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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.

CORE CONTRACTING GROUP,

Respondent.

Docket No. LV 21-2123

Inspection No. 1503677



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

This case arose out of a planned program inspection which resulted from the filing of an Asbestos Abatement Project Notification with the Nevada Department of Business and Industry. *See*, State's Exhibit 2, p. 46 - 47. The inspection occurred at the site of the renovation of an abandoned motel located outside of Boulder City, Nevada, within the Lake Mead National Recreation area. *See*, State's Exhibit 1, p. 6 - 7, *see also*, Respondent's Exhibit pp. 1-2. The State's inspection resulted in the issuance of one citation for a violation of Federal regulations. *See*, State's Exhibit 1, pp. C19-C29.

The matter came before the Nevada Occupational Safety and Health Review Board (the Board) for hearing on October 11, 2023. *See*, Tr., p. 3.¹

¹ "Tr." stands for the transcript of the hearing conducted on October 11, 2023, commencing at approximately 8:00 a.m., followed by the page and line number where the matter cited can be found.

1 The hearing was conducted in furtherance of a duly provided notice. *See*, Notice of Hearing
2 dated September 20, 2023. In attendance to hear the matter and deliberate thereon were Board
3 Chairman Rodd Weber, Board Secretary William Spielberg, Board Member Jorge Macias and
4 Board Member Scott Fullerton. *See*, Tr., p. 9;16-21. As there were four members of the Board
5 present to decide the case, with at least one member representing management and one member
6 representing labor in attendance, a quorum was present to conduct the business of the Board.

7 Nevada has adopted all Federal Occupational Safety and Health Standards which the
8 Secretary of Labor has promulgated, modified or revoked and any amendments thereto. They are
9 then deemed the Nevada Occupational Safety and Health Standards. *See*, NRS 618.295(8).
10 Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised Statutes, NRS
11 618.315. The Respondent disputed the jurisdiction of the State to issue the Citation and,
12 accordingly, that of the Board to review the matter.

13 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety
14 and Health Administration of the Division of Industrial Relations of the Department of Business and
15 Industry (hereinafter, the State or Nevada OSHA), appeared at the hearing on behalf of the
16 Complainant (the State). *See*, Tr., p. 5. The Respondent (hereinafter, Core Contracting or the
17 Respondent) was represented by its president, John Winston. *See*, Tr., p. 10.

18 The State issued its Citation and Notification of Penalty (Citation) on March 18, 2021, for an
19 alleged violation of 29 CFR 1926.1011(d)(5). *See*, State's Exhibit 1, pp. C19-C29. The citation
20 alleged that the Respondent, while engaged as a general contractor, failed to ascertain whether its
21 subcontractor, an asbestos removal company, was in compliance with the asbestos standards.
22 Further, the Respondent failed to require its subcontractor to come into compliance with these
23 standards when necessary.

24 The Complaint set forth the allegation of the violation of Federal regulations. *See*, State's
25 Exhibit 1, p. C28. Citation 1, Item 1, charged a serious violation of 29 CFR 1926.1011(d)(5), as
26 stated below:

27 All general contractors on a construction project which includes work covered by this
28 standard shall be deemed to exercise general supervisory authority over the work
covered by this standard, even though the general contractor is not qualified to serve

1 as the asbestos "competent person" as defined by paragraph (b) of this section. As
2 supervisor of the entire project, the general contractor shall ascertain whether the
3 asbestos contractor is in compliance with this standard, and shall require such
contractor to come into compliance with this standard when necessary.

4 The Respondent, in its capacity as a general contractor, did not follow the requirements set forth in
5 subsection (d)(5) of the regulation as set forth below:

6 The employer failed to ascertain whether the asbestos contractor was in compliance
7 with the asbestos standards, and require the contractor to come into compliance with
8 these standards when necessary. On November 23, 2020, comprehensive inspection
9 of Circadian Enterprises Incorporated, dba American Abatement, was conducted at
10 10 Lakeshore Road, Boulder City, Nevada, 89005 for an evaluation of the asbestos
contractor performing abatement work at the property. Circadian is a sub-contractor
for Core Contracting Group.

11 There were several discrepancies observed in regard to American Abatement's
12 compliance with the asbestos standards, including, failure to have proper signage
13 demarking areas and the waste receptacle, failure of proper three stage
14 decontamination for established containment areas, containment areas without
maintained negative air pressure, and containment areas being removed without a
final clearance. The General Contractor failed to require the sub-contractor to
come into compliance with the asbestos standards when necessary.

