstrated asbestos to be  
14 in existence on the property in the area subject of respondent's work.

15 Mr. Mitchell testified the identified general contractor  
16 representatives reported that respondent was aware of the ACM which he  
17 confirmed as evidence of employer knowledge by virtue of the bid  
18 information.

19 Mr. Mitchell testified from his worksheet at Exhibit 1, page 45.  
20 He explained his findings of respondent employees ACM hazard exposure  
21 without training. He testified from the employee interviews on lack of  
22 training materials for at least two employees, and the supporting  
23 information to demonstrate the proof elements of the standard violation.  
24 He reported the respondent representative informed him the employees had  
25 been trained by their union. He explained the serious classification,  
26 potential serious injuries or death that could result from ACM exposure.  
27 He further explained the "friable" condition to mean "can get airborne"  
28 very easily even by tampering or working near, by or disrupting

1 materials. He also testified as to gravity, probability and severity  
2 as reported at Exhibit 1, page 41.

3 On cross-examination Mr. Mitchell testified that during interviews  
4 Mr. Ralph Paul the general contractor representative admitted he told  
5 the respondent representative, Mr. Jackson, there was no asbestos at the  
6 project. Mr. Mitchell explained his additional citation to Bill  
7 Dickson, the general contractor, due his legal responsibility under OSHA  
8 enforcement guidance in that capacity. Respondent representative  
9 inquired whether Mr. Ralph Paul of Bill Dickson general contractor had  
10 knowledge of the ACM and acknowledged that he knew about the asbestos.  
11 Mr. Mitchell replied, "yes the inspection shows he was there when showed  
12 the sample . . . ." When asked "so as an inspector when you see our bid  
13 and Ralph Paul info that we didn't need an abatement contractor, what  
14 did you think . . . ?" Mr. Mitchell responded that ". . . you (Jackson  
15 Drywall respondent) could have seen the material on the beam as an  
16 experienced contractor in the business and should have noted the ACM  
17 still on the beams despite your bid information and stopped the work to  
18 determine the exposure and extent of the conditions . . . ."

19 On redirect examination, Mr. Mitchell testified the ACM was clearly  
20 visible in **plain view** hanging on the beams and readily observable to not  
21 have been corrected by anyone. He further testified that given the type  
22 of work the respondent company has done for over 30 years, it was not  
23 reasonable to conclude ACM was not identified by the respondent employer  
24 who should have taken action for correction.

25 Respondent offered no witness documentary evidence, but reserved  
26 the right for closing argument.

27 Complainant presented closing argument asserting the two cited  
28 violations were proven by substantial and preponderant evidence. There

1 was no evidence of compliance; only some discussion of conflicting  
2 information provided to the respondent. The photographs in evidence  
3 clearly depict the violative conditions and establish a prima facie case  
4 of violation. The respondent should have, with the exercise of any  
5 basic due diligence, clearly observed, with 30 years of experience in  
6 the industry, that in plain view the beams were contaminated with ACM.  
7 Respondent arguments to having been mislead were not supported by any  
8 facts in evidence nor any sworn witness testimony or explanation  
9 provided as to why when observed they did not immediately stop work and  
10 determine what their responsibilities were and the exposure to their  
11 employees. The respondent's bid was to encapsulate clean beams, yet  
12 they had to see the ACM as depicted in the photographs in evidence which  
13 was clearly visible and in plain view.

14 At Citation 1, Item 2, the employees were not trained, based upon  
15 the un rebutted CSHO testimony. Respondent offered no evidence to  
16 demonstrate training, despite the potential of hearsay commentary from  
17 the CSHO testimony. However the CSHO's testimony was supported and  
18 corroborated by the documents in evidence and establish the required  
19 evidence of violation.

20 Respondent provided closing argument. Mr. Jackson asserted his  
21 company has been in business for 35 years and done a great deal of work  
22 on buildings containing asbestos. He argued that all his employees  
23 completed OSHA 10 classes as union members, so the company should not  
24 be cited for a training violation. He further argued he was told there  
25 was no asbestos so when he bid the job it was without any requirements  
26 to address ACM issues. He argued he was mislead by the general  
27 contractor and as to what he was supposed to bid on, which was different  
28 than what was found at the job site. Mr. Jackson asserted he acted in



1 good faith, and eventually performed the abatement work, "I certainly  
2 did not expect to encounter asbestos at the site . . . there was no  
3 intention on my part to place our employees in jeopardy . . ."

