

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

4 CHIEF ADMINISTRATIVE OFFICER
5 OF THE OCCUPATIONAL SAFETY AND
6 HEALTH ADMINISTRATION, DIVISION
7 OF INDUSTRIAL RELATIONS OF THE
8 DEPARTMENT OF BUSINESS AND
9 INDUSTRY, STATE OF NEVADA

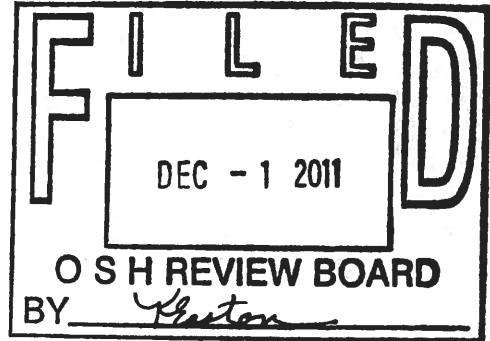
Docket No. RNO 12-1515

Complainant,

vs.

10 DANNY COUSTE CONSTRUCTION LLC,

11 Respondent.
12 _____/



13 DECISION

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 9th day of November,
16 2011, in furtherance of notice duly provided according to law, MR.
17 MICHAEL TANCHEK, ESQ., counsel appearing on behalf of the Complainant,
18 **Chief Administrative Officer of the Occupational Safety and Health**
19 **Administration, Division of Industrial Relations (OSHA)**; and MR. DANNY
20 COUSTE, appearing on behalf of Respondent, **Danny Couste Construction**
21 **LLC**; 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. The alleged violations in Citation 1, Item 1, referenced 29
28 CFR 1926.501(b)(10), Citation 2, Item 1, referenced 29 CFR
1926.503(b)(1) and Citation 3, Item I, NRS 618.987(1).

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1 In Citation 1, Item 1, the respondent was charged with a "serious"
2 violation of 29 CFR 1926.501(b)(10) by failing to ensure that each
3 employee engaged in roofing activities on low-slope roofs, with
4 unprotected sides and edges 6 feet or more above lower levels was not
5 protected from falling by guardrail systems, safety net systems,
6 personal fall arrest systems, or a combination of warning line, or a
7 warning line and safety monitoring system. Two employees were observed
8 working on a roof with no means of fall protection. The alleged
9 violation at Item 1 was classified as serious and a penalty proposed in
10 the amount of FOUR THOUSAND TWO HUNDRED DOLLARS (\$4,200.00).

11 In Citation 2, Item 1, the respondent was charged with an "other
12 than serious" violation of 29 CFR 1926.503(b)(1) for failing to ensure
13 certification of training was provided where at the job site one
14 employee was not provided with certification of training and fall
15 protection by the employer. The violation was classified as other than
16 serious with a zero (\$0.00) penalty proposed.

17 In Citation 3, Item 1, the respondent was charged with a
18 "regulatory" violation of NRS 618.987(1) for failure to ensure that
19 employees working at the job site demonstrated current and valid
20 completion of an OSHA-10 course not later than 15 days after being
21 hired. At the job site one employee performing roofing work was asked
22 to present his OSHA-10 hour training card and he stated that he had not
23 yet taken the OSHA-10 course at that time. The citation was classified
24 as "regulatory" and a penalty proposed in the amount of THREE HUNDRED
25 DOLLARS (\$300.00).

26 Prior to presentation of evidence and testimony, the complainant
27 and respondent stipulated to the admission of Exhibits 1, 2 and 3 in
28 evidence. Additionally complainant and respondent identified the key

1 issues subject of the contested hearing. The complainant asserted that
2 the core issue of the subject case would be a determination of whether
3 the individuals observed engaged in roofing work met the definition of
4 "employees" under the Act and subject to jurisdiction of OSHA.
5 Respondent concurred in the core issue and added that he would establish
6 the roofing work was being performed on property co-owned by he and his
7 father, without compensation, and not subject of an employer/employee
8 relationship or within control of OSHA.

