NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY,

Complainant,

vs.

DIELCO CRANE SERVICE, INC.,

Respondent.

_____/

Docket No. LV 09-1358

DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 11th day of March, 2009, in furtherance of notice duly provided according to law, MR. JOHN WILES, ESQ. appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations** (OSHA); and MR. ROBERT PETERSON, ESQ., appearing on behalf of Respondent, **Dielco Crane Service, Inc.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

The complaint filed by the OSHA sets forth allegations of violation of Nevada Revised Statutes as referenced in Exhibit "A," attached thereto. The alleged violations in Citation 1, Item 1 referenced NRS 618.375(1) commonly known as the "general duty clause." The respondent employer was charged with a failure to furnish employment free from recognized hazards that were causing or were likely to cause death or

serious physical harm to its employees, specifically due to a failure to sound a horn warning prior to swinging a crawler crane super structure. The alleged violation was classified as Serious and a penalty assessed in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS ($3,500.00).

At Citation 1, Item 2, referencing 29 CFR 1926.21(b)(2) the employer was charged with failing to instruct each employee in the regulations applicable to the work environment based upon three crane operators not being trained on a manufacturer's requirement to sound the crane horn to alert personnel prior to swinging of the superstructure. The alleged violation was classified as Serious and a penalty assessed in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS ($3,500.00).

At Citation 2, Item 1, paragraph 1, referencing NRS 618.383(1) the employer was charged with a failure to comply with the written safety program for training on crane operations as to requirements for operators to sound the crane horn prior to swinging the superstructure. The alleged violation was classified as Regulatory and a grouped penalty assessed in the total amount of FIVE HUNDRED DOLLARS ($500.00).

At Citation 2, item 1, paragraph 2, the employer was charged with failing to fully investigate an accident as required in the respondent's Safety Policy Statement. The violation was classified as regulatory and part of the grouped penalty assessed under Citation 2, Item 1, paragraph 1, in the amount of FIVE HUNDRED DOLLARS ($500.00).

At Citation 2, Item 2, referencing NAC 618.540(1)(b) the employer was charged with maintaining a written safety program that did not include the required explanation of methods used to identify, analyze and control hazardous conditions. The violation was classified as Regulatory and a penalty assessed in the amount of FIVE HUNDRED DOLLARS

($500.00).

At Citation 2, Item 3, referencing NAC 618.540(1)(d) the employer was charged with maintaining a written safety program that did not include the procedures that must be followed to investigate an accident, including corrective actions to be initiated pursuant to the regulatory requirements. The violation was classified as Regulatory and a penalty assessed in the amount of FIVE HUNDRED DOLLARS ($500.00).

Counsel for the complainant, through Safety and Health Representative (SHR) Nicholas LaFronz presented evidence and testimony as to the violations and assessed penalties. Mr. LaFronz testified that on May 31, 2008 he conducted an accident investigation at the City Center Project located at the MGM Hotel Casino site in Las Vegas, Nevada. He was directed to the location after a report of an injury resulting in a fatality. He determined that an employee of respondent acting as a crane "oiler" was crushed to death when the crane operator rotated the crane superstructure which pinned the oiler between the crane track and the counterweights. He testified that his investigation revealed the crane operator and oiler were employees of respondent engaged in the process of "shaking out steel." He described the work effort to involve steel material first "rigged" by iron workers and lifted by the crane to approximately "waist height." The crane operator would then rotate the superstructure while the iron workers guided him to the point where the load was to be set down. The process continues until all of the steel material is "laid out" in accordance with the job requirements under the supervision of a steel erection director. During the course of the investigation the SHR interviewed employees, obtained photos, examined the crane operations manual, and reviewed the employer written safety program.

