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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, STATE OF NEVADA

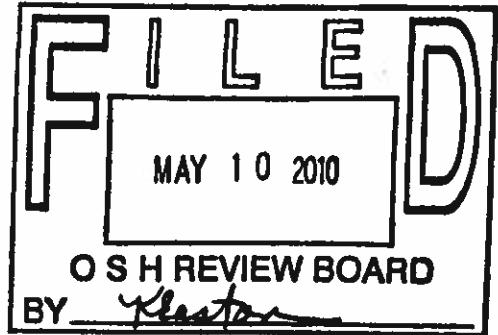
Docket No. LV 10-1400

Complainant,

vs.

DINNER IN THE SKY,

Respondent.



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of March, 2010, in furtherance of notice duly provided according to law, MR. JOHN WILES, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (OSHA)**; and ANTHONY J. CELESTE, ESQ., appearing on behalf of Respondent, **Dinner in the Sky**; 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 29 CFR 1910.180(h)(3)(v) and at Item 2, 29 CFR 1910.180(h)(4)(ii). In Citation 2, the alleged violation at Item 1 referenced Nevada

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1 Administrative Code (NAC) 618.538.

2 In Citation 1, Item 1, the employer was charged with hoisting
3 employees on a platform by use of a crane in violation of the referenced
4 standard. The alleged violation in Item 1 was classified as Serious and
5 a penalty proposed in the amount of Two Thousand One Hundred Dollars
6 (\$2,100.00).

7 In Citation 1, Item 2, the employer was charged with permitting
8 employees to stand, pass or work under a load connected to a hooking
9 mechanism attached to a crane in violation of the referenced standard.
10 The violation was classified as Serious and a penalty proposed in the
11 amount Two Thousand One Hundred Dollars (\$2,100.00).

12 In Citation 2, Item 1, the employer was charged with a violation
13 of the Nevada Administrative Code (NAC) for failing to establish a
14 written safety program within the time proscribed under the referenced
15 code section.

16 Counsel for the complainant, through Safety and Health
17 Representative (SHR) Renato Magtoto presented evidence and testimony as
18 to the violations and appropriateness of penalties. Mr. Magtoto
19 testified that he conducted an inspection at respondent's worksite
20 located on West Sahara in Las Vegas, Nevada. He testified that
21 respondent was engaged in a unique restaurant business operation which
22 provided for the service of food and beverage by employees to patrons
23 seated at a table connected to a platform suspended by a crane
24 approximately 90 feet in the air. Complainant's Exhibits 1, 2 and 3,
25 were admitted in evidence by stipulation. Exhibit 2 is comprised of
26 photographs depicting employees and patrons at or around the dining
27 table located on the platform as well as employees working under the
28 canopy which covers the platform attached by cables to the crane hook.

1 SHR Magtoto determined that employee exposure and risk were governed
2 under the standards and safety regulations for United States amusement
3 rides and consulted the ASTM F-24 for the operational guidelines. He
4 testified from Exhibit 1, pages 7 and 9, which included position letters
5 from Federal OSHA for standard interpretations. Mr. Magtoto
6 specifically identified Exhibit 1, pages 9 and 11 as Federal OSHA
7 interpretation letters. He testified that from his review, inspection,
8 analysis, directives and guidelines that the standards for general
9 industry, 29 CFR 1910, applied to and governed the worksite rather than
10 the standards for the construction industry, 29 CFR 1926.

11 On continued direct examination, Mr. Magtoto testified in Citation
12 1, Item 1, he cited the respondent because its employees were engaged
13 in work serving food and beverage on a platform suspended by a crane in
14 violation of the standard. He testified that the standard prohibits
15 employees working while being lifted on a crane hook. Counsel inquired
16 with regard to the distinctions in applying 29 CFR 1910 as opposed to
17 29 CFR 1926 and the applicability of the standard to the facts in
18 evidence. Mr. Magtoto testified that under construction industry
19 standards, 29 CFR 1926, employees are only permitted to be lifted by a
20 crane if they are being transported to a worksite when no other
21 conventional means of access are available, but so long as the hazards
22 are controlled with appropriate safety equipment. He testified that
23 respondent employees were utilizing safety harnesses as well as other
24 safety equipment. Mr. Magtoto distinguished those protective measures
25 from 29 CFR 1926 coverage because respondent employees were actually
26 **working on the platform** serving food and beverage. 29 CFR 1926 only
27 permits employees to be lifted by a crane for **access to a worksite**
28 rather than **actually work** on a platform suspended by a crane. He

1 continued his testimony in support of his decision to cite the
2 respondent under 29 CFR 1910 based upon his observations and research
3 that the employee work task on the platform violated the standard
4 referenced at Citation 1, Item 1, 29 CFR 1910.180(h)(3)(v).

