

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH

2 REVIEW BOARD

3
4 CHIEF ADMINISTRATIVE OFFICER
5 OF THE OCCUPATIONAL SAFETY AND
6 HEALTH ENFORCEMENT SECTION,
7 DIVISION OF INDUSTRIAL RELATIONS
8 OF THE DEPARTMENT OF BUSINESS AND
9 INDUSTRY,

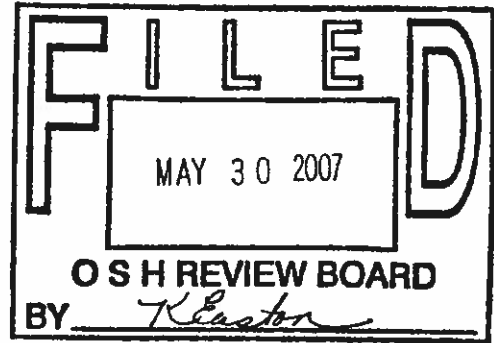
Docket No. RNO 07-1325

Complainant,

vs.

10 DILLARD'S, INC., a Delaware
11 corporation, DILLARD'S NEVADA,
12 INC., a Nevada corporation,
13 DILLARD STORE SERVICES, INC.,
14 an Arizona corporation,

Respondent.



15 DECISION

16 This matter having come before the **NEVADA OCCUPATIONAL SAFETY**
17 **AND HEALTH REVIEW BOARD** at a hearing commenced on the 11th day of
18 April 2007, in furtherance of notice duly provided according to law,
19 MR. ROB KIRKMAN, ESQ., counsel appearing on behalf of the **Chief**
20 **Administrative Officer of the Occupational Safety and Health**
21 **Enforcement Section, Division of Industrial Relations (OSHES)**, and
22 MR. TIM ROWE, ESQ., counsel appearing on behalf of respondent,
23 **DILLARD'S, INC., a Delaware corporation, DILLARD'S NEVADA, INC., a**
24 **Nevada corporation, DILLARD STORE SERVICES, INC., an Arizona**
25 **corporation; the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD**
26 finds as follows:

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

The complaint filed by the OSHES sets forth allegations of

1 violations of Nevada Revised Statutes as referenced in Exhibit "A",
2 attached thereto.

3 Citation 1, Item 1(a) charges a "serious" violation of 29 CFR
4 1910.36(d)(1). The complainant alleges that the respondent employer
5 failed to ensure an exit route door was unlocked at all times and
6 not subject of special knowledge requirements to open. Specifically
7 OSHES charges that the respondent employer permitted employees to
8 work in an area controlled by an exit door which was locked and
9 required special knowledge to open. The proposed penalty for the
10 serious violation was grouped with other items in Citation 1 for the
11 total sum of \$4,500.00.

12 Citation 1, Item 1(b) charges a "serious" violation of 29 CFR
13 1910.37(b)(2). The complainant alleges that the respondent did not
14 ensure each exit at the upper and lower dock area was marked clearly
15 with a sign reading "exit". Specifically OSHES charges that the
16 respondent employer maintained an exit door located at the southwest
17 section of the upper dock area which was not marked with a sign
18 reading "exit"; further, the exit door located at the lower dock
19 area south of the dock doors was not marked with a sign reading
20 "exit". The violation was classified as serious and the proposed
21 penalty for the violation was grouped with that referenced at
22 Citation 1, Item 1(a).

23 Citation 1, Item 1(c) charges a "serious" violation of 29 CFR
24 1910.37(b)(5). The complainant alleges that the respondent employer
25 failed to ensure each doorway along an exit route which could be
26 mistaken for an exit was marked "not an exit" or identified by a
27 sign indicating its actual use. Specifically OSHES charges that the
28 respondent employer maintained at the upper dock area a doorway to

1 a janitorial room which was not marked "not an exit" or with a
2 similar designation or sign indicating its actual use. Further, at
3 the upper dock area, a doorway to an alteration room was not marked
4 "not an exit" or with a similar designation or sign indicating its
5 actual use. The violation was classified as serious and the
6 proposed penalty for the violation was grouped with that referenced
7 at Citation 1, Item 1(a).

