U.S. Department of Labor

Occupational Safety and Health Administration
Region 9
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August 22, 2008

Mr. Tom Czehowski, Chief Administrative Officer
Nevada Occupational Safety and Health Administration
1301 N. Green Valley Parkway, Suite 200
Henderson, NV 89074

Reference: CASPA 07/N-03 and CASPA 07/N-05

Dear Mr. Czehowski:

We have completed our investigation of the Complaint About State Program Administration (CASPA) regarding the fatality investigation conducted by the Nevada Occupational Safety and Health Administration (Nevada OSHA) at the Orleans Hotel (Inspection **310429386,** February 2, 2007 - Orleans Hotel and Casino, 4500 West Tropicana Ave., Las Vegas, NV 89103).

Since the Nevada State plan was granted final approval under section 18(e) of the Occupational Safety and Health Act of 1970 on April 18, 2000, Federal OSHA's standards and enforcement authority no longer apply to occupational safety and health issues covered by the Nevada plan, and authority for Federal concurrent jurisdiction has been relinquished.

However, as provided by section 18(f) of the Act, OSHA continues to evaluate the manner in which Nevada is carrying out its plan. Within the bounds set forth by the approval of Nevada's State plan, OSHA has focused its investigation of this CASPA on how Nevada conducted the fatality investigation and whether Nevada's actions were consistent with its approved policies and procedures.

CASPA Allegation 1: **Nevada OSHA issued untimely citations; citations were not issued within the six-month statute of limitations.**

OSHA Finding: Nevada OSHA issued citations to the Orleans Hotel and Casino approximately three weeks beyond the six-month time period specified in **NRS 618.465(3)** "No citation may be issued under this section after 6 months following the occurrence of any violation." Federal OSHA's review of the case file indicates Nevada Division Counsel had considered, prior to the lapse of the six-month period, the legal ramifications of issuing citations after six months. He also conferred with the State Attorney General's Office on his understanding of this requirement. Nevada OSHA concluded that the six-month statutory deadline for issuing citations under **NRS 618.465(3)** is procedural and not jurisdictional, meaning it can be waived as long as the respondent does not raise it as a legal defense.

Federal OSHA also reviewed decisions of the Occupational Safety and Health Review Commission, which has held that the six month time period is not an absolute "jurisdictional" requirement which cannot be waived [*General Dynamics Corp.*, 15 OSH Cas. (BNA) 2122, 2127 (1993); *CMH Co.*, 9 OSH Cas. (BNA) 1048, 1051-52 (1980)].

The cause of this delay was due to scheduling conflicts with senior leadership of Boyd. Boyd Gaming's management wanted to participate at the Closing Conference; as a result the conference was delayed until August 7, 2007, which was beyond the six month date. Although justified in this situation, it appears to be a routine practice for Nevada OSHA to delay Closing Conferences until citations are ready for issuance. This differs from the Federal practice, although Nevada's written procedures are virtually identical to the Federal. In most cases, Federal OSHA holds the Closing Conference at the conclusion of the walkthrough phase of the inspection or as soon thereafter as possible. Delaying the Closing Conference for 6 months without discussion of possible violations with the employer potentially delays abatement of hazards and may lead to confusion.

Based on facts in this case, Nevada's actions were not in violation of **NRS 618.465(3)** since Boyd Gaming had requested the delay and agreed to waive the six-month deadline, and also not to assert any defense based on the six-month statute of limitations.

Recommendation: Nevada OSHA should review its current procedures regarding Closing Conferences and consider holding such conferences earlier on in the process to provide more immediate feedback regarding inspection findings and assure prompt hazard abatement. The State should also consider revising its procedures to more clearly describe its actual practice and submit the revision for review as a plan change.

CASPA Allegation 2: **Nevada OSHA issued citations classified as "serious" (rather than "willful" or "repeat") although Boyd Gaming Corporation, owner and operator of the Orleans Hotel, had been previously cited for substantially similar conditions/hazards at other properties, and although the investigation file included indications that the violations were willful in nature.**

OSHA Finding: Early on in the accident investigation, Nevada OSHA evaluated the circumstances surrounding the fatalities to determine whether they were caused by a willful violation of an OSHA standard. Nevada OSHA had many internal discussions concerning the apparent violations and the possibility that the violations may have been committed willfully. During the investigation, Nevada followed many leads, reviewed a substantial amount of documentation, interviewed numerous individuals and deposed three Boyd officials to evaluate whether Boyd Gaming's conduct rose to the level of willful.