5 SHR Magtoto further testified with regard to Citation 1, Item 2
6 which referenced 29 CFR 1910.180(h)(4)(ii). He identified photographic
7 Exhibit 2 and particularly photos 2, 3, and 4 of 4. He testified that
8 the photos depicted employees of respondent and those of the crane
9 company working under a canopy structure which covered the platform upon
10 which the dining table was configured. Employees were preparing to
11 attach the canopy, platform and dining table onto the crane coupling
12 "hook". He testified that photograph 3 of 4 depicted respondent's
13 employee exposed to the recognized hazard of standing under a "load on
14 the hook".

15 Mr. Magtoto testified he classified the violations as "Serious" and
16 assessed penalties in accordance with division guidelines after applying
17 appropriate credits to which he believed the respondent was entitled.

18 At Citation 2, Item 1, SHR Magtoto testified he cited the
19 respondent employer for failing to provide a written workplace safety
20 program which as required under the Nevada Administrative Code (NAC)
21 618.538. He assessed a penalty of One Thousand Dollars (\$1,000.00) in
22 accordance with the enforcement section operations manual. Mr. Magtoto
23 testified he requested evidence of the safety program after determining
24 that respondent entered into business in a time frame beyond the 60-day
25 limit which is permitted prior to the requirement for maintaining a
26 written safety program.

27 On cross-examination, SHR Magtoto reaffirmed his opinion as to the
28 applicability of 29 CFR 1910 as opposed to 29 CFR 1926, stating that

1 employees under the latter could only be lifted and work off a platform
2 under very special and limited circumstances whereas respondent
3 employees were engaged routinely in serving food and beverage to guests
4 from the elevated platform. He further testified that employees working
5 under the canopy, even if it is interpreted to be a "spreader bar," are
6 in violation of 29 CFR 1910 because the hook holding the canopy was
7 attached to the crane. On further cross-examination from respondent's
8 counsel, Mr. Magtoto testified that he did not believe the canopy to be
9 a "spreader bar" under the construction standards of 1926 which would
10 permit employees engaged in "rigging" to pass under without violation.

11 Counsel for the respondent presented evidence and testimony in
12 defense of the Citations. Mr. Michael Hinden, identified himself as the
13 owner of respondent and a franchisee of the unique dining operation
14 which engages in business throughout 30 countries. He testified that
15 the dining in the sky concept is very unique, that he follows a written
16 safety program provided by the franchiser, and that no incidents
17 involving safety violations have occurred worldwide after approximately
18 4,000 "flights" and six years of operation. Mr. Hinden testified as to
19 his permit status from the City of Las Vegas. He further testified that
20 he maintained a safety manual onsite but that SHR Magtoto did not
21 request same verbally, or in writing. He stated that he ceased his
22 operations after OSHA inspected the site due to a variety of business
23 reasons and specifically because the crane companies would not lift the
24 load due to the specter of an OSHA violation. Mr. Hinden testified he
25 believes that 29 CFR 1926 applies and that his employees are
26 appropriately safeguarded with all recognized equipment for fall
27 protection. He stated that because there is no other way for the
28 employees to perform their job task, they are permitted to work off the

1 suspended platform while protected with appropriate safety equipment
2 under 29 CFR 1926. Mr. Hinden reiterated that he believes there is no
3 OSHA violation at Citation 1, Item 1 if the operation is governed under
4 29 CFR 1926. The work is exempted due to there being no other way to
5 accomplish the job task.

6 At Citation 1, Item 2, Mr. Hinden testified that working under the
7 canopy is permitted because it is in effect a "spreader bar" and being
8 accessed safely while engaged in permitted "rigging". He testified that
9 employees were not working "under a load on the hook . . ." because it
10 is the platform and table that constitutes the load, along with people,
11 food and equipment such that the employees depicted in the photographic
12 exhibits working under the canopy were working under only a ". . .
13 spreader bar not the load . . ."

