

Testimony of Debi Koehler-Fergen

Before the House Committee on Education and Labor

Hearing on “Nevada’s Workplace Health and Safety Enforcement Program:
OSHA’s Findings and Recommendations”

October 29, 2009

SUMMARY STATEMENT OF DEBI KOEHLER-FERGEN
OCTOBER 29, 2009 HEARING ON NEVADA’S WORKPLACE HEALTH AND SAFETY
ENFORCEMENT PROGRAM

My name is Debi Koehler-Fergen; I reside in Las Vegas, NV and am the mother of Travis Wayne Koehler, who along with Richard Luzier, was killed and Dave Snow was seriously injured at the Orleans Hotel in Las Vegas on February 2, 2007.

The Federal OSHA review of the Nevada State plan agency confirms that NV OSHA utterly failed not only my son and Richard, but also all workers in the state of Nevada. I filed a CASPA because NV OSHA inexplicably downgraded penalties for Boyd Gaming that the investigator recommended as willful and repeat. The Federal report vindicates the allegations in my CASPA because it clearly shows supportable evidence for those recommended penalties. The Federal report is a grave indictment of the problems in the State plan agency, showing it in significant and woeful disrepair. My son trusted his employers and never would have dreamt that on that fateful day he would be called upon to intentionally be put in a deadly situation. And how many people feel that they can trust OSHA to keep their employers from doing them harm? Far too many I’m afraid.

I found it especially troubling to read that NV OSHA investigative personnel are completely lacking in many areas of training for the jobs they are entrusted with. The Federal Review report states that “Two employees have conducted fatality investigations in 2009 without the benefit of Accident Investigation Training”. One employee who had not received basic training for Initial Compliance was hired in 1993! How can an agency entrusted to protect Nevada’s workforce by ensuring they are properly trained lack in many different areas of training themselves? They write citations to companies for non-compliance for various violations and yet they themselves are also in non-compliance.

NV OSHA is not living up to its enforcement plan that it be at least as effective as Federal OSHA. They are allowing powerful companies to use their political connections to influence such things as the outcome of investigations, as I believe Boyd Gaming did. If NV OSHA

continues to buckle to those political pressures and if they fail, within an agreed upon time frame, to fully and completely reform itself according to what has been set out in the Federal Review then Federal OSHA needs to exercise its responsibilities as set forth in Section 18F of the OSHA Act, step in and exert its authority over the State Plan, even if it means taking away Nevada’s certification.

Federal OSHA did a thorough job of looking for the truth and finding the areas that need improvement. I applaud everyone involved for their dedication to make not only the Nevada State office a more effective agency but for helping to ensure that hard working people can go home to their families at the end of the day. I see the enormity of the task ahead for NV OSHA to remedy these serious and troubling problems. I am skeptical whether they will implement the changes in a timely manner and with the degree of urgency that it should, therefore, I have a wait-and-see attitude but urge Federal OSHA and Department of Labor not to let NV OSHA slide back into complacency. Life is too precious to allow that to happen again.

October 29, 2009

Congressman Miller and distinguished Members of the Committee:

My name is Debi Koehler-Fergen; I reside in Las Vegas, NV and I would like to thank you for inviting me to testify here today for the hearing entitled: “Nevada’s Workplace Health and Safety Enforcement Program: OSHA’s Finding and Recommendations”. I do so in the memory of my son, Travis Wayne Koehler. When he was killed February 2, 2007 one of my first prayers was to please allow this one mother’s voice be heard and I give glory to God for hearing my prayer.

It has been my contention for years that NV OSHA made intentional missteps and were unduly influenced in how they handled the Orleans Hotel case that caused the deaths of my son Travis Koehler and Richard Luzier and severely injured David Snow. On that terrible day, Richard was directed by his supervisors to go into a permit required confined space, without any training or knowledge of the consequences, to correct a problem in the grease trap/lift station. Gasses were released after he cut a pipe and when he fell into trouble the same supervisors sent Travis, also untrained and unaware of the consequences, to go help Richard. At his heels Dave Snow was told to go help; he was also untrained and unaware of the consequences. According to the Coroner’s report the level of hydrogen sulfide fumes were at such extreme levels that it would have rendered them unconscious within seconds. Did the supervisors even take the time to consider the innumerable OSHA rules and state laws they were violating? They obviously had time to think about it but their decision shows me they didn’t care. Following are examples of these supervisors’ personal failures and the failures of Boyd Gaming Management:

- Failed to contact the contracted outside company who always did this type of work – the supervisors’ reason for not having their department personnel trained.
- Failed to follow state law and notify the Clark County Fire Dept. Heavy Rescue Squad of their plans. Instead they were 30 miles away conducting training and those poor souls had to stay down in that manhole until CCFD got back into town, set up their rescue equipment and remove their lifeless bodies from their death chamber.