The evidence in the case file was discussed at length between the compliance staff, the supervisor, the Chief Administrative Officer (CAO), Acting CAO and Division Counsel as required by the Nevada Operations Manual. Ultimately, the Nevada staff followed legal counsel's advice on the classification of citations by downgrading violations from willful to serious based on settlement discussions held with Boyd Gaming's attorneys in a settlement meeting held the same day as the Closing Conference. Counsel felt that it would be difficult to sustain the willful classifications during judicial review.

Federal OSHA also reviewed previous citations issued to other Boyd Gaming properties. This search revealed that an "other-than-serious" grouped citation was issued to the California Hotel and Casino on July 17, 2006, for failure to mark confined spaces and provide training to employees. Federal OSHA also noted an inspection of the Gold Coast Hotel and Casino, but it was still ongoing at the start of the Orleans investigation.

In conclusion, while the investigation file in this case contained considerable evidence to support a willful classification, there is also evidence to the contrary. Although OSHA might have made a different determination based on the facts, Nevada's decision not to classify violations as willful was made in a manner in accordance with its approved policies and procedures in that the decision followed legal counsel's advice as to what was supportable. However, Federal OSHA would generally seek attorney input on such complex violations much earlier in the case development process.

Since substantially similar violations were cited before at another Boyd Gaming property in Nevada, Federal OSHA likely would have classified them as repeat, if not willful, violations. We would note that all penalties assessed were at a level only attainable if the violations were considered willful or repeat, although the violations were actually classified as serious.

Recommendation: Nevada OSHA should review its procedures and consider evaluating potentially willful violations with the assistance of Counsel prior to issuance and prior to any discussion with the employer, and ensure that violations are properly classified as willful or repeat when appropriate. Courts have unanimously held that a willful violation of the OSH Act constitutes "an act done voluntarily with either an intentional disregard of, or plain indifference to, the OSH Act's requirements." *Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 208 (3d Cir. 2005). Under the accepted definition of willful, "actual malice is not required." *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.2d 1123, 1127 (D.C. Cir. 2001). A repeated violation is established when the employer was previously cited for a violation of the same regulation or condition, or one that is substantially similar in terms of the hazard to which employees were exposed, and the prior citation has become final before the occurrence of the alleged repeated violation. *See Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979); *Manganas Painting Co. v. Secretary,* 273 F.3d 1131 (D.C. Cir. 2001)

OSHA Finding: There was some question as to the involvement of the Administrator of the Division of Industrial Relations and the Director of the Department of Business and Industry in the decision not to classify the citations as willful or repeated, as opposed to the decision resting solely on the CAO. Per Nevada Revised Statutes **(NRS) 618.235(2)** "A decision of any question arising under the provisions of this chapter must be the decision of the Administrator (Administrator of the Division of Industrial Relations), subject to review by the Department (Department of Business and Industry)."

Our investigation indicated the involvement of the Administrator in this case was caused by the absence of a permanent Chief Administrative Officer at the critical time these citations were being considered. Specifically, the Chief Administrative Officer (CAO) had been transferred by the Administrator to the Nevada Taxi Commission. He returned to the CAO position several months after this case was settled. As noted above, under Nevada's approved procedures, questions arising under the Nevada OSH statute are to be resolved by the Administrator and are subject to review by the Director of the Department of Business and Industry.

Recommendation: Nevada OSHA should consider revising its procedures to ensure that senior professional staff who are familiar with the investigation and conversant with technical compliance issues are available to participate in the resolution of significant and complex cases whenever possible. In the present case, for example, Nevada could have made the permanent CAO available for a brief period in order to assist in the resolution of this high profile, double-fatality accident case.

