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OSH REVIEW BOARD  
BY *A. Kennedy*

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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,**

**Docket No. RNO 20-2025**

**Inspection No. 1425684**

**Complainant,**

**vs.**

**VALLEY JOIST, LLC**

**Respondent.**

**DECISION AND ORDER OF THE BOARD**  
**FINDINGS OF FACT, CONCLUSIONS OF LAW**  
**AND FINAL ORDER**

This case arose out of an investigation of an anonymous complaint, Notice of Alleged Safety or Health Hazard, received on August 12, 2019. The anonymous complaint made two allegations. First, it is claimed that the controls for an overhead crane do not function properly. Second, the State alleges that the employees in an assembly area of the manufacturing facility were at risk for flash burns from welding. *See*, State's Exhibit 1, p. 4. The State's investigation substantiated the allegation that Respondent's employees were at risk for flash burns from welding. *See, Id.* This inspection resulted in the issuance of one citation with two items, both of which were violations of Federal health and safety regulations. *See*, State's Exhibit 1, pp. 4, 10, 20, 25.

The matter came before the Nevada Occupational Safety and Health Review Board (the Board) for hearing at 11:00 a.m. on Wednesday, January 13, 2021. *See*, Tr. 28; 22-24. The Hearing

1 was initially scheduled for June 10, 2020. *See*, Notice of Hearing, dated January 22, 2020. On May  
2 18, 2020, the June 10, 2020, hearing was cancelled and rescheduled for January 13, 2021, in  
3 furtherance of a duly provided notice. *See*, Notice of Rescheduled Hearing, dated May 18, 2020. A  
4 notice that the hearing would be conducted by video conference was provided in furtherance of a  
5 duly provided notice. *See*, Notice of Hearing by Webex, dated November 20, 2020.

6 On January 13, 2021, Board Chairman Steve Ingersoll, Board Secretary Rodd Weber, Board  
7 Member Frank Milligan and Board Member James Halsey were in attendance to hear the matter.  
8 *See*, Tr. p. 1. The same Board members deliberated the case later that day. *See*, Tr. pp. 134-139.  
9 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety and Health  
10 Administration of the Division of Industrial Relations of the Department of Business and Industry  
11 (the State), appeared on behalf of the Complainant (the State). *See*, Tr. p. 29;1-7. The Respondent  
12 (hereinafter, Respondent or Valley Joist) was represented by its safety consultant, Katie Hinckley.  
13 *See*, Tr. p. 37;21-24. Also present for Respondent were Travis Mistler, Operations Manager and  
14 Marsia Randal, Safety Coordinator. *See*, Tr. pp. 29;14-24, 30;1-8.

15 Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised Statutes, NRS  
16 618.315. Jurisdiction was not disputed. As there were three members of the Board present to  
17 decide the case, with at least one member representing management and one member representing  
18 labor in attendance, a quorum was present to conduct the business of the Board.

19 A complaint may be prosecuted for circumstances which arise before or during an inspection  
20 of the employer's workplace. *See*, NRS 618.435(1). Nevada has adopted all Federal Occupational  
21 Safety and Health Standards which the Secretary of Labor has promulgated, modified or revoked  
22 and any amendments thereto. They are, then, deemed the Nevada Occupational Safety and Health  
23 Standards. *See*, NRS 618.295(8).

24 The State inspected the facility on August 23, 2019. *See*, State's Exhibit 1, p. 5. Brandi Gill  
25 and Jared Mitchell were the State's inspectors. *See*, Tr. p. 43;2-3. The employer was represented by  
26 Mr. Mistler, Ms. Randal and Mario Ibarra, plant superintendent. *See*, State's Exhibit 1, p. 11. The  
27 closing conference was conducted on September 2, 2019. *See*, State's Exhibit 1, p. 12.

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1 As the result of violations found during the inspection, the State issued a Citation and Notice  
2 of Penalty for an other than serious violation of 29 CFR 1910.133(a)(5).<sup>1</sup> See, State's Exhibit 1, pp.  
3 29-43. The applicable regulation provides:

4 The employer shall ensure that each affected employee uses equipment with filter  
5 lenses that have a shade number appropriate for the work being performed for  
6 protection from injurious light radiation. The following is a listing of appropriate  
7 shade numbers for various operations.

8 After giving consideration to the severity of the violation and the probability of injury resulting from  
9 this alleged violation, the State recommended a fine of \$0.00. See, State's Exhibit 1, pp. 20-25.