Mr. LaFronz testified in support of Citation 1, Item 1, that based upon information contained in the crane manufacturer safety manual, a horn must be sounded to alert personnel before a swing of the boom or superstructure portion of the crane. He spoke to three respondent employee operators who informed him they were unaware of any requirement to sound the crane horn prior to swing nor were they trained to do so. Respondent admitted through counsel that no horn was sounded prior to the swing at the time of the accident, nor are employees trained to sound the horn prior to swinging the boom. The SHR classified the violation as serious due to the size of the crane, the potential for serious injury and indeed the death which occurred accordingly.

Mr. LaFronz further testified as to Citation 1, Item 2, referencing 29 CFR 1926.21(b)(2). He testified that the citation was based upon the employer failure to instruct its employees in the requirement to sound the crane horn prior to swing of the boom. The basis for his citation was based upon statements of the respondent employee operators interviewed who admitted they received no such training. He classified the violation as serious based upon the same reasoning as that referenced at Citation 1, Item 1 including the resultant death of the oiler employee.

Mr. LaFronz identified Citation 2, Item 1, referencing NRS 618.383(1). He testified as to subparagraph 1 that he examined the written safety program of the employer in conjunction with his interviews of three crane operators to confirm their lack of understanding or following what he determined to be the crane manufacturer **requirements** for operators to sound the crane horn prior to swinging the superstructure. He classified the violation as regulatory and assessed a grouped penalty of $500.00. The subject

violation involved a training issue and the penalty calculation for same was in accordance with the protocol established by the enforcement section. The SHR also cited subparagraph 2 to Citation 2, Item 1, based upon his examination of the employer safety manual and specifically the respondent Safety Policy Statement. He noted the company is required to investigate fully all accidents and cause factors contributing to accidents and to provide viable recommendations to prevent recurrence. However he found the accident investigation information consisted of a single sheet entitled "preliminary mishap incident report" which contained limited information and no corrective actions. He also noted the employer response in the formal report was merely a simple "yes" answer, and no other reports or documentation provided.

SHR LaFronz continued his testimony in support of Citation 2, Items 2 and 3, referencing respectively regulatory violations NAC 618.540(1)(b) and NAC 618.540(1)(d). Both violations involved the employer written safety program. He concluded the safety program failed to provide the required information on methods used to identify hazards. He specifically identified complainant's Exhibit A page 47 regarding verbiage found to be deficient. At Citation 2, Item 3, Mr. LaFronz concluded that the safety program did not include the required procedures for accident investigation. The citations were classified as "Regulatory" based upon the violations being subject of the safety program and assessed penalties of $500.00 for each of the violations.

On cross-examination, counsel for respondent focused on the SHR determination of violation due to the crane manufacturer "requirement," versus a "guide" as referenced in the operations manual. The SHR testified his citation of violation of the general duty clause was based upon his interpretation of the manufacturer operations manual identified

in respondent Exhibit C. Mr. LaFronz testified that while he referred to "industry requirements" in his report, he did not actually inquire of any experts or others in the business of similar crane operations. In response to counsel questions regarding Exhibit C, the operations manual, to identify the "requirement" of horn sounding, the SHR admitted he could only find a manufacturer "guide" as opposed to an operational "requirement." Mr. LaFronz testified that he believes the entire paragraph in the manufacturer operations manual referencing the sounding of the horn must be read in entirety to make sense; his opinion of same is that a **requirement** exists not merely a **guide**.

Continued cross-examination occurred relative to Citation 2, Item 1, referencing NRS 618.383(1) and the SHR reasons for citing violations of the safety program based upon operator responses during his investigation that they were unaware of requirements to sound the crane horn prior to swinging. Respondent counsel questioned SHR LaFronz on his determination that training must occur as a requirement rather than a guide. The SHR again testified he believed the operations manual at Exhibit C, when read in entirety, provided for a requirement rather than a mere guide to sound the horn for alert to employees prior to swinging.

During continued cross-examination, Mr. LaFronz testified that safety training information had been provided to the oiler killed in the accident, he was experienced for the job, and he worked with the same crane operator many times in a team effort.

