

**BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD**

In the Matter of the Appeal of:

**GENERAL DYNAMICS NASSCO  
2798 E. HARBOR DRIVE  
SAN DIEGO, CA 92113**

**Employer**

Inspection No.  
**1262720**

**DECISION**

**Statement of the Case**

General Dynamics NASSCO (Employer) builds and repairs ships. Beginning September 11, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Luis Vicario (Vicario), conducted an inspection arising from an injury at Employer's facility at 2798 East Harbor Drive, in San Diego, California (the site).

On February 27, 2018, the Division issued three citations to Employer alleging five violations of California Code of Regulations, title 8.<sup>1</sup> The Division alleges that Employer failed to: identify and evaluate work place hazards; ensure that a load was well-secured and properly balanced; provide a signal person when an operator had an obstructed view; ensure slings in a basket hitch had a balanced load; and keep employees clear of loads about to be lifted.

Employer filed timely appeals of the citations, contesting the existence of the violations for all of the citations. For Citations 2 and 3, Employer also appealed on the grounds of incorrect classifications and unreasonable penalties. Additionally, Employer asserted various affirmative defenses as to all of the citations.<sup>2</sup>

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board), on December 7 and December 8, 2021, and on May 2, 2022. ALJ Avelar conducted the hearing with the parties and witnesses appearing remotely via the Zoom video platform. Kevin Bland of Ogletree Deakins Nash Smoak & Stewart, P.C., represented Employer. Lisa Wong, Staff Counsel, represented the Division. The matter was submitted on September 15, 2022.

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<sup>1</sup> Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

<sup>2</sup> Except as otherwise noted in the Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

At the commencement of the hearing, the parties presented a proposed settlement of Citation 1, Items 2 and 3; Citation 2, Item 1; and Citation 3, Item 1. The parties also presented stipulations relating to Citation 1, Item 1, the only remaining item at issue, which are recited as the first three findings of fact below.

### **Issue**

1. Did Employer fail to identify hazards associated with rigging a load during the walk-through?

### **Findings of Fact**

1. Jules English (English) was employed by Venture Dynamics at the time of the incident on September 5, 2017.
2. Employer and Venture Dynamics have a written staffing agreement whereby English was provided to Employer under said agreement at the time of the incident on September 5, 2017.
3. Esteban Bielna, Employer's employee, was English's direct supervisor on September 5, 2017.
4. On September 5, 2017, Rigging Supervisor Gonzalo Fernandes (Fernandes) performed a walk-through and gave English and Charles Carter (Carter) rigging assignments at the start of the shift.
5. English was attempting to balance a rectangular desiccant dryer (the load) rigged with nylon slings in a basket hitch when his injury occurred.
6. Small trial lifts may be required to find a load's center of gravity to balance it in a basket hitch. Tilted loads may require repeated lowering and adjustments to achieve balance.
7. English and Carter completed Employer's Basic Rigging Certification training and were certified riggers.
8. Fernandes observed English's process of using nylon slings approximately 50 times.

9. Basket hitches are used nearly every day and Fernandes observed English use a basket hitch to lift items at least 70 to 80 times in the past year.

### Analysis

#### **1. Did Employer fail to identify hazards associated with rigging a load during the walk-through?**

Section 3203, subdivision (a)(4)(B), provides that an Injury and Illness Prevention Program (IIPP) shall, at a minimum:

- (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:  
[...]
  - (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard;

In Citation 1, Item 1, the Division alleges:

Prior to and during the course of the investigation, including, but not limited to 09/05/2017, the employer did not implement Program procedures to identify and evaluate unsafe conditions and work practices related to rigging a desiccant dryer to lift onto Block 517. The required pre-movement walkthrough inspections did not identify and evaluate the hazards associated with rigging a rectangular shaped unit with straps of equal lengths. The failure to identify associated hazards resulted in an unbalanced load which became unstable and slipped out of the straps. [*Sic*]

The Division has the burden of proving an alleged violation by a preponderance of the evidence. (*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).) “‘Preponderance of the evidence’ is usually defined in terms of probability of truth, or of evidence that[,] when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence.” (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

To show that Employer failed to implement its IIPP, the Division must demonstrate Employer failed to identify and evaluate hazards of a new substance, process, procedure, or equipment that presented a new hazard during a walk-through.

