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NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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

Complainant,

vs.

DIELCO CRANE SERVICE, INC.,

Respondent.

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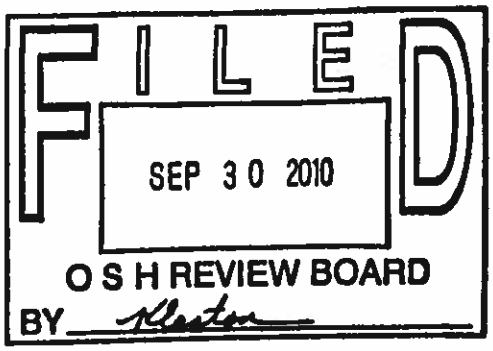
Docket No. LV 10-1402



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 11th day of August, 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 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.

Citation 1, Item 1, alleges a violation of 29 CFR

1910.180(h)(3)(v). The employer was charged with hoisting, lowering, swinging or traveling while anyone is on the load or hook. The violation was classified as "Serious" and a penalty was proposed in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS ($3,500.00).

Citation 1, Item 2, alleges a violation of 29 CFR 1910.180(h)(3)(iv). The employer was charged with carrying loads over people. The violation was classified as "Serious" and a penalty proposed in the amount of THRE THOUSAND FIVE HUNDRED DOLLARS ($3,500.00).

Counsel for the complainant through Safety and Health Representative (SHR) Renato Magtoto presented evidence and testimony as to the violations and appropriateness of the proposed penalties. Mr. Magtoto testified that he conducted an inspection at a worksite in Las Vegas, Nevada based upon information and reports that the respondent was operating a crane lifting employees and guests for a company called Dinner in the Sky (hereinafter "Dinner"), which was providing a unique aerial dining experience. SHR Magtoto arrived at the site on or about September 25, 2009 and observed employees of respondent, Dielco Crane Service, Inc., preparing a crane for a lift. He also observed the loading of employees and customers of Dinner onto a platform connected to the crane hook, and hoisting of the Dinner employees and customers, approximately ninety (90) feet in the air. He obtained photographs and completed his investigation, interviews and report. Exhibit "1" was admitted in evidence and identified as the investigative report consisting of pages 1 through 10. Exhibit "2" was admitted in evidence consisting of photographs obtained by SHR Magtoto itemized as 1 through 8. Exhibit "3" was admitted in evidence identified as an OSHA interpretation letter consisting of pages 1 through 4. Exhibit "4" was

admitted in evidence and identified as an additional OSHA interpretation letter, pages 1 through 4.

Mr. Magtoto issued Citation 1, Item 1, alleging a violation of the specific standard applicable to crane operations at 29 CFR 1910.180(h)(3)(v). He determined that respondent created and was responsible for the recognized hazard based upon the "multi-employer worksite doctrine", even though no respondent employees were exposed on the platform structure lifted by the crane. He testified that the table (platform) weight, lift elevation and employee load constituted the serious danger of exposure to fall hazards by Dinner employees working as food and beverage servers. He further testified that no employees of respondent were lifted on the elevated platform or exposed to the subject fall hazard.

At Citation 1, Item 2, SHR Magtoto testified he cited respondent for violation of 29 CFR 1910.180(h)(3)(vi). He observed an employee of respondent working under the "canopy load" attached to the crane hook. He determined there to be a specific violation of the referenced standard because the respondent employee identified as a "rigger" was working under the load. SHR Magtoto testified as to photographic Exhibit 2, item 5, which depicts the respondent employee standing under the load. He testified that he interviewed the individual who identified himself as an employee of respondent. Exhibit 2, item 6, depicts the same identified employee under the load attached to the crane during a lift. Exhibit 2 photo number 7 depicts the respondent employee working under the "canopy/load" while it was on the hook attached to the crane.

Mr. Magtoto testified as to the hazards associated with working under a load attached to a crane hook specifically prohibited by the

cited standard. He stated the hazard associated with the work is based upon a potential fall of the canopy/load assembly attached to the hook which weighed approximately one ton.

The SHR testified with regard to employer knowledge and the serious nature of the hazard and violation as the aerial dining operation had been ongoing since June, approximately 4 months prior to the date of the inspection and citation. He further testified the crane operator was "in charge of the job" as the management employee on the site representing the respondent. He determined the operator, and therefore by imputation respondent, "created and/or controlled" the fall hazards under the multi-employer worksite doctrine which exposed both its own employee (i.e. the rigger) as well as employees of Dinner.

On cross-examination, SHR Magtoto testified respondent was cited in item 1, because it "created" the hazardous conditions for the Dinner employees. He further testified that the person in direct control of the crane was the crane operator, an employee of respondent, even though the operator was under the general direction of the Dinner company personnel.

