

NEVADA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW BOARD

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Docket No. LV 09-1360

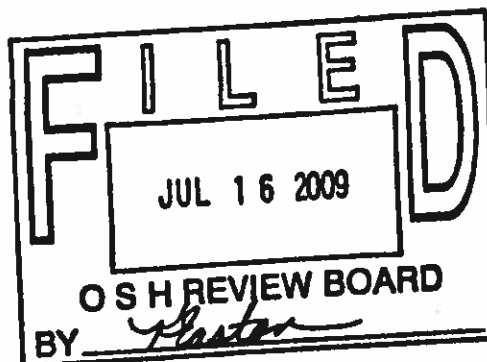
CHIEF ADMINISTRATIVE OFFICER  
OF THE OCCUPATIONAL SAFETY AND  
HEALTH ADMINISTRATION, DIVISION  
OF INDUSTRIAL RELATIONS OF THE  
DEPARTMENT OF BUSINESS AND  
INDUSTRY,

Complainant,

vs.

OBAYASHI/PSM JOINT VENTURE,

Respondent.



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 10<sup>th</sup> day of June, 2009, in furtherance of notice duly provided according to law, MS. JENNIFER LEONESCUE, ESQ. and 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. THOMAS McGUIRE, ESQ., appearing on behalf of Respondent, **Obayashi/PSM Joint Venture**; 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. Prior to commencement of the hearing, counsel for complainant and respondent stipulated to the dismissal of Citation 1, Item 1(c),

1 Citation 2, Item 1(a), Citation 2, Item 1(b), and Citation 3, Item 1 as  
2 well as the admission of violation at Citation 2, Item 1(c). Counsel  
3 further stipulated to the admission of documentary evidence in  
4 complainant's Exhibit 1 and respondent's Exhibit A. Three citations  
5 remain subject of contest, namely Citation 1, Item 1, Citation 1, Item  
6 1(b), and Citation 1, Item 2.

7 At Citation 1, Item 1, referencing 29 CFR 1926.501(b)(1), the  
8 employer was charged with failing to ensure that employees were  
9 protected from fall hazards as required in the cited standard. The  
10 alleged violation was classified as "Serious" and a grouped penalty  
11 assessed in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500.00).

12 At Citation 1, Item 1(b), referencing 29 CFR 1926.501(b)(4)(i), the  
13 employer was charged with failing to ensure that employees were  
14 protected from fall hazards as required in the cited standard. The  
15 alleged violation in was classified as "Serious." The penalty assessed  
16 was grouped with Citation 1, Item 1.

17 At Citation 1, Item 2, referencing 29 CFR 1926.502(b)(1), the  
18 employer was charged with failing to protect employees from fall hazards  
19 as required in the cited standard. The alleged violation was classified  
20 as "Serious" and a grouped penalty proposed in the amount of SEVEN  
21 HUNDRED DOLLARS (\$700.00).

22 Counsel for the complainant, through Safety and Health  
23 Representative (SHR) Francisco Zapanta, Jr. presented evidence and  
24 testimony as to the violations and appropriateness of the penalties.

25 Mr. Zapanta testified that on or about September 15, 2008 he  
26 commenced a site inspection at the Hoover Dam Bypass, Colorado River  
27 Bridge construction site in Clark County, Nevada. During the inspection  
28 Mr. Zapanta observed an employee on a walking surface at an estimated