The Division introduced Employer’s “Safety Procedure Manual” (hereinafter referred to as the IIPP). Employer’s IIPP requires a daily walk-through of work areas to identify hazards. Vicario identified the Safety Management System Audits and Safety Inspections section of the IIPP.<sup>3</sup> It provides, in relevant part:

#### 6.2.2 Supervisor Inspections

*Line supervisors* for each trade and each work area conduct daily inspections of the work areas where their employees will be assigned or are working. *Daily inspections entail a walk-through of work areas, correcting any at-risk conditions or behaviors that are identified.* Work is stopped until unsafe conditions that pose an immediate hazard to employees or equipment are corrected. *Daily supervisor inspections do not require formal documentation.*

(Emphasis in italics added.)

Fernandes testified that on the day of the incident, he began the shift by distributing work assignments. He testified that when he discussed assignments, he identified which items to move and where they must be moved. He also testified that, depending on the experience level of a rigging crew, he may explain the details of rigging.

Fernandes testified that, at the start of a shift, he visited English and Carter at their work location at the site and discussed the basics of their assignment. He testified that he did not discuss the components of the rigging system to be used that day because he deemed English and Carter as “more experienced.” He testified that he usually did not provide them the specifics of rigging a project, relying on them instead to seek his help with any challenges. He testified that he never had a problem with their rigging. He further testified that the materials used on the day of the accident were those that were normally in use to perform tasks normally done at the site.

Fernandes testified that English and Carter completed Employer’s rigging training course and were certified riggers. The Division presented Employer’s Rigging Hazard Analysis, which requires riggers to take rigger training every two years. The Division presented training records showing that English completed a course called “Rigging School” on October 28, 2016, and Carter completed the same course twice, most recently on June 23, 2017. These records demonstrate that they were current in their training at the time of the incident.

Fernandes testified that English used nylon straps as slings to rig the load at issue in a basket hitch. He further testified that English used nylon slings hundreds of times over the year, using them almost every day. Fernandes testified that he watched English’s process of putting on the nylon slings and completing a lift according to Employer’s policies and procedures

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<sup>3</sup> This document is designated as “Revision: F,” dated “4/23/13,” consists of ten pages, and bears a print date of January 11, 2017.

approximately 50 times. Fernandes testified that basket hitches are generally used every day and he previously observed English using a basket hitch at least 70 to 80 times.

Employer's IIPP does not require formal documentation of daily supervisor inspections. Employer's Safety Manager at the time of the incident, Duke Vuong (Vuong), testified that he did not debrief English after his injury, but did speak to others on the rigging crew who confirmed that they discussed their plan for executing the lift with their supervisor. Vuong testified that identification of a work hazard would require a work stoppage. He performed an accident investigation and confirmed Fernandes viewed the rigging crew working prior to the incident and that Fernandes did not identify anything that caused him to stop the job prior to the accident.

Vicario testified that he interviewed Carter, who confirmed that he worked together with English that day. Carter informed Vicario that he and English were directed to hoist two one-ton desiccant dryers onto a block that was being built. Photos show that the dryer at issue was rectangular, resembling a home kitchen refrigerator. Carter shared with Vicario that English would rig the first load and Carter the second, and that they used nylon slings in a basket hitch. Vicario also learned from Carter that the nylon slings were of equal length and used in a cross configuration, perpendicular to each other.

Although Vicario interviewed Carter, he did not interview English. Neither Carter nor English appeared as witnesses. Only Fernandes and Vuong provided testimony outlining how to rig and lift a load in a basket hitch. They both explained that balancing a load in a basket hitch may entail lifting the load an inch or so, lowering it to make any needed adjustments to find the center of gravity, and repeating this process until balance is achieved. Fernandes confirmed that English was in the process of checking the balance of the load to determine whether it was safe to pick up.

This process of incremental achievement of balance is anticipated in Employer's training materials. Employer presented two training documents used in its rigging certification training program: a 153-page Basic Rigging Certification Powerpoint and a 51-page Basic Rigging Participant Guide for trainees. Employer's Basic Rigging Certification Powerpoint requires finding the center of gravity, anticipates loads tilting, and warns against unbalanced loads in basket hitches. It instructs, "You must also determine the Center of Gravity, which is the point where the load is balanced. [...] Center of Gravity: Any load that tilts greater than five degrees while lifted must be placed back down and adjusted." Discussion of the importance of balancing in a basket hitch is highlighted in other sections, it warns for example, "[Basket Hitches are] Not good for difficult to balance loads. [...] Basket Hitches should not be used on unbalanced loads or loads that are difficult to balance." The companion Basic Rigging Participant Guide also requires balanced loads in basket hitches. It warns, "Basket Hitches should not be used on unbalanced loads or loads that are difficult to balance."