14 On cross-examination by complainant's counsel, respondent testified
15 there was no violation at Citation 2, Item 1 and referenced respondent's
16 Exhibit A wherein the safety program was delivered to Nevada OSHA within
17 the time constraints of the Nevada Administrative Code.

18 On closing argument, counsel for complainant argued there was no
19 dispute as to the **factual existence** of violative conditions.
20 Satisfaction of the burden of proof was met through respondent's
21 admissions that its employees were exposed to the worksite hazards
22 depicted in the photographic evidence. He argued the stipulated
23 evidence of the Federal OSHA interpretation of 29 CFR 1910 supports the
24 SHR testimony as to **applicability** of the cited standard. He further
25 argued CFR 1910 applies to the facts in evidence which established
26 respondent's routine operations require employees to serve food and
27 beverages to patrons while suspended on a platform approximately 90 feet
28 in the air. He argued it is undeniable that employees perform their

1 work task while suspended on the load attached to a crane. Counsel
2 distinguished the permissive hoisting of employees on a crane hook in
3 the construction industry when they must be provided access to a
4 worksite if there are no other means as opposed to respondent's regular
5 course of conduct in providing a unique dining experience on a routine
6 basis where employees work from a suspended platform.

7 Counsel further argued there are no lawfully permitted alternatives
8 available for enforcement of the Federal standards adopted by Nevada
9 Revised Statutes just because the work of respondent may be novel and/or
10 unique. Nevada OSHA is constrained to follow the standards under the
11 Code of Federal Regulations as well as the guidelines and interpretative
12 positions of Federal OSHA. He further argued that the remedy for
13 respondent may be to seek a variance as provided under both Nevada and
14 Federal law.

15 Counsel argued at Citation 2, Item 1, that if the evidence
16 demonstrated that the safety plan was actually provided within the
17 permitted time frame then the factual analysis should be left to the
18 board for decision.

19 Respondent counsel presented closing argument in support of its
20 defensive position that the construction industry standards in 29 CFR
21 1926 apply which permit employees to work from a suspended load so long
22 as they are properly protected with appropriate safety equipment. He
23 argued there was no evidence or testimony that employees of respondent
24 were not well protected through harnesses as demonstrated in the
25 photographic exhibits. Counsel further argued that the novel and unique
26 aspect of the business operation was never contemplated by Federal OSHA
27 when it enacted its standards or guidelines. He argued that Exhibit 1,
28 page 11 of the Federal OSHA interpretation letter permits employees to

1 ride on a suspended load if they cannot otherwise accomplish their work
2 task. Counsel argued the Federal interpretation letter permits the
3 respondent to conduct its operations notwithstanding the exhibit
4 guideline letters. He further argued that if there is no other way to
5 accomplish a work task then 29 CFR 1926 must be relied upon. The
6 guideline letter referenced from 29 CFR 1910 recognizes the permissive
7 aspects of 29 CFR 1926 if there is simply ". . . no other way to get to
8 . . . the work effort . . ."

9 Counsel further argued that the canopy depicted in evidence is
10 indeed a "spreader" therefore there is no violation for employees
11 working under same as it is not equivalent to working "under a load".
12 He argued that employees were merely hooking a canopy to the crane
13 before the crane lifted the actual load. The canopy is equivalent to
14 a spreader bar, therefore the employees were engaged in a recognized
15 permitted "rigging" effort and there was no violation of the cited
16 standard.

17 In reviewing the testimony, exhibits, and arguments of counsel,
18 the board is required to measure same against the elements to establish
19 violations under Occupational Safety & Health Law based upon the
20 statutory burden of proof and competence of evidence.

21 In all proceedings commenced by the filing of a
22 notice of contest, the burden of proof rests with
the Administrator. N.A.C. 618.788(1).

23 All facts forming the basis of a complaint must be
24 proved by a preponderance of the evidence. Armor
Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958
25 (1973).

