

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

In the Matter of the Appeal of:

BRAGG CRANE & RIGGING CO.  
6251 Paramount Boulevard  
Long Beach, California 90805

Employer

Docket No. 01-R3D1-2428

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above-entitled matter by Bragg Crane & Rigging Co. [Employer] under submission, makes the following decision after reconsideration.

**JURISDICTION**

On May 16, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at Pacific Coast Highway and Beach Boulevard, Huntington Beach, California (the site). On June 15, 2001, the Division issued a citation to Employer alleging a serious violation of section<sup>1</sup> 3704 [secure loads] which caused a serious injury, with a proposed civil penalty of \$14,400.

Employer filed a timely appeal contesting the existence of the alleged violation and the reasonableness of the proposed civil penalty. Employer subsequently filed a motion to amend its appeal to raise the defenses of lack of knowledge<sup>2</sup> and independent employee act. On June 11, 2002 that motion was granted.

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

<sup>2</sup> Lack of knowledge is not a defense to the violation but rather to its classification.

On January 9, 2003, a hearing was held before Barbara J. Ferguson, Administrative Law Judge (ALJ) of the Board, in Anaheim, California. Eugene F. McMenamain, Attorney, represented Employer. David Pies, Staff Counsel, represented the Division.

On March 26, 2003, the ALJ issued a decision denying Employer's appeal.

On April 29, 2003, Employer filed a petition for reconsideration. On May 29, 2003, the Division filed an answer. The Board took Employer's petition under submission on June 18, 2003.

### **BACKGROUND**

Employer provides specialty rigging for construction projects and in the course of its business was erecting a tower crane at the site. An independent trucker, Robert Campbell [Campbell], delivered jibs on a flatbed truck to be used as part of the tower crane. Kenneth Johnson [Johnson], Employer's foreman checked the securing straps on the truck when it entered the sight and found the jibs were secured. Johnson and Raymond Corder [Corder], his employee, were preparing to sling one of the jibs for removal from the truck when the jib fell from the truck killing Corder and injuring Johnson. It was undisputed that the straps which secured the jibs on the truck were released by the driver, Campbell. Employer was cited for a serious violation of section 3704 which caused the death of the employee and the injury to the foreman.

### **ISSUE**

Did the Division establish a serious violation of section 3704 which caused the death of Employer's employee?

### **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

The Appeals Board has considered the decision of the ALJ and the record in light of Employer's petition for reconsideration and affirms the ALJ's summary of evidence, rulings, findings and conclusions and adopts the decision in its entirety. Accordingly, the ALJ's decision is attached hereto and incorporated herein by reference. In addition, the Board makes the following findings.

#### **Removal of the Securing Straps**

Employer argues in its petition for reconsideration that: “The basic issue in this case is when did Campbell remove the strapping.” Based upon the Board’s independent review of the record, it is found that the precise time the strapping was removed is not dispositive for determining Employer’s liability for the violation of the safety order.

Johnson testified that he checked the security of the straps when the truck delivered the jibs and that he had been off the flatbed for approximately 15 minutes prior to the accident. He remounted the flatbed in order to sling the inverted jib, one of the two remaining jibs on the truck, for its removal. Johnson admitted that he did not recheck the straps upon remounting the flatbed.<sup>3</sup> When Corder mounted the truck after Johnson, the jib fell from the truck. Employer contends that Campbell released the straps securing the inverted jib *after* Johnson remounted the flatbed. Although there is a lack of evidence to establish when the straps were released, a reasonable inference is nonetheless drawn that the straps were released in the 15 minutes prior to the accident when Employer was controlling the jib unloading operation.

What is known is that both Johnson and Corder were up on the flatbed truck while the inverted jib was still there; that an unsecured jib fell; and, that Corder was killed and Johnson was injured. Employer, through its foreman, Johnson, has a duty to make sure that there is a safe work environment pursuant to Labor Code section 6403. The fact that an employer may not have created the hazardous condition does not eliminate this basic responsibility.<sup>4</sup> The Board finds that in this case Employer failed in its obligation. Johnson failed to see that the load was secured from dangerous displacement, thus exposing himself and Corder to the danger of the unsecured jib.

### **Hearsay Testimony**

Employer contends that the ALJ was required to explicitly set forth the grounds for crediting Uriarte’s hearsay testimony that Campbell removed all of the straps securing the truckload of jibs approximately 15 minutes before the accident. The ALJ made no finding that Campbell removed the strapping 15 minutes before the accident; the ALJ merely listed the hearsay testimony in the Evidence portion of the decision. The ALJ did not, nor does the Board, credit Uriarte’s hearsay testimony regarding this 15 minute time period.

### **Inapplicability of the Safety Order**

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<sup>3</sup> The record is silent as to Campbell’s location at the time the jib fell.

<sup>4</sup> *Novo-Rados Enterprises*, Cal/OSHA App. 75-1170, DAR (May 29, 1981); *Dept. of Transportation*, Cal/OSHA App. 81-0017, DAR (Nov. 24, 1981). “DAR” and “DDAR” in this Decision After Reconsideration refer to Appeals Board Decisions After Reconsideration and Denials of Petitions for Reconsideration, respectively.

Employer alleges that section 3704 is inapplicable to its operations, arguing that under *Truecast Concrete Products*<sup>5</sup> it is incumbent upon the Division “to cite the safety order that most closely addresses the alleged violative condition, practice, means, method, operation or process that led to the issuance of the citation.” Employer asserts that “a more appropriate standard would have involved Group 13, entitled “Cranes and Other Hoisting Equipment, Article 101 ‘Slings’.” Article 101 consists of sections 5040 through 5049 and includes figures and tables through S-25.