15 The Respondent sent its notice of intent to contest the Citation on April 16, 2021. *See*,
16 State's Exhibit 1, pp. C30-C31. The State filed and served its Complaint on May 5, 2021. John
17 Winston (Mr. Winston), the president of Core Contracting, answered the Complaint on May 17,
18 2021. *See*, State's Exhibit 1, pp. C38-C40. Therein, Mr. Winston alleged that Nevada OSHA did
19 not have jurisdiction over the site because the work site was located on land under exclusive Federal
20 jurisdiction. *See*, State's Exhibit 1, pp. C38-C40.

21 At the hearing on the matter, the State offered for admission its Exhibits 1 through and
22 including 4, consisting of 207 pages. *See*, 1Tr., p. 5;7-14. Included with these exhibits was an
23 agreement between Federal and Nevada OSHA, which had not been supplied to the Board or the
24 Respondent until before the October 11, 2023, hearing. *See*, Tr., p. 29;14-17. Paragraphs 4(d) and
25 4(g) of that agreement expressly addressed enforcement of the actions of contractors and
26 subcontractors on Federal establishments, including national parks. *See*, State's Exhibit 4, pp. C204,
27 C205. The State's exhibits, including the aforementioned agreement, were admitted without
28 objection. *See*, Tr., pp. 14;9-24, 15;1-2. The Respondent offered a single exhibit for admission,

1 which was also admitted. *See*, Tr., p. 12;12-18. At the duly noticed hearing conducted on October
2 11, 2023, the State presented the testimony of Ralph Poznecki. *See*, Tr., p. 2. Core Contracting
3 presented the testimony of Mr. Winston. *See*, *Id*.

4 As the Respondent had alleged a jurisdictional defect, the burden of proof to establish
5 jurisdiction was on the State. *See*, Tr., p. 11-18. As a matter of law, jurisdictional issues must be
6 resolved first before the Board would be able to reach a decision on the merits. *See*, *Id*. Therefore,
7 the hearing was bifurcated. The first section of the hearing commenced with each party presenting
8 its arguments on Nevada OSHA's jurisdiction. After the parties' presentation on this issue, the
9 Board was required to make a decision on the issue. After the resolution of the jurisdictional issue,
10 presuming it was in the favor of the State, the parties would then present their respective cases on
11 the merits.

12 FINDINGS OF FACTS

13 The Boulder Beach Motel is located outside of Boulder City, Nevada. The motel consists of
14 four buildings. *See*, State's Exhibits 1, pp. C9, C68. These buildings were abandoned and
15 dilapidated and set for demolition. *See*, State's Exhibit 1, p. C9. The Boulder Beach Motel is located
16 inside the Lake Mead National Recreation area. *See*, State's Exhibit 1, p. C38, *see also*, State's
17 Exhibit 3, p. C68. The Lake Mead National Recreation area is on Federal Land under the
18 jurisdiction of the federal government, specifically the National Park Service ("NPS"). *See*,
19 Respondent's Exhibit p. 2. The land for the Lake Mead National Recreation had been conveyed by
20 the State of Nevada to the Federal Government in 1933. *See*, NRS 328.210.

21 The Respondent was the general contractor for an asbestos abatement project at the Boulder
22 Beach Motel. *See*, State's Exhibit 1, p. C9. At the time it entered into the contract, Core Contracting
23 had no experience with asbestos abatement. *See*, Tr., p. 57;1-13. Therefore, it sought information on
24 contractors from the NPS. *See*, *Id*. The NPS provided contact information for one of its previous
25 contractors, Circadian Enterprises Incorporated, doing business as American Abatement (American
26 Abatement). *See*, Tr., p. 57;1-5. In fact, the NPS recommended American Abatement to Core
27 Contracting. *See*, *Id*. At this time, Core Contracting had a job about a mile away, therefore, Core
28 Contracting thought that they could monitor the work with periodic site visits. *See*, *Id*.

1 The NPS had previously attempted to find contractors for this work. No bids were received
2 when a request was published. *See*, Tr., p. 57;6-7. The NPS then came to Core Contracting. *See*,
3 Tr., p. 57;1-4. Core Contracting conducted due diligence and determined that two items were
4 required. *See*, State's Exhibit 1, p. C38. The first, a NESHAP permit from the Clark County
5 Department of Air Quality. *See*, *Id.* Second, a Final Visual Asbestos Clearance Report from a third
6 party was required. *See*, *Id.* With this understanding and the NPS recommendation, Core
7 Contracting felt comfortable engaging American Abatement and relying upon its expertise. *See*, Tr.,
8 p. 57;4-5. American Abatement was the only subcontractor to bid the asbestos abatement work for
9 the job. *See*, Tr., p 57;6-13.