10 The Citation and Notice of Penalty were issued on October 16, 2019. See, State's Exhibit 1,  
11 pp. 29-43. On November 4, 2019, Respondent notified the State of its intent to contest Item 1 of the  
12 Citation, only. See, State's Exhibit 1, p. 44. On November 26, 2019, the State filed its formal  
13 Complaint. See, State's Exhibit 1, pp. 46-52. On December 18, 2019, the Board received Valley  
14 Joist's Answer. See, State's Exhibit 1, pp. 56-72.

15 Respondent's Answer did not deny any of the allegations of the State's Complaint. See,  
16 State's Exhibit 1, pp. 57-72. Instead, Respondent's Answer contained a short cover letter and its  
17 proposed application for a variance to allow its employees to wear shade three eye protection when  
18 tack welding. See, *Id.* The cover letter explained that the Respondent had only recently learned that  
19 it could not proceed with its variance application before the Citation was resolved. See, *Id.*  
20 Accordingly, the Respondent implied that it was necessary to oppose the Citation. See, *Id.* The  
21 application described the type of work conducted at the work area and why the use of a darker shade  
22 of glasses would create additional hazards. See, State's Exhibit 1, pp. 57-72. The application also  
23 explained the safety precautions taken in conjunction with the use of its chosen shade of glasses.  
24 See, *Id.*

25 Evidence packets were submitted and admissibility arguments were addressed before the  
26 hearing. See, Tr. 34;20-24. The State's evidence packet consisted of pages 1 through 158

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27 <sup>1</sup>The only citation at issue is Citation 1, Item 1, the alleged violation of 29 CFR 1910.133(a)(5),  
28 because the Respondent waived its contest of Item 2 an alleged violation of 29 CFR 1910.252(b)(2)(iii). See,  
State's Exhibit 1, pp. 44, 56-72.

1 designated as Exhibits 1 and 2. Exhibit 1 contained pages 1 through and including 72 and Exhibit 2  
2 starts at page 73 through page 158. The Respondent did not object to any of the contents of the  
3 State's evidence package. Accordingly, the State's evidence package is admitted in full in advance  
4 of the hearing.

5 Respondent submitted an evidence packet consisting of Exhibits A through I containing an  
6 unspecified number of pages. The State objected to Valley Joint's exhibits numbered A, B, C, D, F  
7 and H. Respondent failed to oppose to the State's objections. *See*, Tr. p. 35;1-16. As a result,  
8 Valley Joist's Exhibits E, G and I, consisting of a total of 17 pages, were admitted into evidence and  
9 the balance of Respondent's proposed evidence was excluded. *See, Id.*

10 During the hearing, Ms. Hinckley stated that she did not possess the State's evidence  
11 package and could not refer to it when cross examining Ms. Gill. *See*, Tr. p. 57;11-14. The Board  
12 then verified that the documents had been sent to Valley Joint by certified mail on May 8, 2020.  
13 *See*, Tr. p. 63;1-11. In response Ms. Hinckley stated that regardless of whether she received the  
14 evidence package, she would like to proceed with the cross examination of Ms. Gill. *See*, Tr. p.  
15 65;3-8. The Board then verified that Valley Joist waived any and all objections regarding the service  
16 of the evidence package. *See*, Tr. p. 65;6-17.

17 At the duly noticed hearing conducted on January 13, 2019, the State presented the  
18 testimony of Brandi Gill, Jared Mitchell and Mario Ibarra. *See*, Tr. p. 3. This testimony was  
19 supported by the admitted evidence. Valley Joist cross examined the State's witnesses and  
20 presented the testimony of Travis Mistler. *See, Id.*

## 21 FINDINGS OF FACTS

22 Valley Joist is a foreign limited liability company organized under the laws of the State of  
23 Delaware. *See*, State's Exhibit 1, pp., 1-4. Valley Joist is in the manufacturing industry in which it  
24 manufactures joists<sup>2</sup>. *See, Id.* Valley Joist's Nevada facility is located at 255 Logan Lane, Fernley,  
25 Nevada (Logan Lane). *See, Id.* The Respondent builds joists from steel raw stock by cutting,  
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27 <sup>2</sup>A joist is any of the small timbers or metal beams arranged parallel from wall to wall in a structure  
28 to support a floor or ceiling. *See*, [www.merriam-webster.com/dictionary/joist](http://www.merriam-webster.com/dictionary/joist).