1 height of six feet or more above a lower level, but without personal  
2 protective equipment. He cited a violation of 29 CFR 1926.501(b)(1) for  
3 employee exposure to a fall hazard and classified the violation as  
4 serious because of the height and potential for serious injury or death.  
5 He testified as to Exhibit 1, page 9 to show existence of the fall  
6 hazard. Mr. Zapanta identified pictorial evidence of an employee on a  
7 working surface exposed to the fall hazard governed by the cited  
8 standard. The employee depicted at page 10 of Exhibit 1 was wearing a  
9 harness but without an attachment (tied off). The SHR estimated the  
10 fall hazard to be well over 20 foot in height. He testified that a  
11 foreman told him the height was approximately 25 feet to the bottom.  
12 He continued his testimony and noted page 11 of Exhibit 1, which  
13 depicted more employees exposed to the identified fall hazard and  
14 without any safety harness attachment. Mr. Zapanta testified Exhibit  
15 1 pages 12 and 13 depict employees on a walking/working surface wearing  
16 harnesses without tie off. He testified there was no sufficient  
17 protection from an appropriate guardrail. The existing rail level  
18 failed to satisfy the definition of a guardrail under the cited  
19 standard. Mr. Zapanta continued his testimony identifying Exhibit 1  
20 photographs of employees on the same walkway work surface area without  
21 tie-off protection and exposed to the fall hazards. He also testified  
22 as to the height of a potential fall and the existence of rebar beneath  
23 the area which could result in impalement.

24 SHR Zapanta provided additional testimony and evidence with regard  
25 to Citation 1, Item 1(b), 29 CFR 1926.501(b)(4)(i). He observed  
26 employees working around or near "holes or openings" in the  
27 walking/working surface. He identified photographic exhibits depicting  
28 the holes and his measurements of same. He testified that the holes or

1 openings were greater than one inch, noting his photo with a ruler at  
2 Exhibit 1, page 17 which depicted the opening at approximately eight  
3 inches. He also testified as to photographic exhibits depicting an  
4 opening of approximately 17 inches. Mr. Zapanta testified as to the  
5 applicable standard, his interpretation of the violation, and the  
6 potential for serious injury or harm due to a potential fall to the next  
7 lower level of more than ten feet.

8 At Citation 1, Item 2, referencing 29 CFR 1926.502(b)(1), SHR  
9 Zapanta described his determination of a violative condition based upon  
10 a fall hazard controlled by the cited standard. He testified there was  
11 no effective guardrail installed in accordance with the standard. The  
12 top edge height was approximately 22.5 inches. The standard requires  
13 protection when the fall is less than an approximate 42 inches in  
14 height. Exposed employees could fall over the top of the rail and  
15 suffer severe or death. He described the height of fall at  
16 approximately 500 feet in elevation and resultant serious injury or  
17 death. Mr. Zapanta identified photographic evidence from complainant's  
18 Exhibit A depicting the rail section which provided the basis for his  
19 citing the violation. Mr. Zapanta further testified it would have been  
20 easy to remedy the rail problem. Employer knowledge was found due to  
21 the supervisor's presence in the work area.

22 Counsel for respondent conducted no cross examination of SHR  
23 Zapanta. Counsel for complainant submitted his case.

24 Counsel for respondent presented evidence and testimony in defense  
25 of Citation 1, Items 1, 1(b) and 2. Mr. Kent Hirschmugl, identified  
26 himself as the respondent project director. He described the overall  
27 project and the complexities involved with the very substantial bridge  
28 construction at the Hoover Dam site. He identified documentary evidence

1 of the specially designed engineered bridge fabrication form and a  
2 device known as a "traveler" utilized in conjunction with same. Mr.  
3 Hirschmugl testified as to Citation 1, Item 1(a) regarding the cited  
4 fall hazard. He stated there was no fall height of more than six feet  
5 as required for protection under the standard and therefore no  
6 violation. He noted Exhibit A, page 14, which depicted employees  
7 working on a platform but no fall hazard shown. He testified a fall  
8 from the work surface would create less than a potential six foot fall.  
9 He explained the photograph of the site condition and work surface as  
10 actually depicting a sloping surface with a 45 degree angle with "rope  
11 grabs" on the side of the sloped portion. Mr. Hirschmugl identified  
12 Exhibits B and C and explained the design structure, working operations,  
13 platforms, and employee access. He testified the platforms are designed  
14 to take different angles due to an adjustable step, screw jacks, or  
15 other devices. Mr. Hirschmugl testified that Exhibit C from the  
16 employer operations manual explains the design of the work surface  
17 structure through a computer generated rendering. He further testified  
18 there was no requirement to erect a "fence" between a worker and what  
19 he described as a one-to-one slope. He testified that in his 27 years  
20 of experience as a professional engineer, he had never seen nor did he  
21 believe the standard requires fall protection from a sloped surface at  
22 a one-to-one degree as opposed to a direct edge fall to which he  
23 believed the cited standard applies.