8 Counsel for the Chief Administrative Officer presented
9 evidence and testimony with regard to the alleged violations. Safety
10 and Health Representative (SHR) Mr. Chris Carling testified that he
11 inspected the Dillard's Department Store site of respondent located
12 at Highway 395 and the Mt. Rose Highway in Reno, Nevada. He
13 accompanied SHR Ms. Jennifer Cox during the inspection. Mr. Carling
14 testified that he and Ms. Cox met with the designated employer
15 representative Ms. Genzer an assistant manager for the Dillard's
16 Department Store. After an opening conference, the inspection was
17 conducted during business hours. The SHRs were directed to the
18 Dillard's Department Store site based on an anonymous complaint. In
19 furtherance of the anonymous complaint Mr. Carling observed exit
20 doors in the loading dock areas (upper and lower) as well as various
21 items of inventory and merchandise. Complainant's Exhibits 1, 2 and
22 3, admitted in evidence by stipulation, provided photographic
23 depictions of the doors subject of the citation. Mr. Carling
24 testified that he confirmed the lower dock door, subject of Citation
25 1, Items 1(a) and 1(b)(b), was locked and not marked. Ms. Genzer
26 informed him the lower dock door was normally locked to deter
27 employee theft. Mr. Carly testified that Ms. Genzer also informed
28 him that while there were other means to exit the building during an

1 emergency, the lower dock door could be opened by supervisory
2 personnel who maintained keys, the door was subject of a 15 second
3 delayed opening mechanism which permitted same to open if pressed
4 for 15 seconds, the building fire system overrides the door lock,
5 and security cameras continuously monitored the area such that the
6 door lock could be disabled from a master control panel in the
7 security office. SHR Carling testified that the printed
8 instructions on the door, depicted in Exhibit 3, directed that the
9 door could be opened by pressing the push bar for 15 seconds and
10 releasing same. Mr. Carling also testified that there was no sign
11 on or near either of the dock doors indicating or marking them as an
12 "exit". Ms. Genzer informed SHR Carling that the lower dock door
13 was used for regular employee ingress and egress, specifically while
14 reporting for work and departing the store for any purposes, but
15 could also be used for emergency purposes. SHR Carling testified
16 that he was informed by the management representative that employees
17 had been trained in emergency procedures.

18 On cross-examination by respondent counsel, SHR Carling
19 testified that he did indeed test the lower dock locked door in
20 accordance with the instructions and it opened if pushed for 15
21 seconds. He further testified that if a fire occurs anywhere in the
22 store, the subject door automatically unlocks along with all others.

23 On board examination of SHR Carling, he responded that no
24 safety logs were requested or obtained to verify employee training.

25 Counsel for complainant then presented evidence and witness
26 testimony from SHR Ms. Jennifer Cox. Ms. Cox testified that she was
27 the co-inspector on the subject site with Mr. Carling. Ms. Cox
28 testified that she inquired of Ms. Genzer with regard to employee

1 training and use of the lower dock door. Ms. Genzer informed her
2 that employees enter and exit the lower dock door routinely and were
3 trained in its use. SHR Cox further testified that from her
4 observations there was no sign marking the dock doors (lower or
5 upper) as "exit" or "not an exit".

6 On cross-examination Ms. Cox testified that she saw many areas
7 and doors marked "exit". Exhibit 4 admitted in evidence by
8 stipulation depicted all designated emergency exits and routes as
9 well as other non-emergency designated exit doors. On further
10 cross-examination Ms. Cox confirmed that only the orange marked
11 doors were designated fire or emergency exits. She testified that
12 the subject doors cited in Items 1(a) and (b) were not shown on
13 Exhibit 4 to be a designated fire or emergency exit.

14 On board questioning, Ms. Cox testified that she had not
15 requested or referenced the Master Exiting Plan, the Uniform
16 Building Code nor the Uniform Fire Code and therefore did not know
17 the subject diagram to be in non-compliance with same. On further
18 board questioning Ms. Cox testified that she did not request or
19 review safety meeting logs to determine whether employees were
20 trained in identification of emergency exit and/or other ingress or
21 egress doors.