10 At some time before the project commenced, American Abatement filed an Asbestos
11 Abatement Project Notification Form (Notification) with Nevada OSHA. *See*, State's Exhibit 2, pp.
12 C46-C47. That form stated that the project was to commence on November 23, 2020, and be
13 completed on November 30, 2020. *See*, *Id.* American Abatement also submitted a safety plan to
14 Core Contracting. *See*, Tr., p. 61;7-14. However, American Abatement did not submit an asbestos
15 plan to Core Contracting. *See*, *Id.*

16 Core Contracting's bid was accepted on September 3, 2020. *See*, State's Exhibit 3, pp.
17 C191-C197. The work commenced on November 16, 2020. *See*, State's Exhibit 1, p. C38. During
18 the abatement process, all of the motel units were encased with plastic and fresh air was supplied to
19 the workers inside. *See*, *Id.* American Abatement had dumpsters onsite supplied by Boulder
20 Disposal. Further, American Abatement disposed of abated material in sealed bags into these
21 dumpsters. *See*, *Id.* Core Contracting monitored the work through daily inspections. *See*, Tr., p 57;6-
22 13. These occurred from four to six times per day. *See*, *Id.* Core Contracting was able to be at the
23 job site this often because it had another job in close proximity. *See*, *Id.*

24 Nevada OSHA's inspection occurred on November 23, 2020. Ralph Poznecki arrived at the
25 job site and conducted some general observations. *See*, Tr., p. 41;8-16. Of immediate concern was
26 the fact that the asbestos abatement was nearly complete. This was in conflict with the Notification
27 which provided a start date of November 23, 2020, and a completion date of November 30, 2020.
28 *See*, Tr., p. 70;3-13. In addition to the improper notice, Mr. Poznecki observed several obvious

1 violations with the asbestos containment area, the decontamination area and the dumpster for the
2 disposal of the hazardous waste. *See*, State Ex. 1, pp. 41-45, *see also*, Tr., pp. 43-44.

3 After his initial inspection, Mr. Poznecki encountered the supervisor of American
4 Abatement, *see, Id.* Core Contracting was notified of the OSHA inspection by one of American
5 Abatement's employees causing them to come to meet with Mr. Poznecki. *See*, Tr., p. 41;18-21.
6 During the inspection Mr. Poznecki noted obvious violations with the asbestos containment area,
7 the decontamination area and the dumpster for the disposal of the hazardous waste. *See*, State Ex. 1,
8 pp. 41-45, *see also*, Tr., pp. 43-44.

9 On November 24, 2020, Mr. Winston sent Mr. Poznecki an email stating that the asbestos
10 abatement was being conducted in compliance with Federal regulations. Nevada OSHA lacked
11 jurisdiction to issue the citation because the Nevada State OSHA Plan left enforcement of
12 contractors and subcontractors on this job site to Federal OSHA.² *See*, State's Exhibit 1, pp. C38-
13 C40. Mr. Winston's answer stated that are, "[c]ontractors and subcontractors on land under
14 exclusive federal jurisdiction" and, therefore, are exempted from coverage by Nevada OSHA. *See*,
15 State's Exhibit 1, p. C39 (emphasis in original).

16 The project was completed on December 9, 2020. *See*, State Ex. 1, p. C40. The independent
17 inspection was completed on December 10, 2020. *See, Id.* On December 11, 2020, John
18 Hutchinson, Compliance Safety and Health Supervisor for Nevada OSHA, sent David Smith at
19 American Abatement an email in which the applicable asbestos abatement rules were listed, telling
20 them that multiple violations were found at the site and providing the authority of Nevada OSHA as
21 set forth in NRS 618.315. *See*, State's Exhibit 2, pp. C51, C52. Mr. Smith responded that he had
22 complied with the rules which he believed were applicable and, correspondingly, would not comply
23 with inapplicable rules.³ *See*, State's Exhibit 2, p. C52.

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26 ² The Nevada State Plan is available to the general public at www.osha.gov/stateplans/nv.

27 ³ American Abatement subsequently settled with the State leaving Core Contracting the only
28 employer in this contested matter. *See*, Tr., pp. 21;3-11, 30;3-11.