4 In reviewing the testimony, exhibits, and arguments of counsel, the  
5 Board is required to measure the evidence against the required elements  
6 to establish violations under Occupational Safety & Health Law based  
7 upon the statutory burden of proof and competent evidence.

8 In all proceedings commenced by the filing of a  
9 notice of contest, the burden of proof rests with  
the Administrator. See NAC 618.788(1).

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

12 Preponderance of the evidence means evidence that  
13 enables a trier of fact to determine that the  
14 existence of the contested fact is more probable  
than the nonexistence of the contested fact. NRS  
233B, Sec. 2. *Nassiri v. Chiropractic Physicians'*  
15 *Board of Nevada*, 130 Nev. Adv. Op. No. 27, 327 P.3d  
487 (2014)

16 To prove a violation of a standard, the Secretary  
17 must establish (1) the **applicability** of the  
standard, (2) the existence of **noncomplying**  
18 **conditions**, (3) **employee exposure** or access, and  
19 (4) that the **employer knew or with the exercise of**  
**reasonable diligence** could have known of the  
20 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);  
21 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC  
1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
22 (No. 76-1408, 1979); *American Wrecking Corp. v.*  
*Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.  
23 2003).

24 A respondent may rebut allegations by showing:

- 25 1. The standard was inapplicable to the situation  
26 at issue;
- 27 2. The situation was in compliance; or lack of  
28 access to a hazard. See *Anning-Johnson Co.*,  
4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

1           3. Proof by a preponderance of substantial  
2           evidence of a recognized defense.

3           The undisputed evidence and testimony established the mandatory  
4 compliance requirements of the cited specific standards. The  
5 complainant witness testimony was credible and corroborated by the  
6 documentary evidence at complainant's Exhibits 1 through 4. Respondent  
7 offered no competent evidence nor testimony to support the arguments and  
8 explanations submitted at closing argument.

9           The elements to establish violations under the recognized burden  
10 of proof were met. It was undisputed the standard was **applicable** to the  
11 admitted facts in evidence. The existence of **non-complying conditions**  
12 was confirmed through the sworn credible testimony of CSHO Mitchell, and  
13 photographic exhibits, which corroborated the unrebutted employee  
14 witness statements taken during the time of inspection. The photographs  
15 in evidence clearly depicted the ACM and violative working conditions  
16 in **plain view**. The respondent employees were **directly exposed** and/or  
17 had **access** to the violative conditions that could result from the  
18 exposure to and lack of training for asbestos exposures. **Employer**  
19 **knowledge** was established based upon the documentary evidence and  
20 unrebutted CSHO testimony. This Board cannot lawfully accept mere  
21 explanations, rationalizations and/or arguments from the respondent  
22 representative as a defense based upon lack of employer knowledge given  
23 the admitted many years of business dealing with ACM and the  
24 preponderant evidence of record. Employer knowledge of the violative  
25 conditions is imputed to the employer when the supervisor knew, or with  
26 **reasonable diligence** could have known of the violative conditions. (See  
27 *Division of Occupational Safety and Health v. Pabco Gypsum*, 105 Nev.  
28 371, 775 P.2d 701 (1989).) Clearly the CSHO testimony, the undisputed

1 facts in evidence, and the reportings by the supervisory employee  
2 established the respondent had not made a determination or reasonable  
3 analysis of the existent asbestos or ACM despite the bidding information  
4 or the subject matter of its bid before allowing its employees to  
5 commence work and be exposed to the violative conditions. Further,  
6 respondent offered no competent evidence to deny or rebut **employer**  
7 **knowledge** of the violative conditions.

