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NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION OF THE DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA, **Complainant,** **vs.** **PONDEROSA HOTEL, INC.,** **Respondent.**	**Docket No. RNO 19-1975**

DECISION OF THE BOARD AND FINAL ORDER

This matter came on for hearing before the Nevada Occupational Safety and Health Review Board on September 11, 2019. The deliberations and disposition of this matter also took place on the same day.

The hearing was conducted in furtherance of a notice duly provided according to law. Salli Ortiz, Esq., appeared on behalf of complainant, Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations (the "State" or "OSHA"). Mark R. Thierman, Esq., Thierman Buck, LLP, 7287 Lakeside Drive, Reno, NV 89511, appeared on behalf of the Ponderosa Hotel, Inc., respondent. Kamy Keshmiri, of the Ponderosa Hotel, Inc., (Ponderosa) also appeared on behalf of the respondent.

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The Board of Review members in attendance throughout this matter were Steve Ingersoll, Chairman, and Members Frank Milligan and Lance Semenko. There being three members of the Board present to hear this matter, with at least one member from management and one member from labor in attendance, a quorum heard the matter and conducted the business of the Board.

Jurisdiction is not disputed. It is conferred by NRS 618.315. Also, a complaint may be prosecuted which arises before or during an inspection of the employer's workplace. *See,* NRS 618.435(1). And, Nevada has adopted all Federal Occupational Safety and Health Standards which the Secretary of Labor has promulgated, modified or revoked and any amendments thereto, which are deemed the Nevada Occupational Safety and Health Standards. *See,* NRS 618.295(a).

The State's complaint sets forth the allegations of the Citations which the State claims are violations of the Nevada Revised Statutes and Regulations. At the outset of the hearing, the State offered for admission into evidence, Exhibits 1 and 2. Exhibit 1 consists of pages 1 through 124(a) and Exhibit 2 consists of pages 125 through 176. These Exhibits were stipulated to be admitted into evidence without objection. Tr., p. 57;13-24. Respondent, the Ponderosa Hotel, Inc., offered no exhibits for admission into evidence, opting, instead, to defend by cross examination of the State's witnesses and the testimony of the respondent's lone witness, Kamy Keshmiri.

This matter came to the attention of State OSHA by a governmental referral about alleged safety violations. The complaint consists of Citation 1, Items 1 through 7, Citation 2, Item 1 and Citation 3, Item 1. Citation 1, Items 1 through 7, were each classified as Serious. Citation 2, Item 1, was classified as "Other." And, Citation 3, Item 1, was classified as "Regulatory."

Briefly, the Ponderosa is a former hotel and casino situated on South Virginia Street in Reno, Nevada. NRS 47.130. The property eventually evolved into a single room occupancy (SRO) form of affordable housing. The rent charged the tenants is $600 per month for a 400 square foot (20'X20') premises, including a bathroom and kitchenette. Tr., pp. 40, 131, 132. These SROs are a part of the affordable housing stock serving the greater Reno-Sparks metropolitan area. Ownership claims it loses money on the rental units. NRS 47.130. The

property economically survives because of the rent paid by a tenant that occupies the commercial portion of the property. Tr., p. 43. Essentially, this business, respondent claims, subsidizes with its rent, the affordable housing use of the property. Absent this subsidy, market rate rent would have to be charged, a rate the tenants would be unable to afford. Tr., p. 43.

The three Citations of this case revolve around the condition of the premises as opposed to any overt, unlawful conduct on the part of management or the employees. Citation 1, Item 1, alleges a serious violation of 29 CFR 1910.151(c), providing that where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body must be available for immediate emergency use.

Citation 1, Item 2, alleges a serious violation of 29 CFR 1910.1001(j)(3)(i). The Regulation mandates that building and facility owners determine the presence, location, and quantity of ACM and/or PACM at the work site. Employers and building and facility owners shall also exercise due diligence to inform employers and employees about the presence and location of ACM and PACM.