Counsel for respondent presented evidence and testimony in defense of the citations referenced. Mr. Jimmy Weithorn identified himself as a professional engineer, experienced in the crane industry, a member of the National Commission for the Certification of Crane Operators, and qualified as an expert in crane operations. Mr. Weithorn testified

there is no OSHA standard to sound an alert horn before swinging a crane superstructure. He further testified there is no industry practice or requirement to sound a crane alert horn prior to swinging the superstructure. Mr. Weithorn identified various reasons for not requiring an operator to sound a horn before a swing which included a need to control the load, avoid removing hands from the controls, diverting attention from the task at hand to reach a horn button, and the fact that for the subject work the crane boom was swinging approximately every 20 seconds which would make sounding a horn ineffective to alert employees due to the sequencing time. He further testified that utilization of an alert horn in a confined area such as the site of the accident where three cranes were operating in close proximity, would simply create confusion among employees with all other "beeping" going on as well as horn signaling for crane movement. Mr. Weithorn described horn signal protocol utilized by crane operators for stop, travel and related movements; but testified there is no horn signal existent in the industry for swinging. Mr. Weithorn further testified that Federal OSHA responded to him on a variance application in another matter and rejected his request for utilization of horns instead of a barricade to avoid injury from crane swings as being ineffective. The witness also testified it was not foreseeable that an oiler, who was also a crane operator, would ever enter the area behind the crane where he was killed during a 20 second series of superstructure swings.

On cross-examination Mr. Weithorn testified that the only way to abate such a hazard would be by use of a barricade; however same was in place at the time of the accident. He further testified that an alert horn would have had no benefit to protect the subject oiler nor other

employees. He responded that no operator could have expected the oiler, who was also an operator, to place himself in an area of a few square feet at the rear of the crane because it located him in a position where he could not be observed by the crane operator.

On redirect examination, Mr. Weithorn testified that as an expert in the field he never heard anyone interpret the word "guide" in a manufacturer manual to be a "requirement." He further testified that the national committees on the subject serving to develop and redraft standards resultant from various crane issues, are not currently giving any consideration to requiring the sounding of an alert horn prior to swinging.

Counsel for respondent presented testimony and evidence from Mr. Ronald Kohner, who identified himself as an expert in the crane field and a consultant on cranes and heavy lifting matters. He testified that he formally worked as a designer in crane manufacturing, investigated crane accidents, and provides seminar training in the subject field. Mr. Kohner testified that Exhibit C in the owners manual provided only a guide and not a requirement to sound an alert horn. In his expert opinion the industry has no requirement for sounding a horn to alert employees prior to any swing operations. He also testified that the national safety standards do not require same, even though some manufacturers place guides in their manuals. He testified that the oiler violated industry safety training by placing himself in the location where he was found after his death. Mr. Kohner further testified there is no regulatory violation for failing to teach horn sounding before a swing because no horn sounding is required, therefore it should not be taught. He also testified that he knows of no safety experts who recommend such a procedure and no manufacturer that requires

same. Mr. Kohner testified that in his opinion it would be unsafe and create a greater hazard or a dangerous condition for an operator to take his hands off of the operational controls to press a button and sound a horn prior to a swing, particularly when the job task required swinging operations every 20 seconds. He further testified that he knows of no rules in any state where an operator is required to sound a horn when swinging during steel shakeout work.

Counsel for respondent presented additional evidence and testimony from Mr. Scott Wilson. The witness identified himself as the president of Crane Service, Inc., involved in the crane business since 1981 and a trainer of crane operators. He testified there is no industry practice, standard or recognized hazard which requires the sounding of alert horns prior to swinging the crane superstructure. He further testified that union operators are the best trained individuals in the industry and that no union training program for crane operators includes sounding of alert horns prior to swinging as part of operator training.

Counsel presented testimonial evidence from Mr. Shawn Kinsey who identified himself as the business representative of Operating Engineers Local 12. He testified that he has been a crane operator and in the field for approximately 16 years and previously conducted the crane operators apprenticeship school program in Southern Nevada. He further testified he is chairman of the apprentice counsel and a former trainer. He confirmed that the union program does not train operators to sound an alert horn at any time prior to the swinging of the boom arm.