9 Counsel for the complainant through Certified Safety Health Officer
10 (CSHO) Gil Klaiber presented evidence and testimony as to the
11 violations, classifications, and appropriateness of the penalties. Mr.
12 Klaiber testified that he was directed to the subject job site in
13 Gardnerville, Nevada based upon an informal complaint that individuals
14 were observed working on a two story structure without fall hazard
15 protection. He arrived at the site on June 10, 2011 at approximately
16 9:35 a.m. and personally observed two men engaged in roofing work with
17 no fall hazard protection. After observing the individuals working for
18 approximately ten minutes, the CSHO identified himself and proceeded to
19 conduct an inspection and investigation of the working conditions. The
20 men identified themselves as Mr. Danny Couste and Mr. Robert Parkerson.
21 Later during the inspection Mr. Gene Couste arrived and identified
22 himself as the owner of the property. CSHO Klaiber testified as to
23 Exhibit 2 consisting of three photographs which depicted the two
24 identified men working near the edge of a two story roof structure
25 without fall protection; each picture showed different angles of the
26 alleged violative conditions. He testified the individuals stated they
27 were working with protection earlier in the morning but had removed
28 their safety equipment prior to the arrival of Mr. Klaiber. Mr. Gene

1 Couste, the stated owner of the property was not working on the site.
2 Mr. Klaiber identified Exhibit 3 as a building permit application
3 listing the work to be performed on the bid price, contractor identity,
4 and other data. He testified the building permit identified the
5 respondent, Danny Couste Construction LLC, as the "contractor". He
6 further testified that the bid price for the work under the building
7 permit to be the sum of \$5,000.00.

8 CSHO Klaiber cited the respondent for a violation of 29 CFR
9 1926.501(b)(10), classified the violation as serious and proposed a
10 penalty of \$4,200.00. He testified the individuals were working at
11 approximately twenty (20) feet in height near the edge of a roof without
12 fall protection as required by the standard. He referenced the standard
13 as requiring protection for any employees working at a height of six
14 foot or more above ground level. The height was established pursuant
15 to the testimony in evidence at seventeen feet (17') four inches (4").
16 Mr. Klaiber testified that Mr. Danny Couste identified himself as the
17 owner of the respondent LLC licensed contractor. Mr. Parkerson
18 identified himself as an employee of the respondent. The CSHO also
19 testified that Mr. Danny Couste did not identify himself as co-owner of
20 the building at the time of the inspection and interview. CSHO Klaiber
21 further testified that even an owner of an LLC or corporation is
22 required to wear fall protection while engaged in work based upon the
23 specific requirements of the cited standard which provides that anyone
24 "performing work" must be equipped with designated fall protection
25 equipment. Mr. Parkerson identified himself as an employee of the
26 respondent and asserted no ownership interest in the building structure.
27 Mr. Parkerson later told Mr. Klaiber that he owned a handyman service.
28 In response to counsel's inquiry as to whether a handyman company owner

1 is relieved from protection under the standards, Mr. Klaiber responded
2 that anyone engaged in "performing work" at six foot (6') or more must
3 be appropriately protected from a fall hazard. Mr. Klaiber testified
4 that he could not classify the violation as "other" because a fall from
5 20 feet clearly demonstrates a potential and probability for serious
6 injury or death. The gravity of the violative conduct was established
7 by the facts observed and report in evidence. He also testified the
8 employees did have protective equipment at the site but only equipped
9 himself with same after his arrival.

10 At Citation 2, Item 1, classified as "other" with zero penalty Mr.
11 Klaiber cited respondent for a violation of CFR 1926.503(b)(1). He
12 classified the citation as other than serious and proposed no penalty
13 because the employees demonstrated knowledge of training even though
14 they had no certification as required by the standard.

15 At Citation 3, Item 1, CSHO Klaiber cited a violation of NRS
16 618.987(1) because employee Parkerson failed to have an OSHA-10 card
17 with him and stated during the interview that he had not taken the
18 required training course. The violation was classified as regulatory
19 and the penalty proposed at \$300.00.

20 Mr. Klaiber testified the penalty calculations were assessed
21 pursuant to the operations manual and all appropriate credits rendered.

22 The complainant concluded his case and the respondent presented its
23 defensive position.

24 The respondent representative offered no witnesses nor any
25 documentary evidence to rebut the testimony or evidence of complainant.
26 Mr. Danny Couste stated that he elected not to be sworn as a witness but
27 rather read the notice of contest and present a closing argument.

