

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,

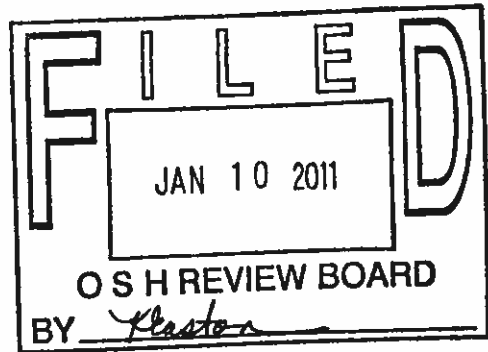
Docket No. LV 10-1402

Complainant,

vs.

10 DIELCO CRANE SERVICE, INC.,

11 Respondent.



12
13 DECISION (REISSUED)

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 11th day of August,
16 2010, in furtherance of notice duly provided according to law, MR. JOHN
17 WILES, ESQ., counsel appearing on behalf of the Complainant, **Chief**
18 **Administrative Officer of the Occupational Safety and Health**
19 **Administration, Division of Industrial Relations** (OSHA); and MR. ROBERT
20 PETERSON, ESQ., appearing on behalf of Respondent, **Dielco Crane Service,**
21 **Inc.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as
22 follows:

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

25 The complaint filed by the OSHA sets forth allegations of violation
26 of Nevada Revised Statutes as referenced in Exhibit "A", attached
27 thereto.

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

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1 1910.180(h)(3)(v). The employer was charged with hoisting, lowering,
2 swinging or traveling while anyone is on the load or hook. The
3 violation was classified as "Serious" and a penalty was proposed in the
4 amount of THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500.00).

5 Citation 1, Item 2, alleges a violation of 29 CFR
6 1910.180(h)(3)(vi). The employer was charged with carrying loads over
7 people. The violation was classified as "Serious" and a penalty
8 proposed in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS
9 (\$3,500.00).

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

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

3 Mr. Magtoto issued Citation 1, Item 1, alleging a violation of the
4 specific standard applicable to crane operations at 29 CFR
5 1910.180(h)(3)(v). He determined that respondent created and was
6 responsible for the recognized hazard based upon the "multi-employer
7 worksite doctrine", even though no respondent employees were exposed on
8 the platform structure lifted by the crane. He testified that the table
9 (platform) weight, lift elevation and employee load constituted the
10 serious danger of exposure to fall hazards by Dinner employees working
11 as food and beverage servers. He further testified that no employees
12 of respondent were lifted on the elevated platform or exposed to the
13 subject fall hazard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 All facts forming the basis of a complaint must be
21 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD
22 ¶16,958 (1973).

23 To establish a prima facie case, the Secretary
(Chief Administrative Officer) must prove the
24 existence of a violation, the exposure of
employees, the reasonableness of the abatement
25 period, and the appropriateness of the penalty.
See Bechtel Corporation, 2 OSHC 1336, 1974-1975
26 OSHD ¶18,906 (1974); Crescent Wharf & Warehouse
Co., 1 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).

27 A "serious" violation is established in accordance with NRS
28 618.625(2) which provides in pertinent part:

1 . . . a serious violation exists in a place of
2 employment if there is a substantial probability
3 that death or serious physical harm could result
4 from a condition which exists or from one or more
5 practices, means, methods, operations or processes
6 which have been adopted or are in use at that place
7 of employment unless the employer did not and could
8 not, with the exercise of reasonable diligence,
9 know the presence of the violation.

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

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

20 Historically, the multi-employer worksite doctrine was carved out
21 of case law and originally applied only to multi-employer **construction**
22 sites where typically multiple employers were working and cross-over
23 responsibilities created disputed employee exposures, hazards, citations
24 and enforcement problems. See Brennan v. OSHRC (Underhill Construction
25 Corp.), 513 F.2d 1032 (2nd Cir. 1975). The federal commission and
26 courts developed what became generally known as the Anning Johnson
27 rules. See, Anning-Johnson Co., 1975-1976 OSHD ¶ 20,690, at p. 24,779,
28 24,783. In Brennan, the Federal Court of Appeals ruled that:

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

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

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

12 "Typically a construction site job will find a
13 **number of contractors and subcontractors** on the
14 worksite whose employees mingle throughout the site
15 while work is in progress. In this situation, a
16 hazard created by one employer can foreseeably
17 affect the safety of employees of other employers
18 on the site . . . We therefore conclude that on a
19 construction site, the safety of all employees can
20 best be achieved if each employer is responsible
21 for assuring that its own conduct does not create
22 hazards to any employees on the site and imposing
23 liability on this basis would not place an
24 unreasonable or unachievable duty on contractors.
25 Citing Grossman Steel and Aluminum Corp., No.
26 12775, 4 OSHC 1185 (May 12, 1976), and Anning-
27 Johnson Co., Nos. 3694 and 4409, 4 OSHC 1194 (May
28 12, 1976), with regard to multi-employer
29 construction sites."