Citation 1, Item 3, alleges a serious violation of 29 CFR 1910.1030(c)(1)(i), which provides that each employer having an employee with occupational exposure as defined by paragraph (b) of this section, shall establish a written Exposure Control Plan designed to eliminate or minimize employee exposure, including occupational exposure to blood and other potentially infectious materials (OPIM) while performing work activities. The State alleged no such Plan existed. 29 CFR 1910.1030(b) defines occupational exposure to mean reasonably anticipated skin, eye, mucous membrane or parenteral contact with blood or other potentially infectious materials that may result from the performance of the employee's duties.

Citation 1, Item 4, alleges a serious violation of 29 CFR 1910.1030(f)(1)(i), which provides that employers shall make available the Hepatitis B vaccine and vaccination series to all employees who have occupational exposure, and post-exposure evaluation and follow-up to all employees who have had an exposure to an incident. The State alleges that the employer did not make the Hepatitis B vaccine and vaccination series available to six employees with occupational exposure to blood or other potentially infectious pathogens.

Citation 1, Item 5, alleges a serious violation of 29 CFR 1910.1030(g)(2)(i), which provides that employers shall train each employee with occupational exposure in accordance with the requirements of this section. The State avers that six employees, with occupational exposure to blood or other potentially infectious material (OPIM) when cleaning rooms or picking up sharps at the facility, were not provided with bloodborne pathogen training.

Citation 1, Item 6, alleges a serious violation of 29 CFR 1910.1200(e)(1), which provides that employers shall develop, implement, and maintain at each workplace, a written hazard communication program. The State contends that the Employer had six employees who used hazardous chemicals during their job duties. Employees used these chemicals on a frequent basis and the Employer had not developed and implemented a hazardous communication program.

Citation 1, Item 7, alleges a serious violation of 29 CFR 1910.1200(h)(1), which requires that Employers provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment. And, whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area, they are to be trained on the new chemical hazard, also. Here, the State avers that employees used multiple hazardous chemicals throughout the facility and the Employer did not provide employees with effective information and training on hazardous chemicals.

Citation 2, Item 1, alleged an "other" violation of 29 CFR 1910.132(d)(2), which provides that an employer shall verify that the required workplace hazardous assessment has been performed through a written certification that identifies the workplace evaluated; identifies the person certifying that the evaluation has been performed; reveals the date(s) of the hazardous assessment; and identifies the document as a certification of hazardous assessment. The State claimed that the Employer could not produce a written workplace hazard assessment when hazards in the workplace necessitated the use of personal protective equipment, such as gloves and safety glasses.

Lastly, Citation 3, Item 1, alleges a "regulatory" violation of NRS 618.383(1), which provides that an employer shall establish a written safety program and carry out the requirements of the program within 90 days after it is established. It is alleged here that the Employer did not

establish a written safety program and carry out the requirements of the program within 90 days when the number of employees exceeded 10 in the workplace. The State alleges that the Employer, the Ponderosa, had 15 employees at the time of the inspection.

Pursuant to NAC 618.788, the burden throughout is upon the State or complainant to prove the "*prima facie*" case which attaches to each citation. The State must show in the liability phase for each Citation: (1) the applicability of the OSHA regulation to the matter at hand; (2) non-compliance with the OSHA regulation; (3) employee exposure to the hazardous conditions, the subject of the OSHA regulation; and, (4) the employer's actual or constructive knowledge of the wrongful conduct. *See, Original Roofing Company, LLC. v. Chief of Administrative Officer of the Occupational Safety and Health Administration,* 442 P.3d 146, 149 (2019). These factors apply, whether the State has alleged a serious violation or a violation of a less than serious or "other" nature. *Brennan v. Occupational Safety and Health Review Com'n.*, 511 F.2d 1139, 1143 (9th Cir., 1975).

At the outset of the hearing, the parties, by and through counsel, stipulated that with the exception of Citation 1, Item 2, the *prima facie* or liability phase of the case was already proven. Nothing further was required of the State to prove the liability phase of the case for the remaining Citations. With the exception, therefore, of Citation 1, Item 2, judgment on the liability phase was conceded for each Citation brought by the State.