28 Complainant provided closing argument asserting there was no

1 evidence or testimony to dispute the evidentiary proof of violation
2 based upon the photographs, building permit and unrebutted sworn
3 testimony of CSHO Klaiber. He further argued there was no evidence
4 presented by Danny Couste to establish his part ownership of the
5 building structure nor the building permit to incorrectly identify his
6 company, Danny Couste Construction LLC as the contractor on the project.
7 He also argued that Danny Couste presented no deed showing himself to
8 be co-owner and noted Mr. Gene Couste did not so indicate at the time
9 he arrived at the site during the inspection. He further argued that
10 even if Mr. Danny Couste had been part owner, the building permit shows
11 him to have been acting through his LLC as a contractor. There was no
12 assertion that Mr. Parkerson had any ownership interest in the structure
13 or anything other than an employee. Counsel argued the unrebutted
14 evidence showed Mr. Danny Couste was performing work on the project, not
15 in his capacity as part owner but rather under his LLC as a contractor.
16 There was no evidence that he was merely an owner/builder nor any
17 defense to support relief from applicability of the standard. There was
18 no testimony from Mr. Danny Couste or from Mr. Parkerson to refute the
19 allegations of employee status under the occupational safety and health
20 act or rebut the evidence and testimony. Counsel concluded by asserting
21 the burden of proof had been met and there were no defenses offered or
22 available to permit the board to do other than find a violation and
23 confirm the penalties.

24 The respondent presented closing argument. Mr. Danny Couste read
25 his notice of contest letter for the record. He asserted that he was
26 neither an employer nor an employee but rather a part owner of the
27 building performing work on the structure co-owned with his father for
28 no compensation and therefore not subject to the jurisdiction of OSHA

1 and not required to comply with the fall hazard standards. He further
2 argued that Mr. Parkerson was a friend, not an employee, working without
3 compensation and merely "helping out", therefore not subject to the
4 jurisdiction of OSHA and the fall hazard protection standards. He
5 further argued he did not know why Mr. Parkerson did not have an OSHA
6 10 card and was unaware that he had not completed the training. He also
7 asserted that the building permit at Exhibit 3 should not be evidence
8 to establish an employer/employee relationship or a contractual
9 commitment for compensation because he simply completed the building
10 permit to satisfy the Douglas County Building Department. He submitted
11 that the permit did not alter the facts of defense he asserted of non-
12 employee status for he and Mr. Parkerson.

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

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

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

22 To prove a violation of a standard, the Secretary
23 must establish (1) the *applicability* of the
24 standard, (2) the *existence* of noncomplying
25 conditions, (3) employee exposure or access, and
26 (4) that the *employer knew* or with the exercise of
27 reasonable diligence could have known of the
28 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)

1 A respondent may rebut the evidence by showing:

- 2 1. The standard was inapplicable to the situation
3 at issue;
- 4 2. The situation was in compliance; or lack of
5 access to a hazard. See, Anning-Johnson Co.,
6 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

7 A "serious" violation is established in accordance with NRS
8 618.625(2) which provides in pertinent part:

9 . . . a serious violation exists in a place of
10 employment if there is a substantial probability
11 that death or serious physical harm could result
12 from a condition which exists or from one or more
13 practices, means, methods, operations or processes
14 which have been adopted or are in use at that place
15 of employment unless the employer did not and could
16 not, with the exercise of reasonable diligence,
17 know the presence of the violation. (emphasis
18 added)

19 The board finds at Citation 1, Item 1, the complainant's burden to
20 prove the serious violation was met by a preponderance of the evidence.
21 There was no evidence or testimony whatsoever to refute or rebut the
22 sworn testimony of CSHO Klaiber, and the documentary and photographic
23 exhibits. Mr. Danny Couste presented an unsupported defense for
24 inapplicability of the standards and regulations based upon mere
25 assertions due to a purported co-ownership of the structure between he
26 and his father, although not as to Mr. Parkerson. He asserts, without
27 legal support, that Mr. Parkerson was merely a friend "helping out" and
28 as a handyman owning his own company, relieved of compliance with the
cited OSHA standards and Nevada Revised Statutes. No other evidence or
testimony was presented.

NRS 618.085 defines an "employee" for the applicability of
occupational safety and health law.

"Employee" means **every person** who is required,
permitted or directed by any employer to engage in
any employment, or to **go to work** or be at any time

1 **in a place of employment, under any appointment or**
2 **contract of hire or apprenticeship, express or**
3 **implied, oral or written, whether lawfully or**
4 **unlawfully employed.**

5 Further, 29 USC 654 provides in pertinent part:

6 (a) Each employer -

7 (1) shall furnish to each of his employees
8 employment and a place of employment which is free
9 from recognized hazards that are causing or are
10 likely to cause death or serious physical harm to
11 his employees;

12 (2) shall comply with occupational safety and
13 health standards promulgated under this Act.

14 (b) Each employee shall comply with occupational
15 safety and health standards and all rules,
16 regulations, and orders issued pursuant to this Act
17 which are applicable to his own actions and
18 conduct.