1 On January 8, 2021, Mr. Poznecki emailed Mr. Winston to request cooperation and
2 assistance from that entity in regards to its inspection of the Boulder Beach Motel site. *See*, State's
3 Exhibit 2, p. 53. This email informed Core Contacting that deficiencies were discovered in
4 American Abatements safety procedures and informed them of their obligation to oversee the
5 asbestos abatement. *See, Id.*

6 At some time before the Respondent filed its answer to the complaint, Audrey Asselin (Ms.
7 Asselin), Branch Chief of Engineering, Facility Management and Engineering Division Lake Mead
8 National Recreation Area - National Park Service, Interior Region 8, communicated with Mr.
9 Poznecki and Mr. Hutchison and informed them that The National Park Service considered the
10 Boulder Beach Motel project to be on Federal lands and under the exclusive jurisdiction of the
11 Federal government. *See*, State's Exhibit 1, p. C40.

12 Accordingly, there was a conflict regarding the authority of Nevada OSHA to inspect this
13 job site and to cite the employer(s) for any violations found. The State believed that its authority
14 was provided through NRS 618.315(1) which states that the Division has authority over working
15 conditions in all places of employment subject to certain specific exceptions which do not apply.

16 Conversely, the Respondent believed that Federal OSHA had exclusive jurisdiction over the
17 job site pursuant to the Nevada Plan and 65 FR 20735-01(b)(1). In accordance with Section 18(e)
18 of the Occupational Safety and Health Act of 1970 final approval relinquished to Federal OSHA
19 authority only with regard to occupational safety and health issues covered by the Nevada Plan.
20 Correspondingly, Federal OSHA retained full authority over issues which are not subject to State
21 enforcement under the Nevada Plan. Accordingly, Federal OSHA retained authority relative to
22 safety and health in specific areas, including, but not limited to, contractors or subcontractors on any
23 Federal establishment where the land is exclusive Federal jurisdiction. *See*, 65 FR 20735-01(b)(1).

24 At the October 11, 2023 hearing, Mr. Zeh opined that the hearing should commence with
25 arguments on the jurisdictional question, Ms. Ortiz would present her view of why the State has
26 jurisdiction and then hear from Mr. Winston as to why the State lacks jurisdiction over the project
27 which is the subject of the complaint. *See*, Tr., p. 13;19-24.

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1 The State's argument commenced by referring to Chapter 13 of Federal OSHA's Field
2 Operations Manual entitled "Federal Agency Field Activities." *See*, State's Exhibit 2, pp. C59-C66,
3 *see also*, Tr., pp. 17;21-24, 18;1-8. Subsection II(D) addresses General agencies with private sector
4 employees on-site. *See*, State's Exhibit 2, p. C65. This section of the field manual states,

5 State Plans do not have jurisdiction over federal employees. However, the state programs
6 can choose to exercise jurisdiction over private sector contractors working at federal
7 facilities and on federal enclaves with the exception of Government Owned Contractor
8 Operated (GOCO) facilities and land ceded by a state to the federal government ("federal
9 enclaves"). Such coverage is set out in various documents including operational status
10 agreements and final approval decisions which are codified at 29 CFR Part 1952. *See, Id.*
11 *see also*, Tr., p. 18;6-13.

12 Ms. Ortiz then stated that the State has chosen to broadly exercise its jurisdiction in a
13 manner that would allow it to regulate contracts and subcontractors on Federal facilities. *See*, NRS
14 618.315(1), (2), *see also*, Tr., pp. 18;14-24, 19;1-3.

15 The State had also contacted Federal OSHA to request clarification of the rules regarding
16 private sector employees working on Federal facilities and Federal enclaves. *See*, Tr., p. 19;4-10. A
17 response was received from Mr. Brooks of Federal OSHA, stating that the facility was subject to
18 State regulation based upon an agreement between Nevada and Federal OSHA. *See*, State's Exhibit
19 4, p. 199, *see also* Tr., p. 19;15-20. Mr. Brooks supplied the agreement to OSHA and it was
20 admitted into evidence. *See*, State's Exhibit 4, pp. 203-207. The document states, in the relevant
21 part, that Federal OSHA will retain jurisdiction for, "enforcement relating to any contractor(s)
22 and/or subcontractor(s) on any Federal establishment **where the state cannot obtain entry**
23 including national parks." *See*, State's Exhibit 4, p. C204 (emphasis added), *see also*, Tr., p. 20;10-
24 15. Section II(g) of the agreement provides for concurrent Federal and State jurisdiction over the
25 employer in any instance where the State is unable to gain access to the job site, even through use of
26 a warrant. *See*, State's Exhibit 4, p. 205. As there was no attempt to prevent Mr. Poznecki from
27 inspecting the work site on the date of the inspection, there was no need for Federal OSHA to
28 exercise jurisdiction.