At the conclusion of complainant's case respondent presented evidence and testimony through Mr. Bill Cunningham, who identified himself as an engineer for respondent. Mr. Cunningham testified as to the applicability of 29 CFR 1926 to construction sites and 29 CFR 1910 to general industry. He reviewed the Federal OSHA interpretation letters in evidence and responded to questions regarding standard applicability.

On cross-examination Mr. Cunningham testified that 29 CFR 1926.550 is the applicable standard to be referenced for protection of the subject employees. He testified that ". . . hoisting employees is

prohibited . . . except for lifting in the basket if necessary . . . to complete the work effort. . ." Mr. Cunningham admitted on cross-examination that the standard was developed for the construction industry to address the need where an employee must be lifted by a crane to perform some special effort which cannot otherwise be accomplished to complete the work task. He further testified that an employer simply cannot hoist people just because, for example, they do not want to walk to a particular location.

At the conclusion of respondent's case, counsel for complainant and respondent presented closing argument.

Complainant argued at Citation 1, Item 1, that the core issue for finding of a violation is whether the standard applies to the facts in evidence. Counsel asserted that Exhibit 3, page 1, second paragraph of the Federal OSHA interpretation letter, did not provide any employer with authority to lift people which is recognized as inherently dangerous. He argued that Dinner employees were exposed and not those of respondent, therefore the standard cited is appropriate as there could be no 29 CFR 1926.550 case. He argued that respondent created a fall hazard by permitting its crane operator to lift employees of another employer and therefore liable for the violative exposure under the multi-employer worksite doctrine. Counsel further argued the respondent cannot defer its liability by asserting compliance with a contractual commitment which is not a recognized defense under occupational safety and health law.

Counsel argued at Citation 1, Item 2, that use of the words "shall" or "should" is not determinative of citation validity as to the charging allegations of violation. The photographic exhibits and the testimony clearly established respondent's employee was working as a rigger under

the load attached to the crane hook in violation of the cited standard. The work area was not a construction site therefore the cited standard for general industry was appropriate and applicable.

Respondent argued in its closing argument at Citation 1, Item 1, there were no respondent employees on the lifted platform or otherwise exposed to the fall hazards charged to establish a violation of the cited standard. He argued the respondent did not "create" or "control" the hazardous conditions, but rather merely provided a crane and operator to the worksite subject of direction by the Dinner company representatives who were in control of the project. Counsel further argued that the well settled case law does not permit the respondent employer to be cited for a violation under the facts nor was it a creating or controlling employer as contemplated by the law to warrant confirmation of a violation at Citation 1, Item 1.

Counsel concluded arguing that the standard cited at Citation 1, Item 2 is flawed and the charging violations rendered meaningless by substituting the word "shall" for the word "should".

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. See 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. See Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).
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> To establish a prima facie case, the Secretary (Chief Administrative Officer) must prove the existence of a violation, the exposure of employees, the reasonableness of the abatement period, and the appropriateness 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).

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.

At Citation 1, Item 1, the respondent is charged with exposing the employees of another employer to hazardous conditions it created and/or controlled under what is known as the "multi-employer worksite doctrine". Respondent Dielco acted as subcontractor to Dinner under a contract. Dielco provided a crane, an employee/operator and an employee/rigger to a site leased by Dinner. The Dielco employee/operator was routinely instructed by Dinner to lift Dinner employees (and guests) on a platform to approximately 90 feet in the air by use of the crane. No employees of Dielco were exposed to the hazardous condition of being located on the elevated platform.

To reach a determination regarding exposure to employees of other than the cited employer, the threshold issue before the board is whether the subject worksite constitutes a **multi-employer worksite** as defined by applicable occupational safety and health law.

Historically, the multi-employer worksite doctrine was carved out of case law and originally applied only to multi-employer **construction** sites where typically multiple employers were working and cross-over responsibilities created disputed employee exposures, hazards, citations and enforcement problems. See Brennan v. OSHRC (Underhill Construction Corp.), 513 F.2d 1032 (2nd Cir. 1975). The federal commission and courts developed what became generally known as the Anning Johnson rules. See, Anning-Johnson Co., 1975-1976 OSHD ¶ 20,690, at p. 24,779, 24,783. In Brennan, the Federal Court of Appeals ruled that:

". . . it would impose liability on a subcontractor who **creates** a hazard or who has **control** over the condition on a **multi-employer construction site** even though only employees of other subcontractors are exposed . . ."

In Beatty Equipment Leasing, Inc. V. Secretary of Labor, U.S. Dept. Of Labor, 557 F.2d 534, 6 O.S.H. Cas. (BNA) 1699, 1978 O.S.H.D. (CCH) P 22,899, the Ninth Circuit Court of Appeals ruled:

". . . policy is best effectuated by placing responsibility for hazards on those who create them."