22 The direct and cross examination of complainant witnesses
23 encompassed issues with regard to the Citation 1 serious violations
24 alleged at Items 1(a), 1(b) and 1(c). At Item 1(b), an alleged
25 violation of 29 CFR 1910.37(b)(2), referenced upper and lower dock
26 doors, including that depicted in Exhibit 3, (Item 1(b)(b)
27 references the same locked dock door identified at Item 1(a)). The
28 doors were cited as violative because they were determined by the

1 inspector to be exit doors and not marked with signs identifying
2 them as an "exit." At Item 1(a), the door was also cited for being
3 a locked exit located along an "exit route." Item 1(c) referenced
4 **each** doorway along an "exit route," specifically the janitorial and
5 alteration room doors which could be mistaken for an exit and not
6 marked "exit" or "not an exit."

7 Respondent counsel presented a defense of non-applicability of
8 the standards principally through Exhibit 4 and the testimony of Mr.
9 Cliff Heller, the Reno Dillard's Store General Manager. Mr. Heller
10 testified that he is in overall charge of the safety at the
11 Dillard's Department Store site. He testified that he maintains an
12 emergency evacuation plan and that employee emergency path diagrams
13 are posted in all work areas where no direct visibility to emergency
14 exit signs might be readily observed. He described the diagram in
15 Exhibit 4 as showing the company security and alarm plan and the
16 emergency exit route, including that for the areas subject of the
17 Citation 1. He testified that the diagram depicts the "lower dock
18 door" which is the focal point of the Citation 1, Items 1(a) and
19 1(b)(b) as further depicted in Exhibit 3. He testified that the
20 lower dock door is the only door used for employee ingress and
21 egress during work hours. Mr. Heller testified that the fire
22 department has inspected the property on approximately eleven
23 occasions and there have been no fire department issues involving
24 the store exits or the subject cited doors. Mr. Heller further
25 testified that the dock doors cited are not designated emergency
26 exits and therefore not marked accordingly.

27 On cross-examination Mr. Heller testified that the subject
28 lower dock door depicted in Exhibit 3 is utilized by employees when

1 arriving and departing work, during lunch breaks and for other
2 general purposes. He stated the lower dock door area is called the
3 "dock and receiving area." Employees "clock in" at that area as the
4 time clock is within seven to eight feet of the door cited as shown
5 in Exhibit 3. He testified that the door not only bears printed
6 instructions regarding opening, but it also is subject of regular
7 daily use by the employees, and monitored on a reasonably constant
8 basis by store security personnel.

9 On closing argument, counsel for complainant stated that as to
10 Citation 1(b) there is no question the doors lacked signage
11 designation as an exit and were indeed "exit" doors. He further
12 argued that as to Item 1(c), the janitorial and alteration room
13 doors could easily be mistaken for exits during an emergency and
14 should have been marked in accordance with the cited standard
15 because they were "along an exit route." He further argued that
16 based upon the dock doors shown in Exhibit 3 unmarked as exits in
17 violation of Item 1(b) then it clearly follows that Items 1(a) and
18 1(c) doors along the "exit route" are in violation based upon the
19 testimony of SHRs Carling and Cox. Counsel argued that the
20 alternate methods for opening the lower dock door requiring a key,
21 awaiting a 15 second delay, "buzzed out" by a security guard,
22 electric override, or reading the printed instructions were not
23 sufficient to satisfy standard compliance. In particular, the lower
24 dock door requires "special knowledge" for employee operation and
25 therefore violative of the cited standard. He further argued that
26 during times of emergency, people panic and it is reasonable to
27 conclude they could easily mistake unmarked doors along emergency
28 routes for exits. Counsel concluded his argument stating that

1 serious injury or death could result from the cited noncompliance in
2 the event of a fire, earthquake, or other emergency.

