

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

In the Matter of the Appeal  
of:

**OLDCASTLE PRECAST, INC.**  
10650 Hemlock Avenue  
Fontana, CA 92337

Employer

DOCKET 13-R3D3-0583

**DECISION**

**Statement of the Case**

Oldcastle Precast, Inc. (Employer) manufactures concrete piles. Beginning August 8, 2012, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Mahmood Chaudhry and Associate Safety Engineer Bahadur Dhillon, conducted an accident inspection at a place of employment maintained by Employer at 10650 Hemlock Avenue, Fontana, California (the site). On January 28, 2013, the Division issued Employer a serious accident-related citation for failure to ensure that a qualified person verified that a concrete pile was secured or supported to prevent inadvertent movement prior to the load being released or detached from a crane<sup>1</sup>.

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, and the reasonableness of the proposed penalty. Employer alleged the defenses of absence of employer knowledge and independent employee action.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Riverside, California on March 19, 2015. M. Craig Hall, Deputy General Counsel, represented Employer. Tuyet-Van Tran, Staff

---

<sup>1</sup> The safety order allegedly violated was California Code of Regulations, Title 8, section 4999, subdivision (h) with a proposed penalty of \$18,000. Unless otherwise specified, all section references are to the California Code of Regulations, Title 8.

Counsel, represented the Division. The parties presented oral and documentary evidence. Leave to file briefs was requested and granted. The matter was submitted on April 16, 2015.

Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ.

### **Issues**

1. Was a load secured or supported to prevent inadvertent movement prior to the load being released or detached from a crane?
2. Was the violation properly classified as serious?
3. Did Employer know of the violation, or could Employer have known of the violation with the exercise of reasonable diligence?
4. Was the violation a result of independent employee action?
5. Was there a causal nexus between the violation and the occurrence of Hook Man Augustine Granado's (Granado) injury?
6. Was the proposed penalty appropriate?

### **Findings of Fact**

1. A concrete pile was hoisted by crane and placed in the location intended before it was detached from the crane. The load was attached to the crane by straps. The load was not secured or supported to prevent inadvertent movement.
2. Serious physical harm as a result of the actual hazard created by failure to secure or support the pile to prevent inadvertent movement was a realistic possibility.
3. Employer knew that the concrete pile was not secured or supported to prevent inadvertent movement.
4. Failure to secure or support the concrete pile caused Granado's injury. Granado's injury was serious.
5. Employer has over 100 employees. An \$18,000 penalty is appropriate.

### **Analysis**

#### **1. Was a load secured or supported to prevent inadvertent movement prior to the load being released or detached from a crane?**

The Division cited Employer for a violation of section 4999, subdivision (h), which provides as follows:

#### Handling Loads

(h) Loads shall not be released or detached from a crane or other hoisting apparatus until the qualified person (rigger) detaching the load has verified that

the load has been secured or supported to prevent inadvertent movement.

Citation 1, Item 1, alleges as follows:

On or about August 08, 2012, the employer failed to ensure that a qualified person (rigger) has been detaching a concrete pile without verifying that it was secured or supported to prevent inadvertent movement prior to releasing or detaching from a mobile gantry crane during stacking in the storage yard.

As a result, at approximately 8:53 AM, on August 08, 2012, a qualified person (rigger) unhooked the straps to detach a concrete pile (24" Octagon shape, 83' long & weighing 41915 lbs.) from a mobile gantry crane (Manufactured by DROTT, model #650AI & Serial #3218) during storing it in a 5' high stack when the pile fell on his right leg causing lower leg amputation.

The safety order has three elements: (1) A load must be released or detached from a crane; (2) A rigger must be "qualified"; and, (3) Before the load is detached or released, the rigger must verify that the load has been secured or supported against inadvertent movement.

Here, the parties agreed that a load was released or detached from a crane<sup>2</sup> and that Granado was a qualified person<sup>3</sup>.

The pile<sup>4</sup> in question was hoisted by straps<sup>5</sup>. The pile was being stacked on top of another concrete pile, with four wood cross members

---

<sup>2</sup> Here, when the crane set the pile down, Granado unhooked the straps that carried the pile, thereby releasing the load from the crane.