19 The definitions of an employee and the status of employment are
20 broad. The spirit and intent of occupational safety and health law
21 requires substantial evidence by a preponderance to rebut the status of
22 employee and/or employment. Here the evidence and testimony clearly
23 demonstrated Mr. Parkerson to be acting within the definition of an
24 **employee**. There is no evidence or law exempting him through his status
25 of owning a handyman company nor was he asserted to be a co-owner. He
26 was a **person . . . permitted . . .** by any employer (Danny Couste
27 Construction LLC) to engage in . . . employment or to **go to work or be**
28 **at any time in a place of employment under any appointment or contract**
29 **of hire or apprenticeship, express or implied, oral or written whether**
30 **lawfully or unlawfully employed**. Clearly Mr. Parkerson is well within
31 the definition and there is no evidence, testimonial or otherwise, to
32 the contrary.

33 Danny Couste Construction LLC was the job employer and contractor
34 in accordance with the building permit in evidence at Exhibit 3. Mr.

1 Parkerson informed CSHO Klaiber during the interview that he had been
2 employed by Danny Couste Construction LLC on and off for over a one year
3 period of time. Clearly, he was an individual acting in the capacity
4 of an employee under the statutory definition and there was no evidence
5 presented of any nature whatsoever to rebut the employee status nor the
6 testimony and documentary evidence provided by complainant.

7 Mr. Danny Couste was personally engaged in **the performance of work**.
8 The presumption of employee status under the statutory definition is
9 reasonable, and the evidence unrebutted by any legally competent
10 evidence or testimony.

11 The defensive assertion of co-ownership to exempt Mr. Danny Couste
12 was unsupported by any evidence whatsoever. There was no deed
13 evidencing same nor any sworn testimony to establish the co-ownership
14 status. However regardless of any possible co-ownership status, it
15 would not have rebutted evidence of the applicability of the cited
16 standards and to the working conditions requiring protection of both
17 individuals who were identified and photographed engaged in unprotected
18 working conditions at the subject site.

19 The board recognizes the assessed penalties to be substantial and
20 the classification of serious as important factors for any contractor.
21 However, there was simply no evidence or testimony offered to legally
22 support any relief from the enforcement provisions under the applicable
23 and governing law. The board understands and appreciates the difficulty
24 of conducting any small business in these uncertain economic times, but
25 it has no authority to ignore the law where egregious facts are
26 evidenced and no legally supported defense for relief. The Nevada
27 Occupational Safety and Health Review Board is mandated to review cited
28 violations in furtherance of the governing body of law under the Code

1 of Federal Regulations (CFR) as adopted by Nevada Revised Statutes (NRS)
2 and the legislative enactments in NRS. It is not within the
3 jurisdictional purview of this board to create new law, variances, or
4 legislate.

5 The board finds as a matter of fact and law and by a preponderance
6 of substantial evidence violation of Nevada Revised Statutes at Citation
7 1, Item 1, confirms the serious classification under 29 CFR
8 1926.501(b)(10) and approves the proposed penalty of FOUR THOUSAND TWO
9 HUNDRED DOLLARS (\$4,200.00). The board further finds as a matter of
10 fact and law violation at Citation 2, Item 1, confirms the other than
11 serious classification under 29 CFR 1926.503(b)(1) and approves the zero
12 (\$0.00) penalty proposal. The board also finds as a matter of fact and
13 law, violation of Citation 3, Item 1, classified as regulatory,
14 referencing NRS 618.987(1) and confirms the proposed penalty of THREE
15 HUNDRED DOLLARS (\$300.00).

16 Based upon the above and foregoing, it is the decision of the
17 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that violations of
18 Nevada Revised Statute did occur as to Citation 1, Item 1, 29 CFR
19 1926.501(b)(10), Citation 1, Item 2, 29 CFR 1926.503(b)(1), and NRS
20 618.987(1). The violations charged are confirmed and the total proposed
21 penalties in the amount of FOUR THOUSAND FIVE HUNDRED DOLLARS
22 (\$4,500.00) approved.

23 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
24 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION**
25 **OF INDUSTRIAL RELATIONS**, to submit proposed Findings of Fact and
26 Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
27 **BOARD** and serve copies on opposing counsel within twenty (20) days from
28 date of decision. After five (5) days time for filing any objection,

1 the final Findings of Fact and Conclusions of Law shall be submitted to
2 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing
3 counsel. Service of the Findings of Fact and Conclusions of Law signed
4 by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
5 **BOARD** shall constitute the Final Order of the **BOARD**.

6 DATED: This 1st day of December, 2011.

7 NEVADA OCCUPATIONAL SAFETY AND HEALTH
8 REVIEW BOARD

9 By /s/
10 JOE ADAMS, Chairman
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