3 Respondent presented closing argument focusing on the
4 recognized defense of inapplicability of the standard. Counsel
5 argued that the referenced OSHA standards are being misapplied by
6 OSHES to the subject doors. He argued that the dock area doors
7 depicted in the exhibits are simply not intended, designated or
8 utilized as emergency "exit doors" nor on designated emergency "exit
9 routes". Counsel argued that one must read the entirety of the
10 standard section commencing with 1910.35 and subpart (e) to
11 understand the overall application which is limited to safe means of
12 egress from ". . . fire and like emergencies." He further
13 referenced the fundamental requirements identified in the section to
14 apply ". . . in case of fire or other emergency." Counsel stated
15 that dock doors were never intended, designated or identified as a
16 fire or emergency exit doors under the city building code, specific
17 fire code, nor the company emergency evacuation plan setting forth
18 emergency exit doors and emergency routes. Counsel argued that
19 OSHES takes the subject standard out of context and attempts to hold
20 the respondent responsible for marking non-emergency designated
21 doors under the fire and emergency standard when said doors are not
22 so designed or designated. He also argues that not every door needs
23 to be marked with something indicating it is or is not an exit but
24 only those that are so intended or along the designated emergency
25 route.

26 Counsel for respondent argued that the citation at Item 1(a)
27 is additionally inapplicable to the case facts in that there is no
28 "special knowledge" required to open the locked dock door which is

1 marked with instructions for a 15 second delay. He argues that
2 every employee who becomes employed with the respondent is trained
3 in the use of the subject door as it is the primary and sole
4 entrance for employees reporting to or departing from work and to
5 access the time clock. The door operation is subject of common
6 daily employee use. Counsel further argues that even should the
7 cited standard be applicable to the facts, there would be no
8 violation of the "special knowledge" provisions.

9 Counsel submits that the OSHES position alleging violations do
10 not "make sense" in the emergency use context based on the testimony
11 of SHR Cox. She testified that if one boarded up the door
12 completely there would be no violation. He argues that such a
13 position leads to an absurd result because the employees would have
14 even reduced access to the outside if there was some kind of an
15 emergency where currently they have an extra way out.

16 Finally, counsel argued that even if one assumed the
17 violations as cited, then same should not be classified as serious
18 because the employees merely had additional exits in the event of an
19 emergency which were more than the fire code requirements therefore
20 the chance of serious injury remote.

21 In reviewing the facts, testimony and evidence, the board
22 notes that this is not only a case of first impression in Nevada,
23 but no case law could be found interpreting the standard in the
24 context of the citations.

25 To find substantial evidence by a preponderance to meet the
26 burden of proof that violations occurred, it must first be
27 determined whether the standard is applicable to the facts.

28 To establish a prima facie case, the

1 Secretary (Chief Administrative Officer) must
2 prove the **existence of a violation**, the
3 exposure of employees, the reasonableness of
4 the abatement period, and the appropriateness
5 of the penalty. See Bechtel Corporation, 2
OSHC 1336, 1974-1975 OSHD ¶18,906 (1974);
Crescent Wharf & Warehouse Co., 1 OSHC 1219,
1971-1973 OSHD ¶15,047. (1972). (Emphasis
added.)

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

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

11 Board analysis is first directed to the meaning of an
12 emergency exit, convenience door or other means of ingress and
13 egress. The plain meaning of words must be recognized and if
14 needed, ascertained by first considering its commonsense meaning.
15 General Motors Corp., 17 OSHC 1217 (1995), affirmed, 89 F.2d 313
16 (1996). The board finds that clearly not **every** door in a business
17 establishment with employees must be marked "exit" or "not an exit".
18 29 CFR 1910.35 identifies the fundamentals and requirements of the
19 section as applicable to ". . . fire . . . or emergency . . . means
20 of ingress and egress." The evidence and testimony, including the
21 emergency plan diagram at Exhibit 4, demonstrate that the door cited
22 at Items 1(a) and 1(b)(b) was not intended to be, identified as, nor
23 designated as an emergency exit or fire door. The standard does not
24 require it to be marked as an "exit". The board finds that even
25 should the dock door depicted in Exhibit 3 have been designated as
26 an emergency exit, no "special knowledge" for employee operation was
27 required. The unrefuted testimony of Mr. Heller was that all
28 employees were trained in use of the door. The testimony of both

1 SHRs Carling and Cox as well as Mr. Heller was that the employees
2 used the Exhibit 3 dock door daily, routinely, as their primary
3 means of ingress and egress to the building. The door was commonly
4 used by the employees therefore no "special knowledge" under the
5 cited standard could even be inferred.