24 On cross-examination by complainant's counsel, Mr. Hirschmugl  
25 admitted that Exhibit 1, page 11 depicted an employee not tied off, that  
26 rebar was shown behind the employee and plywood on the floor surface.  
27 He testified in response to counsel's question as to the height of a  
28 potential fall as being less than six feet and in his opinion "five-

1 foot, eight inches." Mr. Hirschmugl testified that if the employee  
2 slipped or stepped off the work surface he would not fall but he would  
3 rather slide onto the slope section. He stated there existed no  
4 potential fall hazard as defined for protection by the standard.

5 Respondent counsel presented further testimonial evidence from Mr.  
6 Hirschmugl as to Citation 1, Item 1(b). He testified that the gaps or  
7 holes described by the SHR were approximately seven inches on the  
8 approach deck, and actually consisted of expansion areas as opposed to  
9 holes. He testified the expansion areas were required to fill the space  
10 where the bridge meets the road for regular vehicular traffic. He  
11 stated that while employees may walk near same, the holes did not exist  
12 in the actual work/walking area. Mr. Hirschmugl also identified  
13 Exhibits 20 and 21 depicting the cited opening near stairs, but  
14 testified the holes in Exhibit A were not of a violative size. He  
15 testified that the photographs do not properly depict the comprehensive  
16 fall protection of the engineered system in evidence and therefore did  
17 not accurately portray the total protection available for employees.

18 On cross-examination, Mr. Hirschmugl admitted there were gaps or  
19 holes, but that employees would walk around same as opposed to over the  
20 areas of expansion which was intended for vehicular traffic. He  
21 testified that he could not dispute the ruler measurement as to the hole  
22 size, but if anyone fell from those holes there is a platform and  
23 netting within a six foot distance so no violation of the cited  
24 standard.

25 At Citation 1, Item 2, Mr. Hirschmugl testified again referencing  
26 the engineered safety system which he stated included approximately  
27 5,000 feet of handrails. He testified that the angle of the stairs  
28 changes weekly as the bridge is being built and therefore the handrail,

1 as an articulating portion of same, changes in height. Photograph  
2 number 2 of Exhibit A depicts three rails. Mr. Hirschmugl drew an  
3 exhibit of the articulating portion demonstrating the potential  
4 exposure. The drawing was admitted as Exhibit D. He testified the fall  
5 height was less than required for protection with exposure to a serious  
6 fall hazard in accordance with the cited standard.

7 On cross-examination, Mr. Hirschmugl admitted that during an  
8 articulating angle on the erection structure, at some point in time the  
9 rail height could be in violation of the cited standard.

10 Counsel for complainant and respondent presented closing arguments.

11 Complainant referenced the photographic exhibit depicting the fall  
12 hazard distance based upon information obtained from the respondent  
13 foreman. She argued that to constitute a serious classification the  
14 exposure required merely serious injury and not necessarily death.  
15 Counsel challenged the interpretation of the standard by respondent's  
16 witness as being an angle of slide rather than a direct fall. She  
17 submitted that serious injury could result during a slide of 41 to 22  
18 feet, albeit perhaps not death, therefore establishing the potential for  
19 serious injury from the cited fall hazard. Counsel further argued  
20 employer knowledge was proven because both witnesses testified the  
21 company safety representative and foreman walked the job every day and  
22 the violations were in plain site. Counsel noted that the existence of  
23 holes were depicted in the photographs as to Citation 1, Item 1(b) and  
24 therefore established by the evidence, notwithstanding the area being  
25 designated as other than a walking surface. She argued that the  
26 photograph at page 20, Exhibit A confirms the SHR testimony as to  
27 employee exposure. Whereas respondent's witness testified he could not  
28 say for sure. The photograph should be accepted as evidence of employee

1 exposure. As to Citation 1, Item 2, counsel argued the hazard exposure  
2 from the articulating rail was admitted by Mr. Hirschmugl and subject  
3 of testimony as to its existence by the SHR. Counsel recognized that  
4 the job site was indeed unique but argued that was not a defense to the  
5 alleged violations.