Fernandes testified that lifting and lowering a load in a basket hitch to make adjustments for balance is itself one of many processes in identifying hazards of rigging a load in a basket hitch. Fernandes further testified that English had enough experience to be able to assess whether the load was balanced.

Vuong testified that Employer provides the above training to all riggers to address safety concerns in its IIPP. Vuong testified that the IIPP identifies hazards and provides directives to ensure safe rigging practices, such as the requirement to determine the center of gravity. The Division introduced the “Rigging” section of Employer’s IIPP.<sup>4</sup> Relevant provisions require riggers to take care to ensure a load is balanced:

5.1 It is the responsibility of all employees involved in rigging operations to follow these procedures.

[...]

6.24.8 [...]

Care should be taken when using basket hitches so that slings do not slip on the object ring lifted. Slings used in a basket hitch shall have the load balanced to prevent slippage.

[...]

6.24.14 Loads in a basket hitch are balanced in the sling to prevent slippage.

The IIPP and training materials thus support a finding that balancing a load in a basket hitch involves a process that assumes loads may be tilted until they are adjusted.

The Division asserted that using slings of equal length on a rectangular load was evidence that English did not know how to rig it, showing that it was new to him and thus presented a hazard for this particular employee. Vicario testified that he came to this conclusion because each time English attempted to lift, the load slipped. Vicario testified that Employer thus did not appear to follow the steps in its IIPP to analyze the hazards to ensure the load was correctly rigged.

Vicario testified that English may have attempted a lift approximately two or three times. However, Vicario conceded that each time the load came off the ground and started to slip, English brought it down. Further, Vicario agreed it was reasonable to infer that English recognized that he could not complete the lift without adjustments to address the hazard of an unbalanced load slipping.

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<sup>4</sup> This document is designated as “Revision: B,” dated “06-17-13,” consists of 37 pages, and bears a print date of January 11, 2017. Employer presented another version of the Rigging section of the IIPP designated as “Revision: C,” dated “1-20-17,” consisting of 34 pages, and bearing a print date of December 26, 2021. Its corresponding provisions are generally consistent with those in “Revision: B,” with the most notable differences being merely the sequence and enumeration of the provisions. Employer held out that “Revision: C” was the version in effect at the time of the injury but provided no explanation why it provided the Division “Revision: B.”

The Division did not show that slings of equal length could not be adjusted to balance and support a rectangular but otherwise symmetrical load. The Division provided no evidence to show that the rectangular load was difficult to balance and inappropriate for a basket hitch. The Division did not establish a rectangular load with nylon slings in a basket hitch was a new process or presented new hazards to English.

Fernandes credibly testified that he performed his daily walk-through, and briefed English and Carter on their required tasks. Fernandes's testimony that their assignment that day was one routinely performed with materials customarily used, is credited. Finally, tilted or unbalanced loads are not indicative of a failure to identify conditions or practices needing correction.

The Division did not prove by a preponderance of the evidence that Employer failed to identify and evaluate hazards of a new substance, process, procedure, or equipment that presented a new hazard. For these reasons, Employer's appeal is granted.

### **Conclusion**

The evidence does not support a finding that Employer violated section 3203, subdivision (a)(4)(B), by failing to implement the hazard identification procedures in its IIPP.

### **Order**

It is hereby ordered that Citation 1, Item 1, is vacated.

The proposed settlement of the remaining citations presented by the parties is approved and the items are resolved as follows:

Citation 1, Item 2, remains as issued.

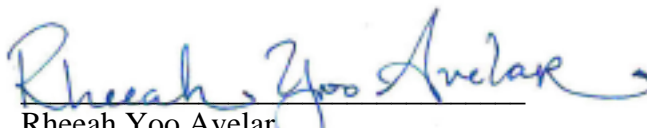
Citation 1, Item 3, is withdrawn, and the penalty vacated.

Citation 2, Item 1, is reclassified from Serious Accident-Related, to General, and the penalty is reduced to \$3,000.

Citation 3, Item 1, will have the recitation of section 5002 deleted from the face of the citation so that the only safety order that is cited is section 5042, subdivision (a)(9), with no other changes.

With regard to the settled citations, the parties stipulate that the settlement terms and conditions are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing whatsoever by employer. Neither Employer's agreement to compromise this matter nor any statement contained in this agreement shall be admissible in any other proceeding, either legal, equitable, or administrative, except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board. Finally, Employer agrees to waive any rights it might have pursuant to Labor Code section 149.5 or section 397 to petition for or recover costs or fees, if any, incurred in connection with this appeal.

Dated: 09/29/2022

  
Rheeah Yoo Avelar  
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**