As stated by counsel for the Board of Review: "If there is no stipulation as to Citation 1, Item 2, we have to hear testimony and evidence on Citation 1, Item 2. Ms. Ortiz: Correct. Mr. Theirman: Yeah, that's fine." Tr., pp. 59;21-24, 60;1-4. ... "Mr. Zeh: Everything else... Mr. Theirman: Everything else is fine." Tr.,p. 60; 6-7."

Then, Board counsel stated: "All other violations you are stipulating to, just not the penalty, or the amount of the fine." Mr. Theirman then responded: "The amount of the fine, you're right." Mr. Zeh: "So we'll hear the case on Citation 1, Item 2, and then when we're done with that, go to the penalty phase." Ms. Ortiz: "That's my understanding, yes." Tr., p. 60;8-16.

Based upon this colloquy amounting to a stipulation that liability is established and a *prima facie* case made out, the State's liability claims for Citation 1, Items 1, 3 through 7,

Citation 2, Item 1 and Citation 3, Item 1, are deemed sustained. The *prima facie* case for each Citation is deemed established. Liability is accordingly conceded for each Citation and Item thereunder. The only matter left to be resolved for these Citations is the amount of the penalty or assessment. There are, however, no penalties associated with Citation 2, Item 1. The penalty proposed to be assessed of Citation 3, Item 1, is $360, an issue left for resolution according to the stipulation of the parties. The same holds for each of the remaining serious claims. For Citation 1, Item 1 through 7, the proposed penalty is $1,800 for each. The State must justify the penalties assessed for these serious citations.

DISCUSSION

The respondent, the Ponderosa Hotel, Inc., (Ponderosa) is a domestic corporation.[1] Exhibit 1, p. 1, located at 515 South Virginia Street, Reno, Nevada. Exhibit 1, p. 1. While labeled a "hotel," the Ponderosa is a six story building that is part of the affordable housing stock of the greater Reno-Sparks area, serving as a single room occupancy apartment of 400 square feet, for which rent of $600 per month is charged. Tr., pp. 40, 131.[2]

The allegation of the State's complaint involve the conditions of the property rather than overt conduct of personnel. As explained, above, only Citation 1, Item 2 was left, however, for contest on the merits. The State is obliged to prove a *prima facie* case, *see*, *Original Roofing Company*, *supra* at 149, for Citation 1, Item 2 according to the stipulation of the parties.

Citation 1, Item 2.

In Citation 1, Item 2, the State claims a violation of 29 CFR § 1910.1001((j)(3)(i). It states:

> Duties of employers and building and facility owners....(i) Building and facility owners shall determine the presence, location, and quantity of ACM and/or PACM at the work site. Employers and building and facility owners shall exercise due diligence in complying with these requirements to inform employers and employees about the presence and location of ACM and PACM.

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[1]The State lists the Ponderosa Hotel, Inc., as a domestic corporation. Exhibit 1, p. 1. The respondent states the Ponderosa Hotel is a limited liability corporation. Tr. p. 20.

[2]The transcript citations are to the version which included the hearings for both Ponderosa RNO 19-1974 and RNO 19-1975.

The Ponderosa is the building owner and operates the premises of the SRO facilities the subject of the complaint. Tr., p. 120. On the face of the Regulation, therefore, it applies to the Ponderosa, as it is also the employer of the personnel maintaining the SRO rooms and common areas. Tr., pp. 65, 113, 126, 137; Exhibit 1, pp. 24-37.

The Regulation is unambiguous. It consists two elements. First, the building owner must determine whether asbestos exists in the work site. Then, if asbestos is determined to exist in the workplace, the employer must inform personnel of both the presence and location of the asbestos. The onus is on the employer/building owner to exercise due diligence when discharging its duty of inquiry and notice under this Regulation. The employer/building owner may not sit on its hands and evince a cavalier attitude towards safety when determining whether asbestos exists in the workplace as well as the location and quantity of the asbestos. *See, Martin v. Occupational Safety and Health Review Comm.,* 947 F.2d 1482, 1485 (11th Cir., 1991).