<sup>3</sup> "Qualified person" is defined in section 3207, subdivision (a) as follows: "Qualified Person" is defined as "A person designated by the employer who by reason of his training and experience has demonstrated his ability to safely perform his duties and, where required, is properly licensed in accordance with federal, state, or local laws and regulations." Employer had designated Granado as a qualified person. He had worked 23 years for Employer before his accident performing similar work. He had received considerable training regarding crane loads, as documented by the safety records Employer introduced into evidence. Granado was also a bilingual safety instructor for Employer. The Division did not dispute that Granado was a qualified person.

<sup>4</sup> The pile in question was an octagon 83 feet long, 24 inches in diameter, with eight eight-inch flat surfaces and a weight of 41,915 pounds.

<sup>5</sup> The straps are a type of sling. Using a hook and chain assembly, the straps were rigged to a steel strong-back, which was attached to a mobile gantry crane. The straps were placed underneath the pile.

separating the piles. The wood cross members were 4' x 4" x 6", called "dunnage." Although the dunnage supported the pile, it was not designed to secure the pile or prevent inadvertent movement. Its purpose was to separate the piles so that the crane could remove the straps used to hoist the piles.

After the crane operator<sup>6</sup> set the pile down on the dunnage, Granado unhooked the straps, thereby releasing the load. The straps no longer bore any weight. Granado then visually inspected the pile and the rigging, signaled the crane operator, and started moving out of the way. He did not do anything else.

Employer believed that the weight of the pile, its octagonal shape with eight flat sides, placement on dunnage, and inspection by a qualified person before the straps were hoisted was sufficient to prevent inadvertent movement. However, no procedure, process, physical barrier or other device was in place to secure or support the pile to prevent inadvertent movement.

Therefore, it is found that although Granado inspected the load before the crane operator lifted the rigging, the load was not supported or secured to prevent inadvertent movement before being released or detached.

Failure to support or secure the load violates the third element of the safety order. When an employer is in violation of one of two or more elements of a safety order, the employer is in violation of the safety order. (See *California Erectors Bay Area Inc.* Cal/OSHA App. 93-503, Decision After Reconsideration (Jul 31, 1998); *Golden State Erectors*, Cal/OSHA App. 85-0026, Decision After Reconsideration (Feb. 25, 1987).)

Therefore, the Division established a violation of section 4999, subdivision (h).<sup>7</sup>

Employer argued that the safety order did not apply because the pile was in storage as soon as Granado unhooked the straps. The safety order applies when the pile is detached or released.<sup>8</sup> The exact point when storage begins is not relevant.

---

<sup>6</sup> Mario Valdez

<sup>7</sup> If Employer believes a safety order is unreasonable or that its own practice provides greater protection for its employees, Employer's remedy is to petition the Standards Board for a permanent variance pursuant to Labor Code § 143 or to have the safety order repealed or amended. (*City of Sacramento Fire Department*, Cal/OSHA App. 88-004, Decision After Reconsideration (Mar. 22, 1989).)

<sup>8</sup> The safety order does not distinguish between transportation and storage. Nonetheless, even though the piles were not bearing any weight, the straps were still attached to the rigging and were still in direct contact with the pile. Removal of the rigging is part of delivery, handling and transportation. Storage does not begin until transportation activity has ended.

Employer argued that the safety order did not apply because all movement was intentional; there was no inadvertent movement. Existence of inadvertent movement is not an element of the violation. Failure to secure or support a load to prevent inadvertent movement is a violation whether or not inadvertent movement occurs.