1 bending and welding pieces of various sizes together. *See*, State's Exhibit 1, p. 57. The joists can  
2 be as large as 65 feet long and weigh 1000 pounds. *See*, State's Exhibit 1, p. 57. In order to connect  
3 the joist components during the assembly process, the joists are tack welded. *See, Id.* Tacking is a  
4 temporary hold between pieces of joists as part of the assembly process. *See*, Tr. pp. 49;16-19.  
5 Conversely, a weld is finished work to the joist. *See, Id.* Each employee on the rigging table makes  
6 hundreds of tack welds in an eight-hour date single day. *See*, Tr. pp. 98;9-14. Each of these  
7 employees work in a common area without separations. *See*, Tr. p. 50;8-11. The employees  
8 involved in tacking are sometimes referred to as riggers and the area where they work is called the  
9 rigging table. *See*, State's Exhibit 1, pp. 57, 58.

10 On August 23, 2019, the State conducted an inspection of the facility located at Logan Lane.  
11 *See*, State's Exhibit, 1, pp. 5-9. The State's inspectors were Brandi Gill and Jared Mitchell. *See*, Tr.  
12 pp. 42;5-6, 72;7-9. At approximately 9:10 a.m. on that date, the State commenced its opening  
13 conference with Mr. Mistler, Ms. Randal and Mr. Ibarra, *See*, State's Exhibit, 1, p. 5, *see also*, Tr.  
14 pp. 29;14-24, 30;1-8. Mr. Mistler consented to Nevada OSHA's inspection of the premises. *See, Id.*

15 During the inspection Ms. Gill interviewed Mr. Ibarra and five employees. *See*, State's  
16 Exhibit 1, pp. 7-8. Relevant to this matter was the testimony of Mr. Ibarra regarding the personal  
17 protective equipment (PPE) requirements determined for each position. Short span rigging requires  
18 a hard hat, shade three safety glasses, gloves, long sleeves and hearing protection. *See*, Tr. p. 45;10-  
19 16. The employees are given documented training on the use of this protective equipment. *See, Id.*

20 Specific to the allegations of the anonymous complaint, Mr. Ibarra stated that one of  
21 Respondent's employees had suffered flash burns to his eyes.<sup>3</sup> *See*, Tr. p. 46;2-11. Mr. Ibarra  
22 indicated that the cause of the flash burn was the misuse of the required PPE. *See*, Tr. p. 46;16-24.  
23 The employee had looked over his glasses while arc welding or while in close proximity to other  
24 employees who were welding. *See, Id.*

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27 <sup>3</sup>A flash burn is basically a sunburn to the cornea. The cornea is one of the few parts of the eye that  
28 tries to absorb all of the UV light to which eyes are exposed. Too much ultra violent light exposure results in  
extremely red and painful eyes. *See*, <https://onevisioneyecare.com/flash-burns/>

1 Mr. Ibarra told Ms. Gill that the employees are given a choice of blue or clear glasses with  
2 ultra violet light protection. *See*, Tr. p. 47;6-9. At the time of the inspection, Mr. Ibarra indicated  
3 that he did not know the shade number rating of the glasses supplied to the riggers. *See*, Tr. p.  
4 47;10-11. Subsequent to the inspection, Mr. Ibarra learned that the Company was supplying shade  
5 three glasses while OSHA required glasses of a shade seven or more. *See*, Tr. pp. 106;17-24,  
6 107;1-2.

7 Subsequent to the inspection, Ms. Gill conducted further investigation regarding the eye  
8 protection provided by the Respondent. First, she contacted the manufacturer of the shade three eye  
9 glasses supplied to the Respondent. *See*, Tr. p. 54;10-19. Through communications with this  
10 supplier, Ms. Gill was informed that the manufacturer recommended shades nine through thirteen  
11 for eye protection for ultra violet light from welding. *See*, State's Exhibit 2, pp. 84-86, *see also*, Tr.  
12 pp. 55;11-24, 56;1-6. Second, Ms. Gill also exchanged correspondence with the Respondent  
13 regarding its choice of three shade safety glasses. *See*, State's Exhibit 2, pp. 77-83, *see also*, Tr. p.  
14 56;8-24. Ms. Randall indicated that Valley Joist chose three shade glasses because they are the  
15 industry standard for North America. *See*, State's Exhibit 2, pp. 81-82, *see also*, Tr. pp. 56;11-24.  
16 Also, Respondent's Alabama facility issues shade three glasses to its riggers. *See*, State's Exhibit 1,  
17 p. 58.