Counsel for complainant and respondent presented closing argument at the conclusion of the evidentiary portion of the hearing.

Complainant counsel argued that the elements to satisfy the burden of proof were established based upon the hazard resultant from the boom

swing which was foreseeable and therefore **recognized** to the extent of requiring protective action by the employer. He argued that the manufacturer guideline when read in totality required that a horn be sounded prior to swing. Counsel argued review commission case law supports the position that even if certain measures are not customary in an industry it does not mean they are not **recognized** such to require protection under the general duty clause to maintain a safe workplace. He argued that it is safer to follow the operations manual to sound a horn rather than to simply do nothing. Counsel argued the burden of proof is met under a general duty clause violation by merely showing a recognized hazard and then feasibility to protect against same. Counsel argued the SHR evidence and testimony regarding all cited regulatory violations was unrebutted and the burden of proof established accordingly.

Counsel for respondent argued there was no requirement anywhere in any OSHA standards or industry for sounding a horn prior to the swinging of the crane superstructure. A manufacturer guide is clearly not a requirement and that interpretation was supported by all the expert witnesses who testified at the hearing. He argued that the word "guideline" is not synonymous for "requirement;" and there is no basis for the horn violations cited. Counsel submitted the reason for guidelines in an operations manual is simply to deter civil suits, which may be prudent for a manufacturer, but not a requirement to support a violation under the general duty clause. He submitted that no industry expert was produced by OSHA to establish that the manufacturer guideline is recognized by the industry and therefore the burden of proof to establish a recognized hazard not met. He further noted that infeasibility to read a guideline as a requirement clearly prevents any

finding of violation. Counsel argued that for a crane operator to remove his hands from controls to hit a horn button every 20 seconds constituted a greater hazard, that no industry standard existed, and no union or other training program teaches operators to sound a horn prior to swing nor requires employers to train to do same. He concluded his argument by asserting the oiler's conduct of placing himself in the dangerous position where he was found was totally unforeseeable by the employer respondent; and while a tragic accident, no basis for a general duty or specific standard violation relating to the sounding of an alert horn.

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. N.A.C. 618.788(1).
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> All facts forming the basis of a complaint must be proved by a preponderance of the evidence. Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).
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> To establish a violation under the **general duty clause**, the Secretary (Chief Administrative Officer) must prove that: (1) a condition or activity in the employer's workplace presented a hazard to employees, (2) the **cited employer or the employer's industry recognized the hazard**, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) a feasible and useful means of abatement existed by which to materially reduce or eliminate the hazard. Kokosing Construct. Co., 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996). (emphasis added)

To prove a violation under the **general duty clause**, complainant is required to prove there is a "recognized" hazard. There must be evidence of a known hazard, and that respondent must have known failure to protect employees created a hazardous condition. *National Realty & Construction Co. v. OSHRC* (D.C.Cir. 1973) 489 F.2d 1257.

Proof of a **general duty clause** violation requires an evidentiary demonstration that the employer exposed its employees to a recognized

hazard likely to cause death or serious injury **and** that the employer could have taken feasible steps to avoid the violation. *See: Carlyle Compressor Co., Div. Of Carrier Corp. v. OSHCR,* 683 Fed2d 673 676 (2nd Cir. 1982); *New York State Electric & Gas Corporation v. Secretary of Labor and Occ Safety and Health RC* 88 Fed3d 98, 105 (1996).

The general duty clause requires a particular burden of proof to prove a violation, and different from that required for a specific standard violation. Substantial evidence and testimony must be offered to support the basis for a finding of violation. See, *General Glass & Window, Inc.*, OSHRC Docket No. 99-1341, August 24, 2000.