And, the employer must exercise due diligence when giving notice to personnel about both the presence and location of the asbestos, if any, in the workplace. That is to say, this Regulation does not require proof employees were in fact exposed to asbestos in the workplace for the Regulation to be violated. Equally, the Regulation does not require a showing of proof asbestos in fact existed in the workplace. The employer/building owner must, however, show it actually conducted a diligent search for the presence of asbestos in the first place. A cavalier, indifference to an investigation to locate the presence of asbestos will not do.

Six employees of the Ponderosa were interviewed during the course of the investigation into this referral. *See*, Exhibit 1, pp. 24-37. From their interviews, it is clear that they worked in and about the premises, made repairs, changed sheets, dealt with bloodborne pathogens, encountered sharps, maintained the premises, cleaned the premises, used corrosive chemicals to perform their jobs, assigned work and helped from within to manage the premises.

Their interviews, admitted without objection into evidence, Tr., p. 57;13-24, describe a desert wasteland for safety in workplace. Almost without exception, from these interviews it is beyond dispute the employees had no hazardous communication training nor saw a program for such training, did not know if Hepatitis B vaccinations were to be made available to employees

exposed to bloodborne pathogens, were never offered such shots despite personnel being exposed to needles and worked with corrosive chemicals without eyewash even being in the building, much less readily accessible to personnel. Exhibit 1, pp. 24-37.

Employees use the Brady products and bleach to clean. Exhibit 1, p. 28. Gloves are provided for personnel protective equipment. (PPE). However, no safety glasses or goggles are supplied. No hepatitis vaccine is provided even though when cleaning rooms, vomit and blood are discovered on the sheets. Employees also use sulfuric acid at work. Exhibit 1, p. 28. They are not provided training in hazardous communication for this, either. And, here, too, employees are unaware of the existence of a communication training program for hazardous chemicals. Exhibit 1, pp. 31, 32.

These incidents do not apply directly to the Regulation, 29 CFR § 1910.1001(j)(3)(i). They reveal an ambient condition for safety concerns that could be labeled charitably as cavalier about the safety of the Respondent's personnel.

Pertinent to 29 CFR § 1910.1001(j)(3)(i), however, according to Dale Marrs, he and David Almond dismantled and repaired walls made of sheet rock (dry wall repair), including holes punched in the walls. Exhibit 1, pp. 31-34. Mr. Marrs could not scrape the acoustical ceiling tiles because the ceiling contained asbestos. Exhibit 1, p. 31. Mr. Marrs, however, was not told where and what contained asbestos in the work place. Mr. Marrs heard, there might have been performed an asbestos survey. Exhibit 1, p. 34.

David Almond scraped the acoustic ceilings and he also did dry wall repair. He was not for this work provided any PPE, and he was not told if there was any asbestos in the ceilings or the drywall of the building. He has seen no asbestos survey. He also removed the old tiles and cut the drywall to repair the rooms. Like the others, he has had no bloodborne pathogen training. Exhibit 1, pp. 34-35.

This means, however, that Mr. Almond was allowed to scrape acoustical tiles without any protection when Mr. Marrs was kept from working on the same ceiling tiles because Respondent suspected the presence of asbestos in the ceiling. Mr. Almond was left to fend for himself. Exhibit 1, pp. 34, 35.

In fact, asbestos was present in the workplace. Mastic, floor tiles being replaced, the wrapping around the plumbing and the ceiling tiles in a women's lounge were found to contain asbestos. Tr., pp. 76, 82, 84, 87, 88, 89. This information was not conveyed to the employees. Tr., pp. 64, 65, 66. In addition, in 2011, an asbestos survey was conducted prior to making repairs due to a fire on the premises. Tr., p. 122. This survey apparently landed with the City of Reno, who was given the survey. It was not produced for this hearing. Tr., pp. 78, 79.

Then, in 2018, another asbestos survey of the premises was conducted as more repair work was needed. Tr., pp. 84, 85, 98. According to this report, it should not be relied upon to address the asbestos issue other than the limited area the subject of the report. Furthermore, the report advised that unless shown otherwise, asbestos should be presumed to exist throughout the building, given its age and the prevalence of the use of asbestos in construction in the 60's when the building was constructed. Tr., pp. 78, 79, 83, 84, 85.

