

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,

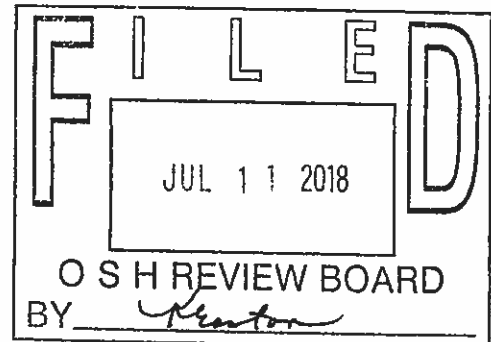
Complainant,

vs.

12 RESTORATION AND RECOVERY, LLC,

Respondent.  
13 \_\_\_\_\_/

Docket No. LV 17-1906



14 FINAL ORDER

15 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**  
16 **HEALTH REVIEW BOARD** at a hearing commenced on the 15<sup>th</sup> day of March  
17 2018, in furtherance of notice duly provided according to law, MS. SALLI  
18 ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**  
19 **Administrative Officer of the Occupational Safety and Health**  
20 **Administration, Division of Industrial Relations (OSHA)**. There was no  
21 appearance by the respondent or counsel, nor any information provided  
22 requesting a continuance of the proceeding. The **NEVADA OCCUPATIONAL**  
23 **SAFETY AND HEALTH REVIEW BOARD** finds as follows:

24 Jurisdiction in this matter has been conferred in accordance with  
25 Chapter 618 of the Nevada Revised Statutes.

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. References made to the complaint for each of the specific

1 citations and allegations of violation.

2 On the June 28, 2017 the respondent filed a response to the  
3 complaint opposing the findings of violations and assessment of  
4 penalties.

5 The Citation 1, Items 1 through 8 classified each of the Code of  
6 Federal Regulations (CFR) violations as **Serious**. The proposed penalty  
7 for the serious violations is in the amount of NINE THOUSAND SIX HUNDRED  
8 DOLLARS (\$9,600.00). Citation 2, Item 1 charged a violation of Code of  
9 Federal Regulations (CFR) and classified of the violation as **Regulatory**  
10 with a proposed penalty in the amount of THREE HUNDRED DOLLARS  
11 (\$300.00).

12 Based upon the non-appearance of the respondent party, counsel  
13 moved for judgment by default. The Board entered an order granting  
14 default subject to presentation of evidence and testimony to confirm the  
15 violations through a Final Order. Complainant submitted documentary  
16 evidence identified as Exhibits 1 and 2, comprising pages 1 through 108.  
17 At the conclusion of the presentation of evidence and testimony,  
18 complainant moved for a order granting summary judgment.

19 DISCUSSION

20 Complainant presented witness testimony from Certified Safety and  
21 Health Officer Industrial Hygienist 3 (CSHO-IH3) Mr. Jody Gascon. The  
22 witness testified to having conducted the NVOSHA inspection based upon  
23 a referral from the Clark County Health Department of Air Quality,  
24 reporting asbestos materials in a dumpster on the premises. CSHO Gascon  
25 testified he spoke to the owner identified as Ms. Marivelle Nunez and  
26 identified the narrative report in evidence at Exhibit 1, pages 9-10.  
27 He testified Ms. Nunez reported that she and others had removed the  
28 ceiling tile and related materials from the office during a remodeling;

1 and deposited the materials in a Republic Services dumpster outside the  
2 building. Ms. Nunez admitted having no training for the recognition  
3 and/or removal of asbestos materials. CSHO Gascon obtained samples for  
4 testing and photographs of the premises as referenced in Exhibit 1,  
5 pages 99-100, depicting the office building site and materials. He  
6 described the materials as pieces of flooring and ceiling tiles with  
7 **mastic** and joint compound which appeared to contain asbestos. He  
8 testified the reported results of an asbestos survey identified  
9 chrysotile asbestos between two and five percent. (Exhibit 1, page 9)

10 Mr. Gascon testified the respondent employees were not informed of  
11 the presence of asbestos prior to starting work; and the employees  
12 admitted to not having proper training to conduct asbestos removal.  
13 CSHO Gascon advised the employer of his findings and recommended  
14 issuance of the citations for the violations as referenced in the  
15 complaint.

16 Counsel presented witness testimony from Mr. John Hutchison. Mr.  
17 Hutchison identified himself as the supervisor at NVOSHES and described  
18 his background and qualifications. He further explained the reportings  
19 at Exhibits 1 and 2 in evidence; and testified with reference to the  
20 documentation. He explained the need for training to protect employees  
21 involved with, or performing work relating to, asbestos materials, and  
22 the statutory requirements referenced in 29 CFR 1926.1101 and various  
23 subsections identified specifically in the citations at Exhibit 1, pages  
24 49-66.

25 Mr. Hutchison testified on the basis for the classification of  
26 **Serious**, the expected detriment to safety and health for any employees  
27 contacting same, insufficient protection or training, and the penalty  
28 calculations under the NVOSHES enforcement manual.