18 On direct examination, Ms. Gill testified to the facts set forth above. *See*, Tr. pp. 40-65. On  
19 cross examination Ms. Hinckley asked about the Respondent's effort to obtain a variance. *See*, Tr.  
20 pp. 66;16-24, 67;1-21. Ms. Gill agreed that she had discussed this with Ms. Hinckley. *See, Id.*  
21 However, Valley Joist could not proceed with its variance application while the Citation was  
22 pending. *See, Id.* In fact, Valley Joist had not considered requesting a variance until after the  
23 citation was issued. *See*, Tr. pp. 107;19-24, 108;1-2.

24 Mr. Mitchell testified that Valley Joist possessed a personal protective equipment hazard  
25 assessment for eye wear to be worn in the area in which the injury occurred. *See*, State Exhibit 2, p.  
26 90. Ms. Hinckley drafted and certified this safety assessment. *See*, Tr. p. 75;4-12. The assessment  
27 stated,

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1 Valley Joist shall ensure that each affected employee uses appropriate eye or face  
2 protection when exposed to.... potentially injurious light radiation.

3 Valley Joist will also ensure that each affected employee uses equipment with filter  
4 lenses that have a shade number appropriate for the work being performed for  
5 protection from injurious light radiation. The following is a listing of appropriate  
6 shade numbers for various operations.

7 *See*, State's Exhibit 2, p. 90. On the same page and directly below these statements was a link to a  
8 chart entitled Filter Lenses for Protection Against Radiant Energy. *See*, State's Exhibit 2, p. 91.  
9 This chart listed the appropriate shade numbers for protection from injurious light radiation. *See*,  
10 State's Exhibit 2, p. 90, *see also*, Tr. p. 75;6-19. This chart provided that no less than a protective  
11 shade of seven should be utilized in metal arc welding.<sup>4</sup> *See, Id., see also*, Tr. p. 76;5-16.

12 Mr. Mitchell testified that the Respondent knew or should have known the proper level of  
13 eye protection from other sources of information. *See*, Tr. pp. 82-87. Specifically, the welding  
14 machine used by Respondent was a Lincoln Electric, Flextec 500X. *See*, State's Exhibit 2, p. 98 *see*  
15 *also*, Tr. p. 82;10-13. This machine is a gas metal arc welder (GMAW). *See*, Tr. p. 82;18-22. The  
16 manual for the welder provides that anyone using a GMAW should protect their eyes as set forth in  
17 the American National Safety Institutes publication for welding, the ANSI - Z49.1. *See*, State's  
18 Exhibit 2, p. 103, *see also*, Tr. p. 83;2-12. The ANSI-Z49.1 lists information regarding the selection  
19 of safety equipment such as clothing, noise protection and eye protection. *See*, State's Exhibit 2, pp.  
20 113-128, *see also*, Tr. pp. 83;15-24, 84;1-14. The specific recommendation for shade glasses  
21 needed for welding is found on table 1 of the ANSI- Z49.1. *See*, State's Exhibit 2, p. 128, *see also*,  
22 Tr. pp. 82-84. ANSI recommends glasses of a shade of seven or greater for welding.<sup>5</sup> *See*, Tr. p.  
23 84;16-19. The ANSI standard notes, "as a rule of a thumb, start with a shade that is too dark to see  
24 the weld zone. Then go to a lighter shade which gives sufficient view of the weld zone without  
25 going below the minimum." *See*, State's Exhibit 2, p. 128, *see also*, Tr. p. 85;2-7.

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27 <sup>4</sup>The Respondent understands that welding, as opposed to tacking, requires the use of protective  
28 glasses in excess of shade three. *See*, Tr. pp. 109;19-24, 110;1-11.

<sup>5</sup>It should be noted that the chart provides no distinction between ordinary welds and temporary  
ones, *i.e.*, between tacking and welding.