- Failed to heed their own managers to get the men trained and keep them away from all confined spaces. Boyd management showed a culture for not caring about safety issues.
- Failed to heed the concerns of a couple of the men who loudly expressed their opinion that this was too dangerous and they needed to wait for the outside company.
- Failed to utilize the safety equipment that was on site, gathering dust in a storage area.
- Failed to equip the men with any more specific safety gear other than gloves. According to the OSHA investigation report, the Orleans had a contractual agreement with the outside pump company which prevented them from letting their engineering employees use respirators!
- Failed to supply air to the area to clear out the fumes and stinking gasses that everyone knew was present in the area.
- Failed to perform an air sampling of the pit to make sure it was free of gasses.

It is not difficult to conclude from these points that Orleans management demonstrated their plain indifference for the employees and set in motion a tragedy that took the lives of two young men and permanently hurt a third. It is was clear to John Olaechea, lead investigator on the Orleans Hotel case, that Boyd management and the supervisors KNEW of the dangerous conditions that existed concerning confined spaces, yet NV OSHA obviously chose to turn a blind eye to the obvious and not support the citations recommended by Mr. Olaechea and essentially let the gaming company get away with – in my opinion – murder.

I believe the Federal review of the Nevada State plan accurately reflects the fact that NV OSHA utterly failed not only my son and Richard, but the other workers who died and all workers in the state of Nevada. I view the findings on NV OSHA’s investigative practices as vindication for my allegations, expressed in the CASPA I filed, that shows clearly supportable evidence for willful or repeat violations that were not cited by NV OSHA. The Federal Review report is a grave indictment of the problems in the State plan agency. It shows the State agency in significant and woeful disrepair that needs urgent attention. People go to work every day with the misguided notion that they are being protected by their employer and an agency whose job it is to keep them safe. I know my son trusted his employers. He would never have dreamt that on that fateful day

he would be called upon to intentionally be put in a deadly situation. He is a Carnegie Award Hero for his actions, but I’m sure he did not believe following the directions of those he trusted would result in his death. And how many people feel that they can trust OSHA to keep their employers from doing them harm? Far too many I’m afraid.

The citations that were clearly warranted by Mr. Olacchea, and documented in an internal memo (taken from the OSHA investigation report) that made his case, according to OSHA’s own definitions, for three willful neglect and three repeat serious citations among others. As supported and stated in this review report, NV OSHA issued serious rather than willful or repeat citations even though the owner/operator of this hotel had been previously cited for substantially similar conditions and hazards at other properties. I might point out that while the citations were irresponsibly downgraded to serious; the penalties assessed were \$23,000 each which is far above the normal penalty fine for a serious violation. According to Boyd Gaming online financial reports, the quarter ending September 2007 the total fines of \$185,000 equals one third (1/3) of one day’s NET profit. To say these were significant fines and some of the largest assessed in the state is laughable considering what the gaming company earns. OSHA, as a whole, needs to understand that when they downgrade or withdraw citations and penalties, it just adds to our family’s overwhelming grief over the death of our loved one and it feels like there is no justice for anyone - except for the offending company.

Personally it was clear to me, and many others, that NV OSHA was trying to cover the fact that they knew they should have cited them for willful and repeat since while they downgraded the citations they penalized them more on the level of repeat. To further point out that NV OSHA missed the mark on our investigation and ignored obvious reasons to cite Boyd Gaming with willful or repeat, consider the following points that the Boyd Gaming EHS Manager stated in our OSHA report:

- He knew of the notice of violation at the California Hotel for confined spaces.
- He knew that confined spaces were very dangerous hazards and that they were common to all Boyd properties (not only in Las Vegas but across the country).

- He also knew there were no safety programs or training at the Coast properties.
- He discussed all this with corporate officials above him and he knew all of this in mid 2005.
- He attempted to do audits on safety issues but upper management canceled the internal audits.

It is clear that Boyd Gaming upper management was aware of the safety issues at their properties, yet did nothing to address the hazard of confined spaces by making sure their employees were well-trained. It is clear that since the Nevada state agency was in such disarray they completely and utterly missed an opportunity to not only do the right thing and give justice to these young men, but also to have sent a very loud, clear message across the Las Vegas valley to the other companies – especially construction – that may have prevented at least some of the deaths that occurred in the months following my son’s death.

While the findings of the Federal review team do not entirely surprise me, I found it especially troubling to read that investigative personnel are completely lacking in many areas of training for the jobs they are entrusted with. The Federal review report states “Two employees have conducted fatality investigations in 2009 without the benefit of Accident Investigation Training”. OSHA employees who should have had basic training for Initial Compliance, for example, had not received this training – and one was hired as far back as 1993! How can an agency entrusted to protect Nevada’s workforce by ensuring they are properly trained lack in many different areas of training themselves? They write citations to companies for non-compliance in getting their employees trained and yet they themselves are also in non-compliance.