6 Counsel for respondent first recognized the professionalism of SHR  
7 Zapanta, the extent of work being performed on the massive project at  
8 substantial heights, and the limited number of violations cited by the  
9 SHR. He argued that no respondent management employees believed fall  
10 protection for a sloped work surface was required by the cited standard.  
11 Mr. Hirschmugl testified that a sloped area created no fall hazard  
12 exposure to any employee, particularly on a one-to-one slope which was  
13 subject of his testimony and evidence. He argued that a fall is off an  
14 edge down six feet. The SHR evidence of only a one-foot fall and then  
15 a speculative slide factor, does not establish a basis for violation  
16 under the standard cited. He argued there was no employer notice that  
17 slopes are to be interpreted as edges under the standard and therefore  
18 it is not applicable to the cited facts. Counsel further argued that  
19 there was no employer knowledge of exposure allegedly created due to the  
20 moving rail. He also submitted that for the hole violation cited to be  
21 subject of fall exposure under the standard, it must be at least six  
22 feet and constitute a hazard for a fall not merely a tripping potential  
23 as testified by the SHR. He argued that the citation is based on a fall  
24 hazard of more than six feet but no evidence established the height but  
25 the sworn testimony of respondent's witness was that it was not six feet  
26 in height. Counsel further argued that the fall distance on the  
27 changing angle stair, due to the engineered erection structure, made the  
28 rail requirements very complex but protection was afforded by the



1 design. He concluded by submitting that a two-foot gap in a 5,000 foot  
2 guardrail system is not significant but when same was noted by the SHR  
3 it was promptly corrected.

4 The board reviewed the facts and evidence presented as well as the  
5 specific standards for applicability to the conditions at the worksite.

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

8 All facts forming the basis of a complaint must be  
9 proved by a preponderance of the evidence. Armor  
Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958  
10 (1973).

11 To prove a violation of a standard, the Secretary  
12 must establish (1) the applicability of the  
13 standard, (2) the existence of noncomplying  
14 conditions, (3) employee exposure or access, and  
15 (4) that the employer knew or with the exercise of  
16 reasonable diligence could have known of the  
17 violative condition. See Belger Cartage Service,  
Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
18 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);  
19 Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC  
20 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
21 (No. 76-1408, 1979); American Wrecking Corp. v.  
22 Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.  
23 2003).

24 A respondent may rebut the evidence by showing:

- 25 1. That the standard was inapplicable to the  
26 situation at issue;
- 27 2. That the situation was in compliance; or lack  
28 of access to a hazard. See, Anning-Johnson  
Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690  
(1976).

29 A "serious" violation is established in accordance with NRS  
30 618.625(2) which provides in pertinent part:

31 . . . a serious violation exists in a place of  
32 employment if there is a substantial probability  
33 that death or serious physical harm could result  
34 from a condition which exists or from one or more  
35 practices, means, methods, operations or processes  
36 which have been adopted or are in use at that place  
37 of employment **unless the employer did not and could**

1           **not, with the exercise of reasonable diligence,**  
2           **know the presence of the violation.** (emphasis  
          added)