1 In addition to ANSI, the International Safety Equipment Association (ISEA) also provides  
2 an eye and face protection selection tool. *See*, State's Exhibit 2, pp. 151-56, *see also*, Tr. p. 85;2-7.  
3 The ISEA standard for eye protection during arc welding is a filtered lense of shade 10 though 14.  
4 *See*, State's Exhibit 2, p. 155. ISEA also suggests selecting the darkest possible shade of glasses for  
5 the task. *See, Id.* The ISEA manual cross references the ANSI Z49.1 chart, discussed above. *See*,  
6 State's Exhibit 2, p. 156, note 2. The ANSI and ISEA standards for eye protection are identical  
7 those required by OSHA. *See*, State's Exhibit 2, pp. 95-96, *see also*, Tr. p. 83;17-23.

8 Mr. Mitchell testified about the calculation of the penalty. The violation was viewed as  
9 other than serious because it was not likely to cause a death or serious physical harm even though  
10 the violation had direct immediate relationship to the safety and health of employees. *See*, Tr. p.  
11 79;15-21. Further, OSHA took into account that the Respondent provided some level of protection  
12 to its employees. *See*, Tr. pp. 79;15-24, 80;1-5. Mr. Mitchell explained that no fine was proposed, a  
13 zero fine was proposed, because the matter was other than serious with a low probability of injury.  
14 *See*, Tr. p. 80;12-17.

15 The State's final witness was Mr. Ibarra, an 18 year employee of the Respondent. *See*, Tr.  
16 pp. 96;24, 97;1-3. Mr. Ibarra worked his way up from the bottom at the Logan Lane facility. *See*,  
17 Tr. p. 97;1-3. Specific to this inquiry, Mr. Ibarra has worked as a welder and a tack welder. *See, Id.*  
18 Mr. Ibarra believed that there was sufficient difference between welding and tacking to make the use  
19 of shade three glasses suitable for tacking but not for welding. *See*, Tr. pp. 108;11-24, 109;1-11.  
20 However, he did not articulate any reason for his belief that tacking required a lower level of PPE.  
21 In fact, Mr. Ibarra admitted that there was no difference between the light intensity between tacking  
22 and welding. *See*, Tr. p. 114;17-20.

23 Mr. Ibarra testified that Respondent had supplied shade three glasses for tacking for all of his  
24 18 years with the company. *See*, Tr. p. 97;15-24. Mr. Ibarra explained that the Respondent had  
25 conducted its own safety analysis and employed an outside consultant to determine the hazards  
26 associated with the short spin rigging table, the place where the tacking occurs. *See*, Tr. p. 98;15-  
27 22. Based upon these studies, Valley Joist determined that shade three glasses provided sufficient  
28 protection for the riggers. *See*, Tr. p. 99;8-15. The Company does, however, have additional safety



1 demands for the riggers such as, cautioning them against looking directly at the arc, requiring them  
2 to always wear the glasses even when looking at paperwork and to report red or watery eyes. *See*,  
3 State's Exhibit 1, pp. 69, 71.

4 On cross examination Mr. Ibarra explained that the area in which the riggers work is  
5 compact with several people working in close proximity, seven people within a 60-foot radius. *See*,  
6 Tr. p. 100;7-16. Additionally, the employees are working with objects that weigh in excess of 200  
7 lbs. *See*, Tr. p. 100;17-18. The combination of those factors creates an environment where there is  
8 a significant possibility of accidents. This probability would increase if the employees' vision is  
9 limited as the result of wearing dark lenses. *See*, Tr. p. 100;19-22. Lastly, Mr. Ibarra testified that,  
10 subsequent to the citation, he had experimented with using level seven glasses while tacking and he  
11 felt that it would not be safe in the designated work area. *See*, Tr. p. 102;3-10. Adding more light  
12 to the work area did not overcome this difficulty. *See*, Tr. p. 102;11-15. In fact, he believed it  
13 actually resulted in poorer visibility. *See, Id.*

14 On redirect, Mr. Ibarra admitted that the Respondent had no documentation to support the  
15 allegation that use of darker glasses would result in an increase in accidents and injuries. *See*, Tr. p.  
16 103;10-13. Further, Respondent neither conducted any empirical studies nor gathered any  
17 information from competitors or industry trade groups indicating that the use of level seven glasses  
18 resulted in additional injuries. *See*, Tr. pp. 103;18-24, 104;1-10.

19 Ms. Ortiz: And just to be clear, neither you nor anyone else at Valley Joist had  
20 ever tried the shade seven glasses [for tacking] prior to the citation  
being issued, is that what your testimony was?