Allegation 3: **Nevada OSHA negotiated a settlement with Boyd Gaming Corporation before any citations were issued.**

OSHA Finding: Although Federal OSHA does not normally enter into a settlement agreement before citations are issued to an employer, it is not without precedent. Such settlements by Federal OSHA have been very rare, and have been undertaken only after consultation with and approval by senior agency officials. Such consultation took place in this case, and OSHA finds that the settlement procedure employed here was not in conflict with any existing provision of Federal or State procedure.

CASPA Allegation 4: **The settlement agreement signed by Nevada affords Boyd Gaming Corporation the benefit of inclusion into Nevada's Safety and Health Achievement Recognition Program (SHARP) along with limited enforcement inspections; SHARP is typically reserved for small employers who operate an exemplary safety and health management program.**

OSHA Finding: The Compliance Assistance Authorization Act of 1998, which authorizes federal funding and provides basic requirements for State on-site consultation programs, provides that small businesses shall be a priority, but does not prohibit providing services to larger firms.

Nevada's priority for consultation services should remain for those employers with 250 or fewer employees on site. The staff of the consultation program can certainly also work with large employers such as Boyd if they are also meeting the needs of the small employers in Nevada. Our review of the Nevada program indicates priority is being given to small employers. However, we also note an existing backlog of consultation requests by other Nevada employers. Nevada OSHA's commitment to providing consultation services under its settlement agreement with Boyd should not impede the State from addressing that backlog. In addition, Consultation is a voluntary service provided only at the request of the employer. Therefore, including use of Consultation in a settlement agreement, in addition to raising questions as to the appropriateness of devoting significant State resources to a larger multi-site corporation with its own safety department, could be difficult to enforce should the employer fail to fulfill the commitments in the agreement.

The agreement signed prior to the issuance of the citations includes language regarding an exemption to programmed inspections while under consultation services. Generally, deferral of programmed inspections may be appropriate during the consultation process, but complete exemption from statutorily-mandated complaint inspections is never permitted. The exemptions in the State's agreement are generally consistent with approved policies and procedures, but as written there is a potential for misinterpretation. OSHA's consultation program regulations and procedures impose a variety of limitations and conditions concerning compliance inspection activity, which should be made clear to any participating employer. For example, employers participating in the consultation program are entitled only to deferral of programmed inspections; they remain subject to other types of inspections such as complaint or accident inspections or other investigations authorized by the Act.

Some confusion is evidenced in that there has already been a dispute between the parties with regard to when Nevada OSHA can and cannot conduct inspections. Nevada OSHA drafted a clarifying letter written on October 4, 2007, signed by John Wiles, Counsel for the Division. This interpretation indicates that the exemption from programmed inspections is for a limited time and only when consultation is working with Boyd properties. To date Boyd has elected not

to challenge the interpretation of October 4th but such challenge could come at any time Nevada OSHA attempts to conduct a programmed inspection.

Recommendation: Nevada OSHA should carefully review documents or agreements in all future settlements to remove any potential ambiguity. The State should continue to ensure that consultation services to Boyd do not adversely affect the provision of consultative services to small employers. Nevada should also carefully consider the appropriateness of the use of Consultation as a tool in future settlement agreements.

Conclusion: Taken individually, the irregularities in this case generally appear minor. When reviewed in their entirety, however, we think you will agree that the handling of this case raises some significant concerns. Although the evidence does not support a finding that the State's investigation did not meet the minimum requirements under the State Plan, we ask that in response to the conclusions and recommendations in this letter that you carefully review and appropriately revise all of your procedures for Closing Conferences, citation issuance and settlements to ensure they fully meet the at least as effectiveness criteria for your State Plan. As you know, Federal OSHA plans to issue a revised Field Operations Manual in the near future. We expect that Nevada may also want to substantively revise its procedures to conform them to that issuance and appropriately train staff on any changes.

Based on the investigative findings outlined above, we are closing the investigation of this CASPA. Please provide us with a written response within 30 days addressing the concerns and recommendations contained in this report and detailing corrective actions, as well as any supporting information for the handling of this case.

Thank you for your cooperation with our CASPA investigation. If you have any questions regarding this letter please call my office.

Sincerely,

KEN NISHIYAMA ATHA
Regional Administrator