29 The Respondent's argument was limited to a proof that the Lake Mead Recreation Area was
30 a Federal facility. *See*, Respondent's Exhibit pp. 1-2. Therein, Ms. Asselin affirmed that the
31 Boulder Beach Motel was located on Federal property on land under exclusive Federal jurisdiction.

1 *See, Id.* However, Ms. Asselin did not address the issues of whether or when State OSHA could
2 regulate private sector employers on this Federal facility.

3 After the resolution of the jurisdictional question, Mr. Poznecki was called as a witness
4 regarding the factual allegations of the complaint. *See, Tr.*, pp. 38-54. Mr. Poznecki had
5 documented and photographed each of the alleged violations found at the Boulder Beach Motel job
6 site. Mr. Poznecki's first photograph showed American Abatement's containment area for any
7 friable asbestos created or dislodged in the abatement process. *See, State's Exhibit 1*, p. C41. The
8 problem was the lack of equipment to monitor the airflow inside the containment area. *See, Tr.*, p.
9 43;7-13. There was a manometer⁴ on the job site. However, it was unused, American Abatement
10 had not hooked up the device to the containment area. *See, Id.*

11 The second photograph showed the containment area for one of the buildings which lacked
12 the negative air pressure which must be established for asbestos removal. A negative pressure
13 machine was actually on site and in a trailer ready to be shipped back to Arizona. *See, State's*
14 *Exhibit 1*, p. C42, *see also, Tr.*, p. 52;9-14.

15 The third photograph showed that American Abatement did not establish a decontamination
16 area for the employees adjacent to the abatement area. *See, State's Exhibit 1*, p. C43. As a result
17 American Abatement's employees had no way of removing any particulate which may have attached
18 to them in the decontamination area or to allow them to go through a decontamination process. *See,*
19 *Tr.*, p. 43;14-22. The fourth photograph showed that there was no signage around the areas in which
20 the abatement was occurring. *See, State's Exhibit 1*, p. C44. The lack of signage would make it
21 difficult for the employees to take the necessary precautions before entering the areas in which the
22 abatement was occurring. *See, Id.* The fifth photograph showed the waste container being used
23 which did not have any warning signs. *See, State's Exhibit 1*, p. C45.

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27 ⁴A manometer is a device used for measuring pressure in the lower ranges. Manometers operate on
28 the principle that changes in outside pressure will cause a liquid to rise or fall in a tube, based on the
pressure deferential between the known area and the unknown area.
www.realpars.com/blog-post/manometer

1 As part of his testimony, Mr. Poznecki explained why the standard of 29 CFR
2 1926.1101(d)(5) applied to Core Contracting as the general contractor.

3 Ms. Ortiz: And why does that standard apply in this situation?

4 Mr. Poznecki: It applies in this situation because it covers general contractors having
5 to oversee the work of the asbestos abatement contractors in this case in the
6 performance of their tasks and duties so that they remain within compliance of our
7 regulations. *See*, Tr., pp. 45;24, 46;1-6.

7 Mr. Poznecki then explained how the State determined the amount of the fine for Citation 1,
8 Item 1. The fine was determined using objective evaluations of certain factors. *See*, State's Exhibit
9 1, pp. C14, C15, *see also*, Tr., pp. 46-49. The fine is a gravity based penalty, a combination of the
10 severity and the probability of the alleged violation causing injury, calculated prior to any penalty
11 adjustments. *See*, Tr., p. 49;6-10. Mr. Poznecki testified to the severity of the alleged violation of
12 29 CFR 1926.1101(d)(5). *See*, Tr., p. 46;7-18. Core Contracting's violation was considered serious
13 because exposure to asbestos could result in conditions as serious as the death of the exposed
14 person. *See*, State's Exhibit 1, p. C15, *see also*, Tr., p. 48;3-10.

15 Mr. Poznecki then addressed the likelihood of injuries from the hazardous condition. *See*,
16 State's Exhibit 1, p. C15. In this instance, a lesser the probability was determined. *See, Id.* Mr.
17 Poznecki then testified to the determination of the probability calculation. *See*, Tr., p. 49;14-18.
18 Mr. Poznecki explained that the gravity was a combination of the severity and probability of the
19 alleged violation. *See*, State's Exhibit 1, p. C15, *see also*, 1Tr., p. 219;15-24. The gravity based
20 penalty started at the amount of \$9,639. *See*, State's Exhibit 1, p. C15. The gravity based penalty
21 was subject to a 70% reduction as the result of the size of the employer and a further 10% reduction
22 because the employer had few employees. *See, Id.* Accordingly, the final penalty recommended
23 was \$2,603.