In short, the prospect of encountering asbestos in the workplace was and remains a serious matter. Indifference to the inquiry required by 29 CFR § 1910.1001(j)(3)(i) as displayed, here, cannot be tolerated. The Board, therefore, finds and concludes that 29 CFR § 1910.1001(j)(3)(i) has been violated.

The question, then, becomes whether the State can show a violation for OSHA purposes, allowing the Board to sustain Citation 1, Item 2. For that to be determined, the Board must turn to the elements of a *prima facie* case in order to decide whether for OSHA's purposes, Citation 1, Item 2 can be sustained. *See, W.G. Yates & Sons Const. Co. Inc. v. OSH Review Comm.,* 459 F.3d 604, 606 (5th Cir., 2006).

The Liability Phase, All Citations

As explained, above, the burden of proof rests with the State to show: (1) the applicability of the OSHA regulation to the matter at hand; (2) non-compliance with the OSHA regulation; (3) employee exposure to the hazardous conditions, the subject of the OSHA regulation; and, (4) the employer's actual or constructive knowledge of the wrongful conduct. *See, Original Roofing Company, supra* at 149 (2019). The discussion, above, shows that non-compliance with 29 CFR § 1910.1001(j)(3)(i) is established. The State must also be able to prove the remaining three

elements of the *prima facie* case in order to affirm 29 CFR § 1910.1001(j)(3)(i) has been violated under State OSHA. *Yates, supra* at 606.

Turning to the first element, the applicability of the Regulation, on its face, it is intended to provide a measure of protection from the exposure to asbestos in the work place by surveying the places where work is to be performed in order to determine if asbestos will be encountered. Fulfillment of this step, in turn, enables the employer to inform the employees of the results of the study so that the employees can either avoid exposure altogether, or wear PPE to protect themselves from exposure to this lethal construction material. The Respondent's building, given its age, could well have been full of asbestos. Tr., pp. 73, 75, 84, 85, 89, 113. There was clearly a need to know, which is precisely a major function of this Regulation. The first element of a *prima facie* case has been satisfied.

Turning to the third element of a *prima facie* case, the Regulation is intended to protect against hostile conditions by warning employees and alerting employers to the existence of asbestos in order to prevent exposure in the first place. The purpose of the Regulation falls squarely within the meaning of this element of a *prima facie* case. As it turned out, asbestos was also present in the workplace threatening employees. Tr., pp. 71, 77, 84, 87, 88, 89, 123, 142 . That is to say, asbestos is expressly called out in the Regulation. Unless the Board is to presume asbestos was mentioned for no specific reason, the Regulation, itself, bakes into the analysis the dangers inherent in asbestos. Why else would the Regulation call out asbestos, for warning, if it was not a hazardous material?

That is to say, with the danger of asbestos baked into the Regulation, the State further satisfies proof of exposure to a hazardous condition. *See, Vecco Concrete Construction,* 5 BNA OSHC 1960, 1961, 1977-78, CCH OSHA ¶ 22,247 (No.15579, 1977). As stated there, when the express terms of the standard contemplate the existence of a hazard when its terms are not met, exposure to the hazard element of the *prima facie* is shown. *Vecca, supra* at p.2.

This element of a *prima facie* case is satisfied.

This brings analysis to the question of knowledge. The State must show the Respondent either knew or should have known of the violation of 29 CFR § 1910.1001(j)(3)(i). *See, Yates,*

supra at 607. Here, the Regulation places the onus upon the employer to conduct an asbestos evaluation and then notify the workforce of the results so that the employees and Respondent can take steps to provide protection against exposure to asbestos. Surely, the Respondent must have known it did not investigate or give notice of the results of the investigation. The Board, however, understands the knowledge should evince some kind of scienter relating to the protection of employees from asbestos. The State meets that test. The Respondent had ample opportunity, *see,* Exhibit 1, p. 43, to acquire knowledge which would alert it to the fact that it should have been sensitive to the presence or likely presence of asbestos in the workplace to warn employees so that they might protect themselves through PPE or a complete avoidance of asbestos in the first place. *See, Lancaster Enterprises, Inc.,* OSHR Docket No. 97-0771, 8/1/2000, p. 12; *Koskasing Const. Co.,* 17 BNA OSHC 1969, 1871, 1995-97 CCH OSHD ¶ 31,207, p. 43,723 (No. 92-2596, 1996) (the employer's constructive knowledge may be based upon the obvious).