## **2. Was the violation properly classified as serious?**

Labor Code § 6432 states:

(a) There shall be a rebuttable presumption that a ‘serious violation’ exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things: [...]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).) The evidence must not lead to impossibility, must be within human reason and logic, must not be speculative, and thus based on actual events and circumstances that are proven to exist. (*Oliver Wire & Plating Co., Inc. supra.*)

The violation was failure to secure or support a load to prevent inadvertent movement when it was detached or released from a crane. Prevention of inadvertent movement is required to reduce the hazard of the load tipping or falling. The hazards created by the violation are crushing of body parts as a result of the load falling, which can result in amputation and death. Associate Safety Engineer Bahadur Dillon’s opinion<sup>9</sup> that serious

---

(See *Forklift Sales of Sacramento*, Cal/OSHA App. 05-3477, Decision After Reconsideration (July 7, 2011).)

<sup>9</sup> Dhillon has had all Division mandated training, and thus is competent to give his opinion per Labor Code section 6432, subdivision (g). Dhillon’s opinion was also based upon his 24 years’ experience working for the Division, which included similar hoisting accidents, amputations and crushing injuries. Dhillon has three Bachelor of Science degrees that are relevant to job hazards. He is a registered professional engineer in California. Dhillon’s opinion was based upon a reasonable evidentiary foundation consisting of his education and training. See *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999.)

injury or death is a realistic possibility when a concrete pile weighing over 41,000 pounds falls on an employee's leg or other body part (as occurred here) is found credible and is accepted.

Here, Granado's right leg was partially amputated below the knee as a result of the pile falling on it. Amputation is a serious injury as defined by Labor Code section 6432, subdivision (e) and section 330, subdivision (h)<sup>10</sup>.

The realistic possibility of a serious injury combined with existence of the actual hazard caused by failure to support or secure the load comes within the definition of "serious" set forth in section 6432. Therefore, the violation was properly classified as a serious violation.

### **3. Did Employer know of the violation, or could Employer have known of the violation with the exercise of reasonable diligence?**

Under Labor Code section 6302, subdivision (h) and Labor Code section 6432, subdivision (c), a serious violation is not found where employer demonstrates that "it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April. 1, 2003).)

Employer argued that it lacked knowledge of the violation because it had been manufacturing similar octagonal piles for over twenty years and never had an incident where an octagonal pile fell. Employer believed that the octagonal shape, flat side, and great weight of the pile combined with its placement on wood cross members and the inspection by a qualified person was sufficient to prevent inadvertent movement. Absence of previous accidents is not relevant to the issue of the classification of a violation. (See *National Cement Co.*, Cal/OSHA App. 310, Decision After Reconsideration (Mar. 10, 1993).)

Employer knew about the violative condition—failure to support or secure a load prior releasing or detaching it.

Therefore, Employer's lack of knowledge defense fails and the serious classification stands.

---

<sup>10</sup> Labor Code section 6302, subdivision (h) and Section 330, subdivision (h) define a "Serious injury or illness" to include the loss of any member of the body occurring in a place of employment or in connection with any employment. Labor Code section 6432, subdivision (e) defines "serious physical harm" to include the loss of any member of the body.

#### **4. Was the violation a result of independent employee action?**

All five of the following elements must be proven to establish the affirmative defense of independent employee action set forth in *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980):

- 1) The employee was experienced in the job being performed.
- 2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments.
- 3) The employer effectively enforces the safety program.
- 4) The employer has a policy of sanctions against employees who violate the safety program.
- 5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

Employer established that Granado was experienced in the job being performed and that he was trained regarding his job duties, but Employer did not establish the second or fifth elements of the affirmative defense. Granado was not trained to secure or support a load before it was detached or released as there were no such procedures. Thus, Employer did not have a well-devised safety program (the second element.)

Further, Granado did not inspect the rigging sufficiently to reveal that it could become entangled and dislodge the pile when the rigging was lifted. He also failed to clear himself from the fall area. Assuming these actions were a violation of Employer's safety rules, they do not bear on whether the load was secured or supported. Thus, Employer did not establish that Granado knew he was acting contra to Employer's safety requirements (the fifth element) when no action was taken to secure or support the load before it was detached.

Because Employer did not establish all five elements, the independent employee action defense fails.