6 Complainant presented no evidence of the Master Exiting Plan,
7 the Uniform Building Code nor the Uniform Fire Code emergency exit
8 requirements or designations. Exhibit 4 did not depict nor identify
9 the upper or lower dock doors as designated for fire or emergency
10 exit purposes.

11 Complainant did not meet its burden of proof to establish a
12 violation of Items 1(a) and 1(b)(b) by substantial or a
13 preponderance of evidence that the lower dock door identified in the
14 exhibits was subject to the cited standard as an emergency "exit"
15 door requiring marking or an emergency "exit route" door that
16 required "special knowledge" to open.

17 The board in analyzing the alleged violations at Item 1(c)
18 referencing 29 CFR 1910.37(b)(5) and Item 1(b)(a) referencing 29 CFR
19 1910.37(b)(2) found the bases for violations.

20 At Item 1(b)(a), the evidence established that the **upper** dock
21 door was on an exit route and required marking as an exit pursuant
22 to the cited standard.

23 The testimony and evidence presented by complainant
24 established a prima facie case of violation with regard to the
25 janitorial room and alteration room doors under the cited standard.
26 There was no testimony or evidence to refute the allegations of the
27 complaint and SHR testimony that the janitorial and alteration room
28 doors were along an exit route and susceptible to mistaken use in

1 the event of fire or emergency if not marked "not an exit." These
2 doors differ from the principal ingress and egress dock door
3 identified in Exhibit 3 which was marked with opening instructions
4 and subject of both employee training and common use. During a time
5 of fire, emergency, or panic, employees could reasonably mistake the
6 janitorial and alteration room doors as exits and suffer death or
7 serious injury. Employee error or mistake as to exit door
8 identification in the familiar work area is somewhat remote and
9 provides a basis for reducing the level of seriousness and penalty
10 assessed; however the **potential** for serious injury or death remains.
11 The unmarked doors are not permitted in the workplace pursuant to
12 the mandate of 29 CFR 1910.37(b)(5) as referenced in Item 1(c) of
13 Citation 1.

14 Based upon the above and foregoing, it is the decision of the
15 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that violations
16 of Nevada Revised Statutes did occur as to Citation 1, Item 1(b)(a),
17 29 CFR 1910.37(b)(2) and Item 1(c), 29 CFR 1910.37(b)(5). The
18 violations were properly classified as "serious". The proposed
19 penalty is reduced due to the level of seriousness and a penalty is
20 confirmed in the amount of ONE THOUSAND DOLLARS (\$1,000.00).

21 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY**
22 **AND HEALTH REVIEW BOARD** that no violation of Nevada Revised Statutes
23 did occur as to Citation 1, Items 1(a) 29 CFR 1910.36(d)(1). The
24 proposed grouped penalty for the violation attributable to same is
25 denied.


26 The Board directs counsel for the complainant, **CHIEF**
27 **ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH**
28 **ENFORCEMENT SECTION, DIVISION OF INDUSTRIAL RELATIONS**, to submit

1 proposed Findings of Fact and Conclusions of Law to the **NEVADA**
2 **OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve copies on
3 opposing counsel within twenty (20) days from date of decision.
4 After five (5) days time for filing any objection, the final
5 Findings of Fact and Conclusions of Law shall be submitted to the
6 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing
7 counsel. Service of the Findings of Fact and Conclusions of Law
8 signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
9 **REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

10 DATED: This 30th day of May, 2007.

11 NEVADA OCCUPATIONAL SAFETY AND HEALTH
12 REVIEW BOARD

13 By


14 TOM B. WATERS, Chairman
15
16
17
18
19
20
21
22
23
24
25
26
27
28