Respondent concedes it had an asbestos study completed in 2011. Tr., p. 79. The Respondent also admits another study was completed in 2018. Tr., p. 83. The second study or report advised, given the age of the building, the presence of asbestos should be presumed. Tr., pp. 84, 85, 98. The 2018 report also disclosed the presence of asbestos in the building. Tr., pp. 84, 85. And, the manager of the Ponderosa, LLC, admitted, he was aware of the presence of asbestos in the building. Tr., pp. 123, 142.

The Respondent was in the possession of an abundance of information about asbestos in its building to alert it to act and be informed of the obligations imposed upon Respondent by 29 CFR § 1910.1001(j)(3)(i). It is also not as if asbestos and the hazard it poses are unknown. And, as indicated, the threat posed by asbestos is baked into the Regulations. Awareness of the Regulation, itself, amounts to an awareness of the threat posed by asbestos, given that asbestos is baked into the Regulation. The knowledge requirement of the *prima facie* case has also been proven.

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The liability phase for Citation 1, Item 2 is, therefore, affirmed. By reason of the stipulations entered into by the parties, the liability phase of each and every other Citation to the State's complaint, is also affirmed.

The Penalty Phase–All Citations

This leaves for analysis the penalty phase for each citation, including Citation 1, Item 2, for consideration. Here, the burden is upon the State to give due consideration to four penalty phase factors when assessing penalties. They are: "(1) the size of the employer's business; (2) the gravity of the violation; (3) the employer's good faith; and (4) the employer's history of OSHA violations." *Secretary of Labor v. Rawson Contractors, Inc.*, OSHRC Docket No. 99-0018. *See also, J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, CCH OSHD ¶ 41,033 (No. 87-2059, 1993). These factors are not necessarily accorded equal concept. *Id.*

Taking the Citation 1 cluster of claims, first, they are Citation 1, Item 1, through Citation 1, Item 7. Each carries a proposed fine of $1,800. *See*, Complaint, pp. 2-6. To arrive at that figure, the State, in fact, for each Citation 1 claim, considered the size of Ponderosa's business, including the number of employees, in total, as well as the number of employees that might be involved in the specific offense. *See,* Exhibit 1, pp. 4, 41-43. The State also considered the specific and grave nature of the offense, such as asbestos. *Ibid.* As cancer inducing that might lead to death, the State concluded for these reasons that the violation of 29 CFR § 1910.1001(j)(3)(i) was serious and severe. Tr., pp. 99, 100. The likelihood of this outcome and of a violation happening again was also considered. Tr., p. 100. Then, the State, in fact, considered all of these factors together, giving rise to the gravity of the offense, generating a fine of $5,000. Tr., p. 101.

Starting with a penalty of $5,000, the State next gave credit for the fact that it found Ponderosa employed 11 or more employees or less than 25 employees. This size workforce yielded a 60% reduction in the $5,000 fine. The Ponderosa was given by the State an additional 10% good conduct history reduction as there was no record the Ponderosa had previously been assessed a high gravity violation. Tr., pp. 101, 102.

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Another 10% reduction was also potentially available to the Ponderosa. Given a workforce found to be 15 employees, another 10% reduction could have been had for good faith, if it had adopted a written safety program. It had none. Hence, the Ponderosa exhausted its deductions. The good faith deduction is also the subject of Citation 3, Item 1, discussed below. Tr., p. 102.