1 Mr. Hutchison testified as to Citation 2, Item 1, the **regulatory**  
2 classified violation referencing NRS 618.790. He confirmed the employer  
3 was engaged in a project where aggressive methods were used to remove  
4 drywall, joint compound, texture material, plaster, ceiling tiles and  
5 floor tiles. The materials contained between two and five percent  
6 chrysotile asbestos. He confirmed the employer does not hold an  
7 asbestos abatement contractor's license with the state of Nevada to  
8 engage in the project for control of asbestos.

9 Mr. Hutchison testified the respondent management explained they  
10 understood a building inspection was done by the city before their  
11 purchase which included an asbestos survey. Mr. Hutchison testified he  
12 approved the CSHO findings and authorized the issuance of the citations  
13 against the respondent as referenced in the exhibits and evidentiary  
14 reportings.

15 Board members questioned the witness with regard to the status of  
16 the employees working and subsequent determinations of toxicity levels  
17 of the asbestos material. Mr. Hutchison testified Ms. Nunez is the  
18 owner of her own LLC and she was actually performing the work on the  
19 building with the assistance of family members. There were no employees  
20 of a contractor or independent employer performing work on the premises.  
21 Additional questions from Board members reflected the company, although  
22 named "Restoration" was not engaged in construction work; but rather a  
23 drug rehabilitation and psychiatric type facility. He further testified  
24 the employer had no knowledge of the asbestos requirements or toxic  
25 aspects relating to asbestos.

26 At the conclusion of presentation of evidence and testimony,  
27 counsel provided closing argument. Counsel asserted the company bought  
28 the building presumably to expand their business and set about making

1 what they thought were cosmetic changes. However they began taking down  
2 walls and disturbing the ceiling, as well as the tile and the floor.  
3 There was no clear indication of knowledge regarding asbestos by Ms.  
4 Nunez. Counsel asserted the response filed by the respondent did not  
5 provide evidentiary opposition, but objected to the penalty and  
6 expressed her lack of any knowledge or intent for wrong doing. Counsel  
7 argued the evidence, photographs and statements of Ms. Nunez were  
8 sufficient for finding the violations. She argued there was no rebuttal  
9 evidence submitted, neither in the contest letter nor answer; and a  
10 prima facie case of violation established.

11 Complainant moved for an order of summary judgment.

12 APPLICABLE LAW

13 The Board is required to review the evidence and recognized legal  
14 elements to prove violations under established occupational safety and  
15 health law.

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

18 NAC 618.788 (NRS 618.295) In all proceedings  
19 commenced by the filing of a notice of contest, the  
burden of proof rests with the Chief.

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

23 NRS 233B(2) "Preponderance of evidence" means  
24 evidence that enables a trier of fact to determine  
25 that the existence of the contested fact is more  
probable than the nonexistence of the contested  
fact.

26 To prove a violation of a standard, the Secretary  
27 must establish (1) the applicability of the  
standard, (2) the existence of noncomplying  
28 conditions, (3) employee exposure or access, and  
(4) that the **employer knew or with the exercise of  
reasonable diligence could have known of the**

1 **violative condition.** See *Belger Cartage Service,*  
2 *Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
3 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);  
4 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC  
5 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
6 (No. 76-1408, 1979); *American Wrecking Corp. v.*  
7 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.  
8 2003). (emphasis added)

9 A respondent may rebut allegations by showing:

- 10 1. The standard was inapplicable to the situation  
11 at issue;
- 12 2. The situation was in compliance; or lack of  
13 access to a hazard. See, *Anning-Johnson Co.*,  
14 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).  
15 (emphasis added)

16 NRS 618.625 provides in pertinent part:

17 ". . . a **serious** violation exists in a place of  
18 employment if there is a substantial probability  
19 that death or serious physical harm could result  
20 from a condition which exists, or from one or more  
21 practices, means, methods, operations or processes  
22 which have been adopted or are in use in that place  
23 of employment **unless the employer did not and could**  
24 **not, with the exercise of reasonable diligence,**  
25 **know of the presence of the violation.**" (emphasis  
26 added)

27 Federal Rule of Civil Procedure 56 governs and  
28 allows for summary judgment where the pleadings,  
discovery and any affidavits offered demonstrate  
there is **no genuine issue of material fact and law**  
**and that the moving party is entitled to judgment**  
**as a matter of law.** 29 C.F.R. §220061 (regarding  
submission of a case without hearing) ("Motions for  
summary judgment are covered by Federal Rule of  
Civil Procedure 56.") see *United States Steel*  
*Corp.*, 9 OSH Cases 1527 (Rev. Comm'n 1981).  
(emphasis added)

In reviewing the documentary and testimonial evidence under the  
statutory burden of proof for violations of the cited standards, the  
Board finds, as a matter of fact and law, no sufficient preponderance  
of evidence to warrant confirmation of the violations charged in the  
citations referenced in the complaint.

There is no preponderant evidence for the proof requirement of

1 **employer knowledge.** There was no evidence the employer knew, or with  
2 the exercise of reasonable diligence could have known, of the violative  
3 conditions. Mr. Hutchison testified candidly and fairly with regard to  
4 the facts presented and the lack employer knowledge. Similarly counsel  
5 identified the employer knowledge element to be "weak". Without proof  
6 by a preponderance of each of the four critical elements to find a  
7 violation, there can be no final order confirming violations.