24 Mr. Winston then testified for the Respondent. *See*, Tr., pp. 56-67. He began his
25 presentation by telling the Board, "I'm not disputing that OSHA says as far as the violations." *See*,
26 Tr., p. 56;22-23. In other words, the Respondent did not contest any of the facts upon which the
27 State made its *prima facie* case.

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1 Mr. Winston provided some testimony that might have mitigated the fine imposed. He stated
2 that Core Contracting had stopped the work, shut the job down, until American Abatement
3 corrected the deficiencies found in the investigation. *See, Tr.*, p. 57;14-19. However, none of this
4 information was conveyed to Nevada OSHA. *See, Tr.*, pp. 58;23-24, 59;1-5. Mr. Winston further
5 testified that he took photographs of the corrected conditions. *See, Tr.*, p. 59;8-14. However, those
6 photographs had not been provided to the State and were not available to the Board on the date of
7 the hearing. *See, Id.*

8 Under cross examination, Mr. Winston admitted that all of his employees had OSHA 30
9 training. *See, Tr.*, p. 62;11-17. However, Mr. Winston disputed that his employees had ever had
10 asbestos training. *See, Tr.*, p. 62;19-22. As Mr. Winston explained, “[w]e don’t do abatement.
11 We’re dirt movers.... we were hired just because the national park service needed... a small
12 business...to get this contract done.” *See, Tr.*, p. 62;6-10. Mr Winston went on to explain that Core
13 Contracting had no competent person who had ever had asbestos training. *See, Tr.*, p. 62;19-22.

14 Mr. Winston was questioned regarding Core Contracting inspections of American
15 Abatement’s work area. He responded that Core Contracting supervised this job as it would any
16 other subcontractor. *See, Tr.*, p. 63;14-21. It had verified that American Abatement provided
17 proper PPE, first aid kits and fire extinguishers at the job site. *See, Tr.*, p. 60;6-21. Further, Core
18 Contracting had documented all of the weekly meetings where those actions took place. *See, Id.*
19 However, none of this documentation was supplied to the State. *See, Id.* Specific to the asbestos
20 abatement, Mr. Winston said that none of Core Contracting’s employees ever went into the buildings
21 or contaminated areas because its employees were not qualified for asbestos abatement. *See, Id.*

22 Mr. Winston had been of the belief that OSHA would be conducting an inspection
23 subsequent to the November 23, 2020, inspection. *See, Tr.*, p. 64;6-17. This appears to be the
24 reason that Core Contracting did not provide any evidence of its corrections of the deficiencies or its
25 safety meetings and other supervision of its subcontractor. This stood in stark contrast to its efforts
26 to challenge Nevada OSHA’s jurisdiction.

27 To the extent that any of the Conclusions of Law constitute Findings of Fact, they are
28 incorporated herein.

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CONCLUSIONS OF LAW

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

As this was a bifurcated hearing, there are two distinct phases, each subject to their own burden of proof. In the resolution of Nevada OSHA's jurisdiction, the burden of proof falls on the State to prove by a preponderance of the evidence that the State had the authority to issue the citation to the Respondent. *See*, Tr., p.13;11-18.

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

Turning to the jurisdictional issue, there was no dispute that Boulder Beach Motel is located within the external boundaries of the Lake Mead National Recreation Area, land situated in the State of Nevada but owned by the Federal government. The Respondent argues that Nevada OSHA lacks jurisdiction as a contractor on land under exclusive Federal jurisdiction, preempting the application of State law such as the asbestos regulations the subject of the claim against Core Contracting. Core Contracting's authority for that rule is the Nevada OSHA Plan. The relevant language of the Plan states:

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1 The Nevada State Plan applies to private sector workplaces in the state with the
2 exception of contractors and subcontractors on land under exclusive federal
jurisdiction.

3 This statement of Nevada OSHA's jurisdiction is inconsistent with the jurisdictional
4 statement found in NRS 618.315(2). Subsection 2 of this statute provides for jurisdiction over
5 working conditions in all places of employment except (1) household domestic service; (2) motor
6 vehicles operating on public highways of this State; (3) certain Federal agencies, none of which are
7 applicable here.

8 Accordingly, there is a conflict between the Plan issued by the Division of Industrial
9 Relations and the statute enacted by the Nevada Legislature describing State OSHA's jurisdiction.
10 Normally, a statute would be the final authority and the inquiry would be complete. *See, Chevron,*
11 *U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). However, the Plan
12 expressly states in the Federal Register, 65 FR 20735-01, as the Final Approval of the Nevada State
13 OSHA Plan, that the Federal Department of Labor did not relinquish its authority over "any
14 contractors or subcontractors on any Federal establishment where the land is exclusive Federal
15 jurisdiction." *See*, 65 FR at 20741.