The point here is three-fold. First, the State went through all four of the penalty phase elements without omission. Second, it correctly applied the elements and extended to the Ponderosa, each of the deductions to which it was entitled. Third, the analysis the State gave to the penalty phase of Citation 1, Item 2 was also followed to arrive at the $ 1,800 penalty assessed for Citation 1, Item 1 and Citation 1, Items 3 though 7, including the finding of a workforce of 15 employees in number. Tr., pp. 101, 103, Exhibit 1, pp. 4, 83. During the investigation into the complaint, John Hostetler, the front desk manager, Exhibit 1, p. 24, told OSHA that the Ponderosa employed 14/15 employees. Exhibit 1, p. 4. And, in a letter to the State contesting the citations, legal counsel for the Ponderosa stated that the Ponderosa had 11 employees. Tr., p. 101;15-24. *See also*, Exhibit 1, p. 83.

Turning to Citation 2, Item 1, there was no fine or penalty assessed for this violation. As the parties have stipulated to the liability phase for this item, it stands as a conviction without a penalty.

Last, the Board comes to Citation 3, Item 1, a regulatory charge under NRS 618.382(1). The proposed penalty was $360, for having more than 10 employees, and failing to have established a written safety program. As indicated, the Board finds that the Ponderosa had more than 10 employees. Hence, the Board concludes this assessment is sustained, unless the Ponderosa had 10 or fewer employees.

Ponderosa's Defense To The Liability Phase

The Ponderosa's defense was based upon hypothetical questions propounded to the witnesses that were not particularly helpful and an attack upon the State's claim the Ponderosa employed 15 employees which the State then used to determine the level of the fines assessed for the Citation 1 and Citation 3violations. The Ponderosa claims, its work force was 6-8 employees

or less than 10 employees. Were that true, the Ponderosa would have been entitled to a 70% reduction for each charge of Citation 1 and Citation 3, instead of the 60% deduction given the Ponderosa. Tr., p. 101;15-24.

In addition, Citation 3, Item 1 would go away because employers with 10 or fewer employees are not required to have a written safety program. Tr., p. 105. If the Ponderosa only employed 6-8 employees, this would have the effect of reducing the fine by another $360, the Citation 3, Item 1 levy. Tr., p. 105.

Neither of these discounts apply because the Board finds that the Ponderosa had at least 11 employees, if not 15 employees. This finding is based in part upon the letter, Exhibit 1, p. 82, of Ponderosa's legal counsel in this matter wherein it is stated that the Ponderosa employed 11 workers. In addition, John Hostetler stated during the investigation into the charges that the Ponderosa had 14/15 employees. *See*, Exhibit 1, p.4.

The Ponderosa countered this with the testimony of its manager that it only employed 6-8 employees. The Ponderosa produced, however, no payroll records to fortify the claim. Production of payroll records was not beyond the capacity of the Ponderosa. The failure to produce the payroll records when they could have been produced gives rise to the negative inference that if produced, they would not sustain the Ponderosa's claim it only employed 6-8 employees. *See, Bass-Davis v. Bass*, 122 Nev. 442, 448 (2006); *Turner v. Hudson Transit Lines*, 142 FRD 68, 75 (S.D.N.Y., 1991).

Factually, and as a matter of law, the Ponderosa challenge to the penalty phase does not withstand scrutiny. The penalties and abatement assessed by the State are affirmed.

It was therefore, moved by Frank Milligan to affirm liability and the penalty of $1,800 for Citation 1, Item 2. Lance Semenko seconded the motion. The motion was adopted by a unanimous vote of 3 in favor of the motion and none against. Tr., p. 179.

Then, with respect to violations, Citation 1, Items 1, 3, 4, 5, 6 and Item 7, Citation 2, Item 1, and Citation 3, Item 1, the liability for each item is deemed established by stipulation. Tr., p. 180;14-17. Then, for Citation 1, Items 1, 3, 4, 5, 6,and 7, the penalty is $1,800 for each Item.

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For Citation 2, Item 1, there is no penalty but liability if affirmed by stipulation. For Citation 3, Item 1, the penalty was $360.

It was accordingly moved by Lance Semenko to accept the stipulation as to liability for each Citation and Item, to therefore affirm each of these Citations and Items and to affirm the penalty of $1,800 for Citation 1, Items 1, 3, 4, 5, 6 and 7, and the penalty of $360 for Citation 3, Item 1, thereby affirming each Citation, penalty and abatement set out in the Complaint. Tr., p. 181. Frank Milligan seconded the motion. The motion was adopted on a unanimous vote of 3 in favor and none against the motion. Tr., p. 181.