Because I wanted to stay informed about the progress of our report and the findings, I had several conversations with Mr. Olaechea and he told me that he didn’t know why this case was being handled in such an unusual way. He said he didn’t understand why it was taking so long and also told me he had several conversations with Steve Coffield, acting CAO of NV OSHA in Las Vegas, stressing the importance of keeping those violations as willful and repeat. He felt what happened in this incident was so egregious that the company and supervisors should be

criminally prosecuted. He said he was adamant about that and indicated that Mr. Coffield assured him nothing would change. I also contacted Mr. Coffield by phone expressing concern for the six month deadline and he told me not to worry, the case was still intact and indicated to me that I would be very pleased with the outcome. He knew I wanted justice for my son and the only way was to find them willfully negligent. As pointed out in the Federal Review report NV asserted that because of the need for “further investigation” the “need to reinvestigate was a primary reason final settlement was somewhat delayed”. It was disturbing to read this because Mr. Coffield told me the reason for the delay was that it was just difficult to get everyone together at the same time for a meeting, that it was a scheduling issue. I would have appreciated being told the truth, first of all, and it would also have helped me better accept the delay at that time.

Mr. Coffield assured me that I could come to their office and pick up a copy of the report once it was completed and would answer any questions. Of course, due to what I assert were undue influences Boyd Gaming walked away with a sweetheart deal thanks to NV OSHA. I would like to ask if anyone seriously believes that I would be pleased with reduced citations that did not hold the company and individuals that killed my son and Richard accountable for their deaths. To reduce those citations was to say that their lives meant nothing. Adding insult to injury when we arrived to pick up the report I was told to come in the back lobby area and he would be right down (reporters were expected to be coming to the front door and going to their office). Instead of inviting us to his office he stood by the back elevator explaining why they reduced the citations while employees were walking past us watching me cry as I was understandably upset. At no time did he offer me a chair or to go to a private room while I digested what was going on around me. He did not show me common courtesy and was the most unprofessional encounter I have ever had.

Personally, I believe that at some point Mr. Coffield may have planned to give the willful and repeat citations, but some highly unusual maneuverings took place that caused him to back down. I am referring to the very unusual involvement of Mendy Elliott, who worked for the NV governor and Roger Bremnar, of the Department of Business and Industry, who inserted

themselves into the Closing Conference, invited by whom I don’t know. Someone had to have contacted Mr. Bremnar’s office asking for their help. To me that says they believed this case to be bigger than just an accident with a couple of fatalities. In an unsolicited letter she wrote to me, Ms. Elliott expressed her feelings about my filing the CASPA and stated that she and Roger Bremnar were involved in the closing conference and that the settlement discussions that followed were appropriate. I understand that Mr. Bremnar made the final decision to downgrade the citations yet no one has ever communicated with me why. I would still like to know that. Ms. Elliott further stated that she and Roger have “concluded that NV OSHA acted in the best interest of the Nevada workers”. I’m sorry but the “significant monetary penalties” against Boyd Gaming were nothing more than pocket change to the owner and certainly nothing to make them pay attention to any future fines. **And my request of Ms. Elliott for full disclosure of the settlement discussions was ignored.**

While the Federal Review report states that Boyd Gaming is not a part of the SHARP (Safety & Health Achievement Recognition Program), there is a legally-signed document supporting their inclusion into SCATS (Safety Consultation & Training Section) to prepare them for the program in the NV OSHA investigative report. In light of the glaring issues within NV OSHA as well as the history of Boyd Gaming safety issues, I would encourage them to be on top of unannounced inspections of Boyd Gaming properties.

One important reason why I believe Nevada needs a strong, competent OSHA is due to the transient nature of the construction market in Las Vegas where people come from all over North America to work on construction projects, as well as in the hotels and casinos. Employers must be made to keep up with a workforce that could change on a weekly basis.

I believe that within the Nevada State agency there must be 100% openness in all their dealings with regards to the families. No more private meetings, no more making decisions without being prepared for full disclosure on all aspects of the case. Even to why they reduce or withdraw a citation. Corruption can be tolerated NO MORE!! OSHA should be an apolitical office and treat every case the same regardless of the company, corporation or gaming giant they are dealing with.

In my opinion, the only way to get the attention of employers across the Las Vegas valley, especially that of the gaming industry who believe they answer to their own power, and uses its political connections to influence such things as the outcome of an investigation, as I believe Boyd Gaming did, is for Nevada OSHA to take a strong stand and give citations and fines that will send a message that they mean business. If the gaming industry continues to exert its influence by using the political system in the State of Nevada, and NV OSHA continues to buckle to them, then Federal OSHA needs to step in, take over and put a stop to it!

In closing, I am very pleased with the outcome of this review of the NV OSHA office and practices. I feel they did a thorough job of looking for the truth and finding the areas that need improvement. I applaud everyone involved for their dedication to make not only the Nevada State office a more efficient and positive agency, but also for helping to ensure that hard working people can go home to their families at the end of the day.

I see the enormity of the task ahead for NV OSHA to remedy these serious and troubling problems and I am concerned if they will be able to implement the changes in a timely manner and will the NV agency actually be able to resolve the deficiencies that have been identified with the degree of urgency that it needs to. I cannot say that I am satisfied with all the responses made by the State OSHA office. Many of them said nothing really or didn’t address the allegations as thoroughly as they should have. While I want very much to believe they want to address all of these issues and make a more effective agency I personally have a wait-and-see attitude.

I urge Federal OSHA and Department of Labor not to let NV OSHA slide back into complacency.