16 Nevada law adopts Federal OSHA regulations. NRS 618.295(8) states: "All federal
17 occupational safety and health standards which the Secretary of Labor promulgates, modifies or
18 revokes, and any amendments thereto, shall be deemed Nevada Occupational Safety and Health
19 Standards." This Nevada statute embraces the Federal government's decision to retain jurisdiction
20 over employers contracting to perform work on land where the Federal government has retained
21 exclusive jurisdiction. Contractors on any Federal establishment where the Federal government has
22 retained exclusive Federal jurisdiction are exempt from Nevada OSHA regulation and enforcement.

23 The results would be the same with or without the statutes and regulations discussed above.
24 At issue here is something called Federal enclaves. The U.S. Constitution provides that the Federal
25 government has exclusive legislative rights over certain Federal territories such as military bases,
26 courthouses, other official properties and national forests and parks. *See, Allison v. Boeing Laser*
27 *Technical Servs.*, 689 F.3d 1234 (10th Cir., 2012).

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1 The Lake Mead National Recreation Area meets the definition of a Federal enclave because
2 the Federal Government acquired the land for Hoover Dam from Nevada in 1933. *See*, NRS
3 328.210. However, not all Federal enclaves are treated the same. Once property is determined to be
4 a Federal enclave, it must then be determined which State laws are preempted. The general rule is
5 that: (1) State law enacted before the cession continues to apply unless Congress states otherwise;
6 and (2) State law that was enacted after the creation of the enclave does not apply to the enclave.

7 In this instance, it appeared that the second situation controls. The Federal Government
8 acquired the land in 1933. *See*, NRS 328.201. Nevada enacted its Occupational Health and Safety
9 statutes and regulations in 1973. *See*, NRS 618.005, *et seq.* The Federal Government chose to
10 exempt, “contractors and subcontractors on land under exclusive federal jurisdiction,” as set forth in
11 65 FR 20735-01.

12 There are, however, three exceptions to this rule. They are: (1) State law is not exempted if
13 the State had, at the time of the cession, explicitly reserved the right to legislate over the matter at
14 issue; (2) State regulatory schemes that were in place prior to the cession, but which require ongoing
15 changes by the regulatory body, are not preempted; and (3) Federal enclaves are not shielded from
16 State law if Congress provides “clear and unambiguous authorization” for such State regulation over
17 its Federal enclaves.

18 In its presentation, the State showed that State Plans provide the option to enforce
19 occupational health and safety regulations for employees of private employers on Federal lands. *See*,
20 State’s Exhibit 2, p. C65. Evidence that the State has exercised that option, chosen to regulate these
21 private employers, can be found in two sources. The first was NRS 618.315(2) which contains very
22 narrow exceptions for domestic service, vehicles operating on public highways and certain
23 enumerated Federal agencies, none of which apply here. *See, Id.* As the statute contained no
24 exceptions for employees of private employers on Federal lands, it can be inferred that the State
25 chooses for Nevada OSHA to regulate these employers.

26 The State’s second piece of documentary evidence was the Agreement Under Section 18(e)
27 of the Occupational Safety and Health Act of 1970. *See*, State’s Exhibit 4, pp. C203-C207.
28 Therein, these governmental entities agreed that Federal OSHA would retain the authority to

1 regulate contractors and subcontractors on any Federal establishment, including national parks,
2 where the State cannot obtain entry. *See*, State's Exhibit 4, p. C204. This agreement further
3 provided for concurrent jurisdiction to enforce health and safety regulations where the State could
4 not obtain access to the place of employment even with the use of a warrant. *See*, State's Exhibit 4,
5 p. C205. In this instance, the NPS did not attempt to prevent State OSHA from inspecting the
6 Boulder Beach Motel. Therefore, the State had complete and total jurisdiction. Respondent's effort
7 to have the case dismissed on jurisdictional grounds failed. Jurisdiction is vested in the State.

8 Accordingly, the Board moved from the jurisdictional phase to a review of the State's *prima*
9 *facie* case. The standard of 29 CFR 1926.1011(d)(5) applies to all general contractors on a
10 construction project deemed to exercise general supervisory authority over the work covered,
11 regardless of whether the general contractor is qualified to serve as the asbestos competent person.
12 *See*, Tr., pp. 67;20-24, 68;1-2. In this situation, there was no dispute that Core Contracting was the
13 general contractor at the Lake Mead project with authority over its subcontractor, American
14 Abatement. *See*, Tr., pp. 57;6-13, 60;6-14, 63;14-21.