21 Mr. Ibarra: Correct.

22 Ms. Ortiz: And did you take any measurements or readings about the increase of  
23 light creating greater refraction on the lenses?

24 Mr. Ibarra: Not anything scientific, no. Just... visual confirmation that more light  
would be more hindering.

25 The Respondent called Mr. Mistler who testified that he has experience with approximately  
26 a dozen joist plants throughout the United States. Moreover, he has been involved in the drafting of  
27 industry standards and safety guides. Tr. p. 117;5-14. In his experience, the industry standard for  
28 tacking has been the use shade three glasses. *See, Id.* Mr. Mistler agreed with Mr. Ibarra that the

1 use of darker glasses in the rigging area was likely to lead to more accidents. *See*, Tr. pp. 117;15-  
2 24, 118;1-7. Mr. Mistler agreed with Mr. Ibarra that a welder can protect his eyes by covering the  
3 weld with his or her hands. *See*, Tr. p. 119;15-22. This method provides protection for both the  
4 welder and those individuals in close proximity. *See, Id.* Further, Mr. Mistler testified that the  
5 employees in the area agreed that a darker shade of glasses would be dangerous as the result of the  
6 conditions in the area. *See*, Tr. pp.118;16-24, 119;1-8.

7 To summarize, Respondent did not dispute the evidence of the State's *prima facie* case of a  
8 violation of 29 CFR 1910.133(a)(5). Instead, Valley Joist argued that compliance with the statute  
9 was either impossible or would result in greater hazard.

#### 10 CONCLUSIONS OF LAW

11 The burden is on the State to prove, by a preponderance of the evidence, a *prima facie* case  
12 against that Respondent violated the applicable federal regulation. *See*, NAC 618.788(1), *see also*,  
13 *Original Roofing Company LLC v Chief Administrative Officer of the Nevada OSHA*, 442 P.3d 146  
14 (Nev. 2019). Thus, in matters before the Board of Review, the State must establish: (1) the  
15 applicability of a standard being charged; (2) the presence of a non-complying condition; (3)  
16 employee exposure or access to the non-complying condition; and, (4) the actual or constructive  
17 knowledge of the employer's violative conduct. *Original Roofing* at 149, *see also*, *American*  
18 *Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261 (D. C. Cir., 2003).

19 The State is obligated to demonstrate the alleged violation by a preponderance of the reliable  
20 evidence of the record. More than estimates, assumptions and inferences are, therefore, required.  
21 Reliance on mere conjecture is insufficient. Findings must be based upon the kind of the evidence  
22 which responsible persons are accustomed to rely in serious affairs. *William B. Hopke Co., Inc.*,  
23 1982 OSHARC LEXIS 302 \* 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ)). And, the  
24 Board's decision must be based on consideration of the whole record and shall state all facts  
25 officially noticed and relied upon. 29 CFR 1905.27(b). *Armor Elevator Co.*, 1 OSHA 1409, 1973-  
26 1974 OHSD ¶ 16, 958 (1973). *Olin Construction Inc. v. OSHARC and Peter J Brennan, Secretary of*  
27 *Labor*, 525 F.2d 464 (1975).

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1           The State showed that 29 CFR 1910.133(a)(5) applies to riggers because they are exposed to  
2 ultra violet light when using gas metal arc welding machines. *See*, Tr. p. 61;5-8. The State showed  
3 that employees should have been using, at a minimum, a seven-shade safety glasses. *See*, Tr. p.  
4 99;8-15. Instead, the employees were issued and required to use safety glasses with half the level of  
5 protection. *See, Id.* All the Respondent's witnesses agree that shade three safety glasses are the  
6 type issued and used for tacking and that the required shade is seven or better, *i.e.*, that  
7 Respondent's employees were exposed to a hazardous condition. The Respondent knew of the  
8 regulatory requirement because its own safety plan referenced a table stating that a minimum of  
9 shade seven glasses should be used for welding. *See*, State's Exhibit 2, pp. 90-91. There is no  
10 exception or limitation available for employees engaged in tacking. *See, Id.* Additionally, the  
11 manual for the Lincoln Electric Flextec 500X referenced the OSHA compliant eye protections  
12 standards. *See*, State's Exhibit 2, pp. 104, 127, 128, *see also*, Tr. pp. 97;15-24, 98;1-5. Moreover,  
13 Mr. Ibarra, stated that he attended OSHA 30 training on several occasions but did not recall the  
14 welding sections of those courses.