26 To prove a violation of a standard, the Secretary
27 must establish (1) the applicability of the
28 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

1 violative condition. See Belger Cartage Service,
2 Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
3 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
4 Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
5 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
6 (No. 76-1408, 1979); American Wrecking Corp. v.
7 Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.
8 2003). (emphasis added)

9 A respondent may rebut the evidence by showing:

- 10 1. The standard was inapplicable to the situation
11 at issue;
- 12 2. The situation was in compliance; or lack of
13 access to a hazard. See, Anning-Johnson Co.,
14 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

15 A "serious" violation is established in accordance with NRS
16 618.625(2) which provides in pertinent part:

17 . . . a serious violation exists in a place of
18 employment if there is a substantial probability
19 that death or serious physical harm could result
20 from a condition which exists or from one or more
21 practices, means, methods, operations or processes
22 which have been adopted or are in use at that place
23 of employment **unless the employer did not and could**
24 **not, with the exercise of reasonable diligence,**
25 **know the presence of the violation.** (emphasis
26 added)

27 The board finds at Citation 1, Items 1 and 2, that complainant's
28 burden to prove the violations were met by a preponderance of the
evidence. While recognizing the indeed novel and unique aspects of
respondent's business operation, the applicability of 29 CFR 1910, as
opposed to 29 CFR 1926, is clear and convincing. There is no
construction effort underway in respondent's operation. The reason the
respondent employees to be lifted is not to reach a point of operation
for construction work, access to same, or to complete a work task and
then be lowered on the hoist from the crane load. Rather, the
unequivocal testimony and the un rebutted facts in evidence demonstrate
that the employer job tasks are conducted on a regular basis. The job
tasks require employees to routinely work from a suspended platform

1 attached to a crane while providing a dining experience to patrons
2 approximately 90 feet in the air. There is no construction effort
3 underway or worksite to be accessed. The facts, evidence and testimony
4 clearly demonstrate the raising and lowering of the platform to be a
5 routine requirement in the performance of the work task. Employees are
6 exposed to the fall hazards intended to be protected by 29 CFR 1910.
7 The purpose of the Occupational Safety and Health Act is to "provide
8 safe and healthful working conditions . . ." to employees engaged in
9 their work effort. NRS 618.015 (See also, *Manganas Painting Co. v.*
10 *Sec'ty. Of Labor*, 273 F.3d 1131 (D.C. Cir. 2001)).

11 The Nevada Occupational Safety and Health Review Board is mandated
12 to review and interpret cited standards in furtherance of the governing
13 body of law under the Code of Federal Regulations (CFR) as adopted by
14 Nevada Revised Statutes (NRS). To the extent the respondent operation
15 may be novel and/or unique, the remedy is more appropriately relegated
16 to variance procedures where relief may be granted. However it is not
17 within the jurisdictional purview nor the mandate of this board to
18 create new law, variances or legislate.

19 The board further finds, from the testimony and evidence, there was
20 no violation of the Nevada Administrative Code (NAC) 618.538 as
21 referenced in Citation 2, Item 1, and classified as a regulatory
22 violation. The testimony was equivocal regarding the actual request by
23 the SHR during the inspection, as well as the time constraints
24 referenced in the regulation. The safety program was delivered after
25 a written exchange. Weighing the evidence, testimony and resultant
26 compliance by the respondent, and noting the burden of proof rests with
27 the complainant, there was no proof a violation by a preponderance of
28 the evidence.

1 Based upon the above and foregoing, it is the decision of the
2 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of
3 Nevada Revised Statute did occur as to Citation 1, Item 1, 29 CFR
4 1910.180(h)(3)(v) and Citation 1, Item 2, 29 CFR 1910.180(h)(4)(ii).
5 The violations charged are confirmed and the proposed penalties in the
6 amount of TWO THOUSAND ONE HUNDRED DOLLARS (\$2,100.00) each for a total
7 of FOUR THOUSAND TWO HUNDRED DOLLARS (\$4,200.00) are confirmed and
8 approved.

9 It is further decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
10 **REVIEW BOARD** that no violation of Nevada Revised Statute did occur as
11 to Citation 2, Item 1, Nevada Administrative Code 618.538 and the
12 proposed penalty in the amount of ONE THOUSAND DOLLARS (\$1,000.00) is
13 denied.

14 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
15 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION**
16 **OF INDUSTRIAL RELATIONS**, to submit proposed Findings of Fact and
17 Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
18 **BOARD** and serve copies on opposing counsel within twenty (20) days from
19 date of decision. After five (5) days time for filing any objection,
20 the final Findings of Fact and Conclusions of Law shall be submitted to
21 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing
22 counsel. Service of the Findings of Fact and Conclusions of Law signed
23 by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
24 **BOARD** shall constitute the Final Order of the **BOARD**.

25 DATED: This 10th day of May, 2010.

26 NEVADA OCCUPATIONAL SAFETY AND HEALTH
27 REVIEW BOARD



28 By _____ /s/
TIM JONES, Chairman