15 The standard was violated because American Asbestos had several documented violations of
16 OSHA asbestos abatement work. *See*, Tr., p. 68;10-22. Mr. Winston testified, that Core
17 Contracting did not go into the areas where active abatement was occurring. *See*, Tr., 60;6-14. Core
18 Contracting did not ask for or receive an abatement plan to determine what was to occur in the
19 abatement areas. *See*, Tr., 61;7-14. Core Contracting did inquire as to whether or what degree
20 American Abatement was in compliance with OSHA regulations. *See*, Tr., 62;1-10.

21 There was exposure here. The general contractor is responsible for all employees on their
22 work site. In this case, there were six employees of American Abatement that were all working
23 exclusively on doing asbestos abatement work. *See*, State's Exhibit 1, p. C15.

24 Employer knowledge was shown because the point of the contract was to abate the large
25 amount of asbestos inside of the Boulder Beach Motel. *See*, State's Exhibit 3, pp. C68-C188, *see*
26 *also*, Tr., pp. 56;22-24, 57;1-13. Core Contracting undertook this work at the request of the NPS.
27 Core Contracting was aware that it was not familiar with asbestos. Accordingly, Core Contracting
28 subcontracted with American Abatement to do the asbestos abatement work. *See*, Tr., pp. 56;22-24,

1 57;1-13. That Core Contracting was not aware of exactly the extent of its responsibilities does not
2 excuse the fact that those requirements are in place.

3 For its part, Core Contracting did not dispute a single factual allegation of the substantive
4 violations found by the inspector. *See*, Tr., p. 56;22-24. Thus, the State's *prima facie* case was
5 uncontroverted.

6 ORDER

7 On the resolution of Nevada OSHA's jurisdiction, it was moved by Board Member Fullerton
8 that Nevada OSHA was acting within its jurisdiction when they cited Core Contracting for an
9 alleged violation of 29 CFR 1926.1011(d)(5) within the confines of the Lake Mead Recreation Area.
10 *See*, Tr. 33;22-24. The motion was seconded by Board Member Spielberg. *See*, Tr., p. 34;6-7.
11 The motion was approved unanimously upon a vote of four in favor and none in opposition. *See*,
12 Tr., p. 34;8-11. Accordingly, the State Occupational Safety and Health Board of Review hereby
13 finds that Nevada OSHA had jurisdiction in this matter and was authorized to accept testimony and
14 to deliberate upon the substance of the citation.

15 In the case in chief, it was moved by Board Member Macias that the citation and fine of
16 \$2,603 be upheld. *See*, Tr., p. 75;19-10. The motion was seconded by Board Member Fullerton.
17 *See*, Tr., p. 75;22-23. The motion was approved unanimously upon a vote of four in favor and none
18 in opposition. *See*, Tr., pp. 75;24, 76;1-3. Accordingly, the State Occupational Safety and Health
19 Board of Review hereby upholds the citation and fine assessed against Core Contracting in the
20 amount of \$2,603.

21 This is the Final Order of the Board.

22 IT IS SO ORDERED.

23 On March 13, 2024 the Board convened to consider adoption of this decision, as written or
24 as modified by the Board, as the decision of the Board.


25 Those present and eligible to vote on this question consisted of the 5 current members of the
26 Board, to-wit, Chairman Rodd Weber, Secretary William Speilberg, members Frank Milligan, Scott
27 Fullerton and Jorge Macias. Upon a motion by William Speilberg, seconded by Scott Fullerton, the
28 Board voted 5-0 to approve this Decision of the Board as the action of the Board and to authorize

1 Chairman Rodd Weber, after any grammatical or typographical errors are corrected, to execute,
2 without further Board review this Decision on behalf of the Nevada Occupational Safety and Health
3 Review Board. Those voting in favor of the motion either attended the hearing on the merits or had
4 in their possession the entire record before the Board upon which the decision was based.

5 On March 13, 2024 this Decision is, therefore, hereby adopted and approved as the Final
6 Decision of the Board of Review.

7 Dated this 20th day of March, 2024.

NEVADA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD

8
9 By: 
10 Rodd Weber, Chairman

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13 NOTICE: Pursuant to NRS 233B.130, any party aggrieved by this Final Order of the OSHA
14 Review Board may file a Petition for Judicial Review to the District Court within thirty (30) days
15 after service of this Order.
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