15           Respondent seeks to excuse or mitigate its purported knowledge of the applicable standard  
16 with two arguments. First, Respondent argues that all the other members of the industry also use  
17 this level of eye protection for tacking. *See*, Tr. p. 107;5-12. This argument fails because the  
18 actions of all members of an industry do not make a safety violation acceptable. *See, Secretary of*  
19 *Labor v. State Sheet Metal Co.*, 16 OSH Cas. 1155 \*5. Second, Respondent also asserts that the  
20 Respondent's employees agree that using the lower protective glasses is preferable. *See*, Tr. pp.  
21 118;8-24, 119;1-8. Unfortunately, these employees' statements are of little weight because they are  
22 without any experience using shade seven glasses. *See*, Tr. p. 130;17-23. The Respondent knew  
23 that the standard applied and cannot denigrate its knowledge thereof.

24           Therefore, a *prima facie* case of the violation of 29 CFR 1910.133(a)(5) was established by  
25 the State. That is or not, however, the end of the story. Valley Joist offered two affirmative  
26 defenses. Where the State has proved a *prima facie* case for Citation 1, Item 1, the burden shifts to  
27 the Respondent to prove the elements of the proffered affirmative defenses. *See, Danco Const. Co.*  
28 *v. Occupational Safety & Health Review Comm'n*, 586 F.2d 1243, 1246 (8th Cir. 1978). Further,

1 these defenses are narrowly construed. *Greyhound Lines-W. v. Marshall*, 575 F.2d 759, 762 (9th  
2 Cir. 1978).

3 Valley Joist argued its own variations of the impossibility and/or greater hazard defense.  
4 For the Respondent to show that the use of a darker shade of glasses was infeasible, the employer  
5 must, at least, have attempted to adapt existing technology and use some creativity to solve the  
6 problem. *See, Pitt Des Moines Inc.* 16 OSA cas. 1429, 1433-34 (Rev Comm'n 1993). Respondent  
7 did not come close to providing any evidence to meet this standard. The most they provided was Mr.  
8 Ibarra's testimony that he had experimented with using level seven glasses while tacking and he felt  
9 that it would not be safe in the designated work area. *See, Tr. p. 102;3-10.* Further, Mr. Ibarra  
10 testified that increasing the light level in the area did not help because the light reflected back in the  
11 glasses. *See, Tr. p. 102;11-15.* However, Mr. Ibarra's experiments were conducted subsequent to  
12 the OSHA inspection. Thus, the Respondent had not determined the use of the darker shade of  
13 glasses was infeasible because it ignored or was unaware that it had an obligation to try anything  
14 other than shade three glasses.

15 For Respondent to prevail on its greater hazard defense, it would have to show; first, that  
16 compliance with the standard would result in a greater hazard to the employees than with  
17 noncompliance; second, that the employer took reasonable alternative protective measures or there  
18 are no alternative means of employee protection; and, third that an application for a variance would  
19 be inappropriate. *True Drilling Co. v. Donovan*, 703 F.2d 1087, 1090 (9th Cir. 1983); *Noblecraft*  
20 *Industries, Inc. v. Secretary of Labor*, 614 F.2d 199, 205 (9th Cir.1980). *Greyhound Lines, supra*, at  
21 762.

22 Regarding the first element, Respondent must prove the hazards of compliance are greater  
23 than those of non-compliance. *See, State Sheet Metal, supra* at \*6. As the *State Sheet Metal* Court  
24 explained, "[b]efore an employer elects to ignore the requirements of a standard because it believes  
25 that compliance creates a greater hazard, the employer must explore all possible alternatives and is  
26 not limited to those methods of protection listed in the standard." In this instance, Respondent  
27 provided the opinion of Mr. Ibarra that darker glasses would be too much of a hazard as a result of  
28 the small area in which the work was conducted and the physical demands of the work. *See, Tr. p.*

1 101;6-23. Respondent provided only speculation and anecdotal statements from interested parties.  
2 *See*, Tr. pp.100;4-22, 117;17-24. Conversely, Respondent did not provide any evidence that any  
3 alternatives were even considered, much less tried. *See*, Tr. pp. 103;14-24; 104;1-10.