#### **5. Was there a causal nexus between the violation and the occurrence of Granado's injury?**

The Division issued the citation with the characterization of Serious Accident Related. To be accident-related, there must be a causal nexus between the violation and the employee's injuries. (See *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).) The Division establishes that a violation is accident-related by showing that the violation more likely than not was the cause of the injury. (*Mascon, Inc.*,

Cal/OSHA App. 08-4270, Denial of Petition for Reconsideration (Mar. 4, 2011).)

Inadvertent movement is any movement which was not intended. (*Machinery Trade Center*, Cal/OSHA App. 00-3244, Decision After Reconsideration (June 6, 2002), citing *Simpson Timber Company*, Cal/OSHA App. 77-1038, Decision After Reconsideration (June 9, 1980).)

Here, when the rigging began to lift, it caused the pile to fall down onto Granado's leg, resulting in an amputation. Although raising the rigging was intentional, the pile's fall was unintentional. Thus, the fall was inadvertent movement.

If the pile had been supported or secured from inadvertent movement, the pile would not have moved and Granado's leg would not have been seriously injured. Thus, the serious violation was the cause of Granado's serious injury.

Therefore, the accident-related characterization of Citation 1 is proper.

#### **6. Was the proposed penalty appropriate?**

Penalties calculated in accordance with the regulations are presumably reasonable and will not be reduced absent evidence that the penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (May 27, 2006).) All serious violations begin with a base penalty of \$18,000. (§ 336(c)(1).)

Where a serious violation causes a serious injury, the only downward penalty adjustment allowable is for size. (Labor Code § 6319(d); § 336(c)(3); *Dennis J. Amoroso Construction Co., Inc.*, Cal/OSHA App. 98-4256, Decision After Reconsideration (Dec. 20, 2001).)

Here, a serious violation caused a serious injury and Employer had over 100 employees. Hence, no reduction is available for size.

Therefore, the \$18,000 proposed penalty was properly calculated and is found reasonable.

#### **Conclusion**

Therefore, Employer's appeal is denied. Citation 1, Item 1, is affirmed, and the \$18,000 penalty is assessed.

**Decision**

It is hereby ordered that the citation is established, modified, or withdrawn as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalty indicated above and set forth in the attached Summary Table be assessed.

Dated: May 14, 2015

---

**DALE A. RAYMOND**  
Administrative Law Judge

DAR: ml

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD  
OLDCASTLE PRECAST, INC.  
Docket 13-R3D3-0583**

Date of Hearing: March 19, 2015

**Division's Exhibits**

<b>Number</b>	<b>Description</b>	<b>Admitted</b>
1	Jurisdictional Documents	Yes
2	Photo of stack of pilings (same as C-1)	Yes
3	Photo of strong-back used to lift pile (same as C-3)	Yes
4	Photo of two chains (same as C-2)	Yes
5	Photo of lifted strap and eye (same as C-4)	Yes
6	Piling weight calculation test	Yes
7	Photo-fallen piling—site of injury	Yes
8	Form 1BY—Notice of Intent to Issue Serious Violation	Yes
9	Revised Form 1BY—Notice of Intent to Issue Serious Violation	Yes
10	Employer response to Form 1BY—Notice of Intent to Issue Serious Violation	Yes
11	Form C-10—Proposed Penalty Worksheet	Yes

**Employer's Exhibits**

<b>Letter</b>	<b>Description</b>	<b>Admitted</b>
A	Crane Operator Manual	Yes
B	Jurisdictional Documents	Yes
C	Photos C-1 through C-8	Yes

D	Crane Operator Safety Training	Yes
E	Safety Training Records	Yes
F	Safety Training Records	Yes
G	Safety Training Records	Yes
H	Safety Training Records	Yes
I	Safety Training Records	Yes
J	Written statement of Augustine Granado	Yes
K	Written statement of Mario Valdez	Yes

**Witnesses Testifying at Hearing**

1. Augustine Granado
2. Mahmood Chaudhry
3. Bahadur Dhillon

**CERTIFICATION OF RECORDING**

*I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.*

\_\_\_\_\_  
**DALE A. RAYMOND**  
 Signature

May 14, 2015  
 Date