8 What constitutes the exercise of **reasonable**  
9 **diligence** is a question of fact and will vary from  
10 cases to case. As the Commission has explained,  
11 "[w]hether an employer was reasonably diligent  
12 involves a consideration of several factors,  
13 including the employer's obligation to have  
14 adequate work rules and training programs, to  
15 adequately supervise employees to anticipate  
16 hazards to which employees may be exposed, and to  
17 take measures to prevent the occurrence of  
18 violations." *Martin v. OSHRC* (Milliken & Co.), 947  
19 F.2d 1483, 15 OSH Cases 1373 (11<sup>th</sup> Cir. 1991);  
20 *Precision Concrete Constr.*, 19 OSH Cases 1404, 1407  
21 (Rev. Comm'n 2001). See e.g., *Consolidated*  
22 *Freightways*, 15 OSH Cases 1317, 1321 (Rev. Comm'n  
23 1991) (failure to train); *Gary Concrete Prod. Inc.*,  
24 15 OSH Cases 1806, 1810 (Rev. Comm'n 1994) (failure  
25 to supervise); *Carlisle Equip v. Secretary of*  
26 *Labor*, 24 F.3d 790, 793, 16 OSH Cases 1681 (6<sup>th</sup> cir.  
27 1994) (failure to verify weight of crane load); *Con*  
28 *Agra Flour Milling Co.*, 15 OSH Cases 1817, 1823  
(Rev. Comm'n 1992) (failure to inspect machinery  
and discover exposed wiring); *CF&T Available*  
*Concrete Pumping Inc.*, 15 OSH Cases 2195, 2197  
(Rev. Comm'n 1993) (failure to take steps to obtain  
employee compliance with clearance requirements).

Employer will often be found to have **constructive**  
**knowledge** of violative conditions or practices that  
are in **plain sight**. Compare *Simplex Time Recorder*  
*Co. v. Secretary of Labor*, 766 F.2d 575, 589, 12  
OSH Cases 1401 (D.C. Cir. 1985) (spray booth  
conditions and practices "readily apparent to  
anyone who looked"), with *United States Steel*  
*Corp.*, 12 OSH Cases 1692, 1699 (Rev. Comm'n 1986)  
(exercise of reasonable diligence would not have  
disclosed ice block hidden by dirt and in a place  
where it would not have been expected).

Respondent offered no witness testimony to rebut the allegations,

1 CSHO testimony, documentary evidence or in mitigation of the  
2 preponderant evidence of violation.

3 The classification of the violation as "serious" is confirmed. NRS  
4 618.625 provides in pertinent 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  
of employment unless the employer did not and could  
not, with the exercise of reasonable diligence,  
know of the presence of the violation."

10 Congress, through enactment of the Code of Federal Regulations  
11 (CFR), develops **specific** standards to protect employees in the workplace  
12 after extensive study and determination that particular hazards are  
13 known and/or **recognized** in certain industries. A hazard is deemed  
14 "recognized" when the potential danger of the condition or practice is  
15 either actually known to the particular employer or generally known in  
16 the industry. *Continental Oil Co. v. OSHRC*, 630 F.2d 446, 448 (9<sup>th</sup> Cir.  
17 1980).

18 The testimonial and documentary evidence was unrefuted and  
19 confirmed the dangers associated with exposure to asbestos and ACM in  
20 support of the serious classification; as well as direct or potential  
21 employee exposure through access to the hazards for serious injury or  
22 death. The issue before the Board as to the violation classification  
23 is not that any serious injury **occurred** but whether the **potential** for  
24 same existed. Employees on the worksite had **access** to hazardous  
25 asbestos and related ACM conditions well recognized to result in serious  
26 injury or death. The **probability** for serious injury or death from  
27 exposure to the hazardous conditions is governing criteria included in  
28 the penalty calculation at Exhibit 1, pages 41 through 48. There is a

1 preponderance of evidence in the record to support the classification  
2 of the violation as serious and the reasonableness of the proposed  
3 penalty.

4 The Board finds, as a matter of fact and law, that a violation did  
5 occur as to Citation 1, Item 1, 29 CFR 1926.1101(k)(1)(i), Citation 1,  
6 Item 2, 29 CFR 1926.1101(k)(9)(vii), the classification of the violation  
7 as "Serious" are confirmed, and the proposed penalties in the amount of  
8 THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500.00) reasonable and approved.

9 Based upon facts, evidence and testimony, it is the decision of the  
10 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of  
11 Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR  
12 1926.1101(k)(1)(i), the Serious classification confirmed, and the  
13 proposed penalty in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS  
14 (\$2,500.00) approved.

15 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**  
16 **HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did  
17 occur as to Citation 1, Item 2, 29 CFR 1926.1101(k)(9)(vii), the Serious  
18 classification confirmed, and the proposed penalty in the amount of ONE  
19 THOUSAND DOLLARS (\$1,000.00) approved.

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

1 **BOARD.**

2 DATED: This 17th day of December 2015.

3 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
4 REVIEW BOARD

5 By /s/  
6 JOE ADAMS, CHAIRMAN