DECISION AND FINAL ORDER OF THE BOARD OF REVIEW

FINDINGS OF FACT

All Findings of Fact relevant and necessary to a determination of the contested issues have been specially found and appear in the proceeding discussion and decision. *See,* Rule 52(a), NRCP. Further, to the extent the discussion constitutes Conclusions of Law or mixed Statements of Fact and Conclusions of Law, they are incorporated into the Conclusions of Law which follow.

CONCLUSIONS OF LAW

Based upon the foregoing, the Board of Review hereby concludes as a matter of law, that Citations 1, Items 1 through 7, Citation 2, Item 1, and Citation 3, Item 1 are affirmed in their entirety, including the fines levied, if any, and the abatements are so ordered.

ACCORDINGLY, it is hereby ORDERED that Citation 1, Item 1, the penalty of $1,800, and the abatement, are affirmed, effective immediately;

It is HEREBY ORDERED Citation 1, Item 2, the penalty of $1,800, and the abatement, are affirmed, effective immediately;

It is HEREBY ORDERED Citation 1, Item 3, the penalty of $1,800, and the abatement, are affirmed, effective immediately;

It is HEREBY ORDERED Citation 1, Item 4, the penalty of $1,800, and the abatement, are affirmed, effective immediately;

It is HEREBY ORDERED Citation 1, Item 5, the penalty of $1,800, and the abatement, are affirmed, effective immediately;

It is HEREBY ORDERED Citation 1, Item 6, the penalty of $1,800, and the abatement, are affirmed, effective immediately;

It is HEREBY ORDERED Citation 1, Item 7, the penalty of $1,800, and the abatement, are affirmed, effective immediately;

It is FURTHER ORDERED Citation 2, Item 1 is affirmed, with no penalty assessed;

It is FURTHER ORDERED Citation 3, Item 1, the penalty of $360, and the abatement, are affirmed, effective immediately;

It is FINALLY ORDERED that the abatement required in each instance is so ORDERED effective immediately.

APPROVAL OF DECISION AS FINAL ORDER OF THE BOARD

On June 9, 2021, the Board convened to consider adoption of this Decision, as written or as modified by the Board, as the Decision and Final Order of the Board.

Those present and eligible to vote on this question consisted of three of the five current members of the Board, to-wit, Chairman Ingersoll, Secretary Weber and Member Mulligan. Board Spielberg and Macias were ineligible to vote on this matter as neither were present for the hearing on the merits of this case and had not reviewed the record giving rise to the decision. Secretary Rodd Weber has reviewed the entire record that was before the Board on this matter and is, therefore, also eligible to consider whether this decision tracks the Board's disposition of this matter according to NRS 233B.124. A quorum was, therefore, present and eligible to vote on whether this draft decision accurately reflected the Board's rational and action taken by the Board.

Accordingly, it was moved by Frank Milligan, seconded by Rodd Weber, to approve the draft decision prepared by Board Counsel as it accurately reflected the action taken by the Board. The Motion was adopted. Vote: 3-0-2 (Macias and Spielberg abstaining).

The Board authorizes the Board Chairman or his Designee, after any grammatical or typographical errors are corrected, to execute, without further Board review, this Decision on behalf of the Nevada Occupational Safety and Health Review Board.

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Therefore, on June 9, 2021, this Decision is hereby adopted and approved, thereby constituting the Board's Findings of Fact, Conclusions of Law, Decision of the Board and the Final Order of the Board of Review.

DATED this 18th day of June, 2021.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: _____
Steve Ingersoll, Chairman

CERTIFICATE OF SERVICE

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

Salli Ortiz, Esq.
DIR Legal
400 West King Street, Suite 201
Carson City, NV 89703

Mark R. Thierman, Esq.
Thierman Buck, LLP
7287 Lakeside Drive
Reno, NV 89511

Dated this 18th day of June, 2021.

Karen Kennedy
Employee of
The Law Offices of Charles R. Zeh, Esq.

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