> To prove a violation of a **specific standard**, the Secretary (Chief Administrative Officer) must establish (1) the **applicability of the standard**, (2) the existence of noncomplying conditions, (3) employee exposure or access, and (4) that the employer knew or with the exercise of reasonable diligence could have known of the violative condition. See Belger Cartage Service, Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); American Wrecking Corp. v. Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir. 2003). (emphasis added)

A respondent may rebut allegations by showing:

1. That the **standard was inapplicable** to the situation at issue;

2. That the situation was in compliance; or lack of access to a hazard. See, Anning-Johnson Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976). (Emphasis added)

A "serious" violation is established in accordance with NRS 618.625(2) which provides in pertinent part:

> . . . a serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists or from one or more practices, means, methods, operations or processes

which have been adopted or are in use at that place of employment unless the employer did not and could not, with the exercise of reasonable diligence, know the presence of the violation.

Based upon the above and foregoing, the board concludes it is compelled as a matter of fact and law to deny the violation and proposed penalty at Citation 1, Item 1, referencing NRS 618.375(1) the "general duty clause." There was no preponderance of evidence or testimony to establish a **known** or **recognized** industry hazard nor **employer knowledge** direct or by constructive notice.

> When citing a violation of the **general duty clause**, the Secretary must establish that the cited condition **actually** poses a hazard to employees . . . The general duty clause, while intended to protect employees from hazards that have yet to be addressed by standards, is not intended to replace standards as an enforcement mechanism. Waldon Healthcare Center, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993) (emphasis added). See, Crowley American Transport Inc., OSHRC Docket No. 97-1231, June 29, 1999 " . . . neither side is convincing, but it is the Secretary who must meet the burden of proof. She has failed to do so here. Without some evidence other than the compliance officer's sense that seatbelts should be worn, the Secretary cannot **prove** that a hazard existed. The citation alleging a serious violation of the general duty clause . . . is vacated." (emphasis added)

The board further concludes no violation of Citation 1, Item 2 referencing the specific standard, 29 CFR 1926.21(b)(2). There was no evidence to establish a requirement for operator training to sound a horn prior to swing of the crane boom. The three operators were not trained to sound a crane horn prior to swing because the cited standard was not applicable as no such requirement could be established through the evidence and testimony.

The board further concludes there was no violation at Citation 2, Item 1 referencing NRS 618.383(1). The employer cannot be charged with

the failure to carry out the requirements of the written safety program as to training operators to sound a horn when no such requirement could be established. However, the board concludes the complainant met the burden of proof with regard to Citation 2, Item 1(2) referencing NRS 618.383(1), and Citation 2, Item 2, and Citation 2, Item 3, referencing respectively NAC 618.5401(b) and NAC 618.5401(d). The evidence and testimony of the SHR was clear and convincing by a preponderance based upon his examination of the respondent Safety Policy Statement and the employer written safety program. The Safety Policy Statement and the written safety programs were deficient as cited and subject of the unequivocal and unrebutted testimony of SHR LaFronz.

Based upon the above and foregoing, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation of Nevada Revised Statute did not occur as to Citation 1, Item 1, NRS 618.751, Citation 1, Item 2, 29 CFR 1926.21(b)(2), and Citation 2, Item 1, sub 1, NRS 618.383(1). The proposed penalties as to Citation 1, Item 1 and Citation 1, Item 2 are dismissed. The proposed penalty as to Citation 2, Item 1, sub 1, (grouped), is dismissed as to the sum of TWO HUNDRED FIFTY DOLLARS ($250.00) of the proposed FIVE HUNDRED DOLLAR ($500.00) grouped penalty.

It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as to Citation 2, Item 1(2), NRS 618.383(1). A portion of the grouped penalty is confirmed in the amount of TWO HUNDRED FIFTY DOLLARS ($250.00).

It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of the Nevada Revised Statute did occur as to Citation 2, Item 2, NAC 618.5401(b) and Citation 2, Item 3,

NAC 618.5401(d). The proposed penalties in the amount of FIVE HUNDRED DOLLARS each for a total of ONE THOUSAND ($1,000.00) are confirmed.

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

DATED: This 8th day of April, 2009.

CALE
DATE

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JOHN SEYMOUR, Chairman