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

38 In 1996 the Federal Review Commission (OSHRC) expanded the **multi-**
39 **employer construction** worksite doctrine beyond construction sites to
40 multi-employer **worksites in general**. In Rockwell International Corp.
41 17 OSHC 1808 No. 11 (1996), the Review Commission recognized that while
42 multi-employer worksite defenses originally arose in the context of
43 **construction**, they are also applicable in other areas of employment

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

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

15 While certainly a multi-employer site consists of more than one,
16 the facts and evidence in the subject case demonstrate there were only
17 two contractors on site, i.e. Dinner and the respondent Dielco Crane.
18 The case law confirms the focus of the courts and federal review
19 commission to cover situations where a number of contractors and/or
20 subcontractors are on a worksite whose employees mingle throughout the
21 site. Further, evidence must establish the cited employer created or
22 controlled a hazardous condition to its employees or those of another
23 employer. The control of the overall operation and creation of the
24 unique worksite conditions were in Dinner not respondent. Multi-
25 employer worksite conditions under governing law did not exist here
26 based upon the facts in evidence. There is limited legal precedent to
27 provide guidance and no definition of a worksite occupied by two
28 contractors as meeting the criteria for application of the multi-

1 employer worksite doctrine. However, the rationale in Rockwell supra
2 is to the contrary. The board is unable to apply the multi-employer
3 worksite doctrine to the subject facts to satisfy the legal burden of
4 proof.

5 Based upon the above and foregoing, as matter of fact and law,
6 there was no hazard exposure to employees of the cited respondent at
7 Citation 1, Item 1 established by a preponderance of evidence. The
8 board is without facts, evidence or controlling law to find a violation.
9 There was no preponderance of evidence that respondent had controlling
10 authority over the unique worksite conditions. Without "creation and/or
11 control" of any hazard by the subcontractor respondent employer at the
12 worksite and threshold evidence of a multi-employer site, the extension
13 of liability to an employer for exposing the employees of others to
14 hazards cannot be found.

15 At Citation 1, Item 2, the facts in evidence establish a single
16 employee of respondent identified as a rigger performed work under the
17 canopy associated with the spreader bar attached to the crane hook.
18 29 CFR 1910.180(h)(3)(vi) provides that "the operator **should avoid**
19 carrying loads over people." (Emphasis added) The evidence established
20 that only the rigger employee of respondent was exposed to an overheard
21 load. There was no competent evidence that any other employee of
22 respondent nor those of Dinner or "people" were exposed to overhead
23 carrying of the load. The evidence demonstrated that to properly "rig"
24 the specialized canopy structure and spreader bar, the rigger was
25 required to position himself under the "canopy" assembly while it was
26 attached to the crane hook prior to a lift. The evidence established
27 that only the rigger was at some time under the "load" while performing
28 his work task to rig the assembly but prior to "carrying the load".

1 There was no "carrying of the load over (other) people. The citation
2 must fail when measured by the specific terms of the standard. Had the
3 standard been **mandatory** and proscribed that an employer **shall not** carry
4 loads over people then perhaps, unless a distinction could be made for
5 an exception to the rigger who by necessity must perform his work, the
6 citation might have been supportable; however because the terms of the
7 standard were **permissive** providing only that the ". . . operator **should**
8 **avoid** carrying loads over people", the governing case law does not
9 permit the finding of a violation when a standard is advisory in nature.
10 Standards derived from advisory sources are only advisory in nature as
11 well as standards which are framed with the use of the word "should".

12 ". . . The Commission and **reviewing courts** have
13 previously examined similar problems arising under
14 other standards and have concluded that standards
15 adopted under section 6(a) of the Act, 29 U.S.C. §
16 655(a), that are **derived from advisory source**
17 standards are **advisory** under the Act. *Marshall v.*
18 *Union Oil of California*, 616 F.2d 1113 (9th Cir.
19 1980); *Marshall v. Annaconda Co.*, 596 F.2d 370 (9th
20 Cir. 1979); *A. Prokosch & Sons Sheet Metal, Inc.*,
21 80 OSAHRC, 8 BNA OSHC 2077, 1980 CCH OSHD P24,840
22 (Nos. [*7] 76-406 and 76-576, 1980); *General*
23 *Dynamics Corp.*, *Electric Boat Division*, 80 OSAHRC,
24 8 BNA OSHC 1360, 1980 CCH OSHD P24,416 (No. 78-
25 3290, 1980); *Interlake, Inc.*, 80 OSAHRC, 8 BNA OSHC
1414, 1980 CCH OSHD P24,453 (No. 78-2462, 1980);
Wheeling-Pittsburgh Steel Corp., 77 OSAHRC 811 C10,
5 BNA OSHC 1495, 1978 CCH OSHD P23,056 (Nos. 10611,
11327 & 14366, 1977), *aff'd sub nom. Marshall v.*
Pittsburgh Des-Moines Steel Co., 584 F.2d 638 (3d
Cir. 1978); *Kennecott Copper Corp.*, 76 OSAHRC 811
A2, 4 BNA OSHC 1400, 1976-77 CCH OSHD P20,860 (no.
5958, 1976), *aff'd*, 577 F.2d 1113 (10th Cir. 1977);
McHugh & McHugh, 77 OSAHRC 351 A2, 5 BNA OSHC 1165,
1977-78 CCH OSHD P21,629 (No. 13010, 1977); *United*
States Steel Corp., 77 OSAHRC 641 C8, 5 BNA OSHC
1289, 1977-78 CCH OSHD P21,795 (Nos. 10825 & 10849,
1977)." (Emphasis added)

26 The board in reviewing the factual evidence and testimony finds
27 that the complainant failed to meet its burden of proof to establish the
28 serious violation of the cited standard alleged at Citation 1, Item 2.

1 Based upon the above and foregoing, it is the decision of the
2 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violations
3 of Nevada Revised Statute occurred as to Citation 1, Item 1, 29 CFR
4 1910.180(h)(3)(v) and Citation 1, Item 2, 29 CFR 1910.180(h)(3)(vi).
5 The violations and proposed penalties are denied.

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

16 DATED: This 03 day of January 2011.

17 NEVADA OCCUPATIONAL SAFETY AND HEALTH
18 REVIEW BOARD

19 By 
20 TIM JONES, Chairman