The employer who asserts another safety order on the grounds that it more particularly addresses the violation as alleged by the Division must first establish that it has complied with the safety order protections required under the alternative safety order.<sup>6</sup> Employer points to no specific safety order with which it claims to have complied that more particularly addresses the violation in the Division’s citation. Rather, it defends on the theory that it was not engaged in the transportation or delivery of the jibs, merely their unloading. It argues that a component of transportation is required for section 3704 to apply and that as to Employer, this component is lacking. The Board disagrees with Employer’s assessment.

As the ALJ made clear in the decision, and as the Board reiterates and emphasizes here, *Hood Corporation*<sup>7</sup> held that:

Pipes transported to the site were being unloaded when they became unstable and rolled off the truck. By removing bands, without first taking measures to insure the pipes did not disengage, the load was made unsecured against dangerous displacement during transportation.

Thus, the applicability of section 3704 is established when the unloading of materials from a truck is made at Employer’s site.

### **Substantive Due Process**

Employer claims its substantive due process rights were violated by the ALJ’s failure to independently evaluate the appropriateness of the penalty. Since the Board has adopted the ALJ’s decision, the Board shall deal with Employer’s claim on this issue.

Employer’s substantive due process challenge to the penalty assessment essentially attacks the Director’s penalty setting regulations [§§ 333—336] as

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<sup>5</sup> Cal/OSHA App. 80-394, DAR (Nov. 21, 1984).

<sup>6</sup> *California Erectors, Bay Area, Inc.*, Cal/OSHA App. 84-1254, DAR (Sep. 30, 1986).

<sup>7</sup> Cal/OSHA App. 85-672, DAR (Dec. 2, 1987).

applied by the ALJ in this case. The Appeals Board considers penalties calculated in accordance with the penalty setting regulations promulgated by the Director of Industrial Relations to be presumptively reasonable penalties.<sup>8</sup> In order to succeed in its challenge of deprivation of due process, Employer needs to show that the penalty assessed was excessive or unreasonable.

Substantive due process is a limitation upon government, the legislative as well as the judicial and executive branches, thus preventing arbitrary and unreasonable legislation. The chief limitation is the Due Process Clause [Art. 1, § 7] of the California State Constitution. If the attempted exercise of power is unreasonable or arbitrary so as not to sufficiently be justified by public necessity, or too drastic in its methods, it is a violation of due process;<sup>9</sup> however, the availability of less drastic remedial alternatives will not invalidate a statute.<sup>10</sup>

Generally, the constitutional guaranty of substantive due process protects against arbitrary legislative action; it requires legislation not to be unreasonable, arbitrary or capricious, but to have a real and substantial relation to the object sought to be attained.<sup>11</sup>

Employer contends that the ALJ deprived it of substantive due process by not independently addressing the size of the penalty. The Board disagrees with Employer's position. If Employer's real position is that the regulations are not reasonable as applied, it has an obligation to set forth the reasons so that the Board can determine whether or not Employer has successfully rebutted the presumptive reasonableness of the penalties.<sup>12</sup> When the Legislature delegated the authority to promulgate the penalty setting regulations to the Director it conferred upon the Director the ability to set parameters which are presumptively reasonable.<sup>13</sup> Although the Board believes that it has the

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<sup>8</sup> *Dye & Wash Technology*, Cal/OSHA App. 00-2327, DDAR (July 11, 2001).

<sup>9</sup> Witkin, 8 Summary of California Law, 9<sup>th</sup> ed., §791.

<sup>10</sup> *Hale v. Morgan* (1978) 22 Cal.3d 388, 398-399.

<sup>11</sup> *Longval v. Workers' Comp. Appeals Bd.* (1996) 51 Cal.App.4<sup>th</sup> 792, review denied.

<sup>12</sup> This obligation for an employer is distinguishable from the Division's obligation to offer evidence in support of the proposed penalty. The Board recognizes that "while there is a presumption of reasonableness to the penalties proposed by the Division in accordance with the Director's regulations, the presumption does not immunize the Division's proposal from effective review by the Board .... Nor does the presumptive reasonableness of the penalty calculated in accordance with the penalty-setting regulations relieve the Division of its duty to offer evidence in support of its determination of the penalty since the Board has historically required proof that a proposed penalty is, in fact, calculated in accordance with the penalty-setting regulations. [Citation]" (*Plantel Nurseries*, Cal/OSHA App. 01-2346, DAR (Jan. 8, 2004).) In the instant case, the record establishes that the Division calculated the penalty in accordance with the penalty-setting regulations which only allow for an adjustment for the size of the employer for a serious violation which causes an accident.

<sup>13</sup> *Dye & Wash*, supra.

<sup>14</sup> See *DPS Plastering, Inc.*, Cal/OSHA App. 00-3865, DAR (Nov. 17, 2003).

ultimate authority to determine the appropriate penalty in each case, it is reluctant to do so except in extraordinary cases and only where Employer sets forth a challenge to the specific penalties.<sup>14</sup>

**DECISION AFTER RECONSIDERATION**

A serious violation of section 3704 which resulted in the death of an employee of Employer is established. A civil penalty of \$14,400 is assessed.

MARCY V. SAUNDERS, Member  
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON June 28, 2004