8 The Board finds no **employee exposure** within the intended  
9 jurisdictional scope of the Nevada Occupational Safety and Health Act.

10 Here the owner was not an employer engaged in the construction,  
11 asbestos, or property renovation business. The respondent operates a  
12 rehab facility. She and her partner/assistant, together with family  
13 members, were merely attempting remodel of the office premises. There  
14 were no employees engaged by an employer to perform construction work  
15 or regulated asbestos removal requiring training or licensure. The  
16 spirit and intent of the Occupational Safety and Health Act is to assure  
17 safe working conditions for employees of employers engaged in regulated  
18 work tasks. The facts presented here depict a property owner and  
19 friends pitching in together to effectuate a remodel. Accordingly,  
20 there were no **employees exposed** to hazardous conditions as contemplated  
21 under the jurisdiction and scope for employer/employee relationships  
22 governed by the Act. At best, it appears the only employee on the  
23 premises was an office assistant, not employed for demolition or  
24 remediation requiring training for asbestos materials nor knowledgeable  
25 in the safety requirements for same. Similarly the respondent owner was  
26 merely doing her own remodel work. The other individuals involved  
27 appeared to be assistive family members. NRS requires **employees of an**  
28 **employer** subject of exposure to codified or recognized **hazards** for which

1 there is **employer knowledge** of the conditions requiring safety  
2 protection and training.

3 Notably, the respondent written opposition reflected an expenditure  
4 of substantial funds at Exhibit 1, pages 83-84, to later determine and  
5 confirm the lack of any actual harmful conditions of asbestos and  
6 included various methods to address, remove or deal with same. Specific  
7 reference is made to the statements provided at Exhibit 1, pages 83-98:

8 ". . . It is never our intent to do any harm in  
9 contrary we want to improve the lives of the  
10 residents of Las Vegas, Nevada. I would also like  
11 to take a moment to mention we also met with Jody  
12 Gascon of the State of Nevada, Department of  
13 Business and Industry, Division of Industrial  
14 Relations, Occupational Safety and Health  
15 Administration and complied with all of his  
16 request. I also requested Chris and Sara keep him  
17 and Kevin in the loop as to what was going on. We  
18 thank him, Kevin, Chris and Sara for walking us  
19 through this process that we were totally  
20 unfamiliar with as this is our first commercial  
21 purchase. This process has been very stressful and  
22 intimidating and we are grateful this problem was  
23 identified by Kevin and rectified by Chris and  
24 Sara's offices."

17 The evidence presented by complainant included a report of the  
18 testing results for the materials removed. It demonstrated the asbestos  
19 found was at a "**non-actionable level.**"

20 Fairness, good faith, and a reasonable application of occupational  
21 safety and health law requires the case be dismissed.

22 The Board concludes, based upon the evidence, as a matter of fact  
23 and law, the cited violations at Citation 1, Items 1 through 8 and  
24 Citation 1, Item 2, be and they hereby are dismissed. The complainant  
25 motion for summary judgment is denied. The Board grants judgment for  
26 the respondent.

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1 This Order shall be deemed a Final Order of the **NEVADA OCCUPATIONAL**  
2 **SAFETY & HEALTH REVIEW BOARD** and inclusive of Findings of Fact and  
3 Conclusions of Law.

4 DATED: This 28 day of June 2018.

5 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
6 REVIEW BOARD

7 By:

8 Steve Ingersoll  
9 STEVE INGERSOLL, CHAIRMAN  
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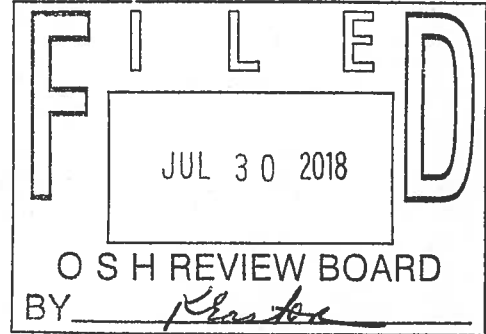
Docket No. LV 17-1906

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RESTORATION AND RECOVERY, LLC,

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



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12  
13 ERRATA

14 ON THE 11<sup>th</sup> day of July 2018 the **NEVADA OCCUPATIONAL SAFETY AND**  
15 **HEALTH REVIEW BOARD (BOARD)** entered a Final Order in the subject  
16 captioned matter. The Final Order contained errors as to the following:

17 At page 2, line 20, the **Certified** Safety and Health Officer should  
18 read **Compliance** Safety and Health Officer (CSHO).

19 Page 8, line 24, should read ". . .**Citation 2, Item 1.** . . ."

20 The Final Order is amended and corrected through this *Errata*. In  
21 all other respects the Final Order entered by the BOARD is confirmed.

22 DATED this 30<sup>th</sup> day of July 2018.

23 NEVADA OCCUPATIONAL SAFETY AND  
24 HEALTH REVIEW BOARD

25 By: \_\_\_\_\_ /s/  
26 STEVE INGERSOLL, CHAIRMAN  
27  
28