4 As far as the second element, reasonable alternative steps is concerned, the Respondent  
5 provided no evidence to support why choosing shade three glasses is a reasonable alternative to  
6 shade seven glasses. All the Respondent provided was speculation that additional hazards would  
7 occur if a darker shade is used. *See*, Tr. pp.100;4-22, 117;17-24. The Board need not accept the  
8 Respondent's conclusory statements without being given any factual basis for them. *See, State*  
9 *Sheet Metal, supra*, at \*6. ("While the witness may sincerely believe that his opinion is correct, an  
10 employer may have an incorrect good-faith belief that compliance creates a greater hazard.")

11 As far as the variance application being inappropriate, the Respondent provided no evidence  
12 of this. In fact, the Respondent was unaware of the potential for the use of a variance until after the  
13 inspection had been initiated and they were made aware that their own documents show that they are  
14 using the wrong shading of glasses. *See*, Tr. pp. 107;19-14, 108; 1-2. Moreover, the Respondent is  
15 ready to proceed to obtain a variance once this citation is resolved. *See*, State's Exhibit 1, pp. 57-  
16 72. So, the third factor cannot be established.

17 Thus, the Respondent proof of its proffered affirmative defenses failed. Accordingly, the  
18 State's *prima facie* case remains intact.

### 19 ORDER

20 It was moved by Board Member Milligan to sustain Citation 1, Item 1 with a fine of \$0.00.  
21 *See*, Tr. p. 138;10-22. The motion was seconded by Board member Halsey. *See*, Tr. p. 139;9. The  
22 motion was approved unanimously. *See*, Tr. p. 139;10-15. Accordingly, the State OSHA Board of  
23 Review sustains Item 1 of Citation 1 with the total penalty of \$0.00.

24 This is the **Final Order** of the Board.

25 IT IS SO ORDERED.

26 On November 9, 2022, the Board convened to consider adoption of this decision, as written  
27 or as modified by the Board, as the decision of the Board.

28 ///

1 Those present and eligible to vote on this question consisted of four current members of the  
2 Board, to-wit, William Steinberg, Frank Mulligan, Jorge Macias and Scott Fullerton. The Board  
3 had changed over in personnel at the time of this hearing. Acting Chairman William Spielberg and  
4 members Jorge Macias and Scott Fullerton were eligible to vote because they had read the  
5 transcripts, the pleadings and the exhibits offered and admitted into evidence (e.g., the record). See,  
6 NRS 233B.124. Upon a motion by Frank Milligan, seconded by Scott Fullerton, the Board voted 4-  
7 0 to approve this Decision of the Board as the action of the Board and to authorize William  
8 Spielberg, the Acting Chairman, after any grammatical or typographical errors are corrected, to  
9 execute, without further Board review this Decision on behalf of the Nevada Occupational Safety  
10 and Health Review Board. Those voting in favor of the motion either attended the hearing on the  
11 merits or had in their possession the entire record before the Board upon which the decision was  
12 based.

13 On November 9, 2022 this Decision is, therefore, hereby adopted and approved as the Final  
14 Decision of the Board of Review.

15 Dated this 15 day of November, 2022.

NEVADA OCCUPATIONAL SAFETY AND  
HEALTH REVIEW BOARD

17 By: William Spielberg  
18 William Spielberg, Acting Chairman

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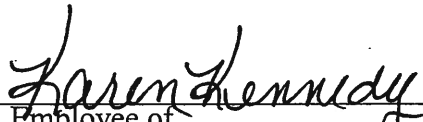
1 **CERTIFICATE OF SERVICE**

2  
3 Pursuant to NRCP 5(b), I certify that I am an employee of the Law Offices of Charles R.  
4 Zeh, Esq., and that on this date I served the attached document, *Decision and Order of the Board,*  
5 *Findings of Fact and Conclusion of Law, and Final Order,* on those parties identified below by  
6 placing an original or true copy thereof in a sealed envelope, certified mail/return receipt requested,  
7 postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada:  
8

9 Salli Ortiz, Esq.  
10 DIR Legal  
11 400 West King Street, Suite 201  
12 Carson City, NV 89703

13 Howard J. Russell  
14 c/o Weinberg, Wheeler, Huggins  
15 6385 S. Rainbow Blvd. Ste. 400  
16 Las Vegas NV  
17 NV 89118

18 Dated this 16<sup>th</sup> day of November, 2022.

19   
20 Employee of  
21 The Law Offices of Charles R. Zeh, Esq.

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