3           The board finds evidence of an extensive bridge construction  
4 worksite and a complex system designed and engineered for employee  
5 working surfaces. At Citation 1, Item 1, the facts demonstrate a  
6 potential fall hazard from a sloping rather than direct edge working  
7 surface. Additional terms would have to be read into the standard to  
8 reach applicability to the working conditions in evidence. The  
9 Occupational Safety and Health Administration has developed specific  
10 standards to protect sloping areas in many particular construction  
11 worksites regarding, for example, roofing and excavation areas. However  
12 the standard cited does not address a sloped working surface from the  
13 aspect of either protection or existence of hazard. The applicability  
14 of the standard to the facts in evidence is vague. The burden of proof  
15 is upon complainant to establish a violation by a preponderance of  
16 evidence. The board is without authority to create or expand the  
17 specific terms of the cited standard to extend applicability, as here,  
18 to a sloped rather than direct fall hazard. Applicability of the  
19 standard and exposure to the cited hazard cannot be established from the  
20 facts and evidence.

21           At Citation 1, Item 1(b) there was no admissible evidence to  
22 establish distance for the fall violation. Hearsay may not be admitted  
23 to prove the ultimate fact. Respondent's witness testified, under oath,  
24 that the potential for a fall under the facts alleged and cited at  
25 Citation 1, Item 1(b) was less than the six-foot, specific distance  
26 required to be proven by a preponderance of evidence under the standard  
27 cited. Two sworn witnesses provided opposing testimony as to the  
28 potential fall distance. Both witnesses appeared credible. Statements

1 from a respondent foreman, while admissible in an administrative hearing  
2 as hearsay, cannot be relied upon to establish the ultimate fact of  
3 violation. See, Kiff v. St. Dep't Mtr. Vehicles, 101 Nev. 729, 709 P.2d  
4 1017 (1985); Biegler v. Nevada Real Est. Div., 95 Nev. 691 (1979); also  
5 see, Nevada Employment Security Dept. v. Hilton Hotels Corp., 102 Nev.  
6 606, at 609, 729 P.2d 497 (1986).

7 At Citation 1, Item 2, the facts and evidence depicted the  
8 existence of a violation. Both witnesses who testified, Mr. Zapanta on  
9 behalf of the complainant and Mr. Hirschmugl on behalf of the  
10 respondent, agreed that a gap would occur at some point in time in the  
11 articulating guardrail system. Regardless of the unique system and the  
12 weekly changing angles created by the erection structure, employees  
13 could be exposed to a potential fall hazard. There was proof respondent  
14 employees were working in the area. Violative conditions existed,  
15 albeit briefly. The violative condition could have occurred on a weekly  
16 basis, as the work progressed and angles changed. The standard was  
17 applicable to the facts in evidence, there were non-complying conditions  
18 as demonstrated, and there was employee exposure or access to the  
19 identified hazard. The employer knew or in the exercise of reasonable  
20 diligence should have known there was indeed a gap in the rail structure  
21 at a given point in time which constituted a violative condition. The  
22 distance of the potential fall was established at well over that  
23 required by the standard, and estimated by both witnesses to be either  
24 a ". . . long way or more than 500 feet." Accordingly, the  
25 classification of the violation as "Serious" and the potential for death  
26 was established as well as the appropriateness of the penalty. The  
27 board finds a violation of the standard cited at Citation 1, Item 2.

28 Based upon the above and foregoing, it is the decision of the

1 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violations  
2 of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR  
3 1926.501(b)(1) and Item 1(b), 29 CFR 1926.501(b)(4)(i) and the proposed  
4 group penalty is denied and dismissed.

5 It is the further decision of the **NEVADA OCCUPATIONAL SAFETY AND**  
6 **HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did  
7 occur as to Citation 1, Item 2, 29 CFR 1926.502(b)(1) and the proposed  
8 penalty, although grouped, is reasonable for the violation and confirmed  
9 in the amount of SEVEN HUNDRED DOLLARS (\$700.00).

10 The admitted violation at Citation 2, Item 1(c) is confirmed and  
11 the zero penalty approved.

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

22 DATED: This 16th day of July, 2009.

23 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
24 REVIEW BOARD

25 By /s/  
26 JOHN SEYMOUR, Chairman