"Typically a construction site job will find a **number of contractors and subcontractors** on the worksite whose employees mingle throughout the site while work is in progress. In this situation, a hazard created by one employer can foreseeably affect the safety of employees of other employers on the site . . . We therefore conclude that on a construction site, the safety of all employees can best be achieved if each employer is responsible for assuring that its own conduct does not create hazards to any employees on the site and imposing liability on this basis would not place an unreasonable or unachievable duty on contractors. Citing Grossman Steel and Aluminum Corp., No. 12775, 4 OSHC 1185 (May 12, 1976), and Anning-Johnson Co., Nos. 3694 and 4409, 4 OSHC 1194 (May 12, 1976), with regard to multi-employer construction sites."

". . . we specifically adopt the court of appeals decision in Brennan v. OSHRC (Underhill Construction Corp.), 513 F.2d 1032 (2d Cir. 1975), to the extent that it would impose liability on a subcontractor who creates a hazard or has control over the condition on a multi-employer construction site even though only employees of other subcontractors are exposed."

In 1996 the Federal Review Commission (OSHRC) expanded the **multi-employer construction** worksite doctrine beyond construction sites to multi-employer **worksites in general**. In Rockwell International Corp. 17 OSHC 1808 No. 11 (1996), the Review Commission recognized that while multi-employer worksite defenses originally arose in the context of **construction**, they are also applicable in other areas of employment

where there are **frequently a number of different employers working at the same time.**

To find liability of an employer for exposing **other than its own employees** to workplace hazard requires threshold proof of a **multi-employer worksite.** A determination of the number of employers to establish a multi-employer worksite is a case of first impression for this board. Nevada law and the Occupational Safety and Health Act place the burden of proof by a preponderance of evidence upon the complainant to establish exposure to a cited employer's employees. However the case law expands liability to a cited employer for exposure of other employers' employees provided the site is a multiple employer worksite. In Rockwell, supra, the commission provided guidance on multi site employment to be ". . . **areas where there are frequently a number of different employers working at the same time . . .**"

While certainly a multi-employer site consists of more than one, the facts and evidence in the subject case demonstrate there were only two contractors on site, i.e. Dinner and the respondent Dielco Crane. The case law confirms the focus of the courts and federal review commission to cover situations where a number of contractors and/or subcontractors are on a worksite whose employees mingle throughout the site. Those conditions did not exist here based upon the facts in evidence. There is no sufficient legal precedent to provide guidance to establish that a worksite occupied by two contractors is a multi-employer worksite. The board is unable to apply the multi-employer worksite doctrine to the subject facts to satisfy the legal burden of proof for the element of hazard exposure to employees other than the employees of the cited respondent.

Based upon the above and foregoing, as matter of fact and law,

there was no hazard exposure to employees of the cited respondent at Citation 1, Item 1 established by a preponderance of evidence. The board is without facts, evidence or controlling law to find a violation. Accordingly the board need not address "creation and/or control" of any hazard by the subcontractor respondent employer at the worksite in that without threshold evidence of a multi-employer site, the extension of liability to an employer for exposing the employees of others to hazards cannot be found.

At Citation 1, Item 2, the facts and evidence clearly establish the employee of respondent identified as a rigger was working under the canopy associated with the spreader bar while attached to the crane as part of the "load". 29 CFR 1910.180(h)(3)(vi) prohibits an operator from carrying loads over people. A preponderance of evidence established that the rigger employee of respondent was exposed to the recognized hazard of working under the load as prohibited by the standard.

The hazard was classified as serious due to the potential for serious injury or death. The employer knew, or with the exercise of reasonable diligence could have known, of the serious conditions implicit through the adoption of a standard which identifies hazards recognized in an industry. Under the facts in evidence, the test for determining an employees exposure to a hazard is satisfied.

> ". . . The test for determining an employee's exposure to a hazard is whether it is "reasonably predictable" that employees would be in the **zone of danger** created by a non-complying condition. Kokosing Construction Co., Inc., 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). To be "reasonably predictable," there must be a showing that either by operational necessity or otherwise, including inadvertence, employees **have been or will be** in the zone of danger. See Fabricated Metal Products, Inc., 18 BNA OSHC 1072, 1074 (No. 93-1953, 1997)

See William Brothers Construction, Inc., 2001 OSHD ¶ 32,350, at p. 49,622-49,623. Capform, Inc., 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994)."

The board in reviewing the factual evidence and testimony finds that the complainant met its burden of proof to establish the serious violation alleged at Citation 1, Item 2.

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 occurred as to Citation 1, Item 1, 29 CFR 1910.180(h)(3)(v). The violation is dismissed and the proposed penalty denied.

It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of Nevada Revised Statute did occur as to Citation 1, Item 2, 29 CFR 1910.180(h)(3)(vi). The violation is confirmed as "Serious" and the proposed penalty in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS ($3,500.00) approved.

The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION OF INDUSTRIAL RELATIONS**, 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

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by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

DATED: This 30th day of September 2010.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
TIM JONES, Chairman