

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

W A RASIC CONSTRUCTION COMPANY INC.
4150 Long Beach Blvd.
Long Beach, CA 90807

Employer

DOCKETS 13-R3D1-2951
and 2952

DECISION

Statement of the Case

W A Rasic Construction Company Inc. (Employer) is an underground utility construction contractor. Beginning March 13, 2013, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Thurman Randall Johns (Johns), conducted an accident inspection at a place of employment maintained by Employer at Gypsum Canyon, Yorba Linda, California (the site). On September 6, 2013, the Division cited Employer for having sheet-pile chains that did not have identification markings¹, for using sheet-pile chains that did not have identification markings², for failing to have records of inspection for sheet-pile chains³, and for hoisting piles without the use of hooks or shackles⁴.

Employer filed a timely appeal on all possible grounds and alleged multiple affirmative defenses. The Division withdrew Citation 1, Item 2 on the grounds it was duplicative of Citation 1, Item 1. Employer agreed 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 incurred in connection with its appeal of Citation 1, Item 2. Employer withdrew its appeal of the classification and penalty for Citation 1, all items. It withdrew its appeal of the abatement requirements and time to abate. Employer stipulated that the penalties were properly calculated in accordance with the Division's policies and procedures. (Exhibit 5)

¹ Citation 1, Item 1, a general violation of § 1615.3, subdivision (a)(1). Unless otherwise specified, all section references are to the California Code of Regulations, Title 8.

² Citation 1, Item 2, a general violation of § 1615.3, subdivision (a)(3)

³ Citation 1, Item 3, a general violation of § 1613.9, subdivision (a)

⁴ Citation 2, a serious violation of § 1600, subdivision (s).

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Board), at West Covina, California on April 30, 2015. This matter originally came for hearing before ALJ Sandra L. Hitt at West Covina, California on October 8, 2014. ALJ Hitt subsequently resigned from the Board and was unable to issue a decision prior to her departure. Pursuant to Board Regulation 375.1(c), the proceeding was transferred to ALJ Raymond, who held a hearing *de novo*.

Ronald E. Medeiros, Attorney, represented Employer. Richard Fazlollahi, District Manager, represented the Division. The parties presented oral and documentary evidence. The parties stipulated to use at this hearing of exhibits used at the prior hearing held on October 8, 2014. The matter was submitted on April 30, 2015. The ALJ extended the submission date to June 1, 2015.

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

Issues

1. Did permanently affixed and legible identification markings on T-handles at each end of sheet pile chains indicate the safe working load for the sheet pile chains?
2. Was Employer required to have its sheet-pile chains inspected by a specialist where they had been in use for less than 12 months?
3. Did Employer hoist piles without the use of hooks?
4. Was the violation of section 1600, subdivision (s) properly classified as serious?

Findings of Fact

1. Employer used two steel sheet-pile chains to hoist and lower steel piles. Each chain consisted of chain links with a T-handle, or toggle, at each end.
2. Each T-handle had the manufacturer's name and the recommended safe working load legibly stamped on it. The T-handles were permanently attached to the chain links.
3. The manufacturer required the sheet-pile chains to be inspected and tested by a specialist at intervals depending on the frequency of use, but not less than every 12 months. Employer did not perform these inspections.
4. Employer's sheet-pile chains were in use for less than 12 months when they broke.
5. Employer did not use hooks or shackles to hoist piles.
6. A serious injury as the result of an accident caused by the hazard resulting from failure to use hooks or shackles is a realistic possibility.

Analysis

1. Did permanently affixed and legible identification markings on T-handles at each end of sheet pile chains indicate the safe working load for the sheet pile chains?

Section 1616.3, subdivision (a)(1) states:

- (a) Employers must ensure that rigging equipment:
 - (1) Has permanently affixed and legible identification markings as prescribed by the manufacturer that indicate the recommended safe working load; ...

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) The Division must make some showing that each element of the violation occurred. (*Lockheed California Company*, Cal/OSHA App. 80-889, Decision After Reconsideration (July 30, 1982).)

The alleged violation description reads as follows:

Employer was found to have an alloy steel sheet-pile chain for use in handling piles on its work site that did not have any type of permanently affixed and legible markings as prescribed by its manufacturer, Ketten-Walder Chain Technology.

Chains with T-handles at each end attached piles to the vibrating pile driving machine. The chains bore the weight of the load when a pile was being lifted or lowered. The parties agreed that the chains were rigging equipment.

The Division agreed with Employer that the name of the manufacturer (Ketten-Walder) and correct load capacity of the chain (3.15 tons) was stamped into each T-handle,⁵ that the stamps were permanent and legible identification, and that the T-handles were permanently attached to each end of every chain.

The T-handles were fastened to the chain links in the same way as the chain links were fastened to each other. Thus, Employer's sheet-pile chains had permanently affixed and legible marking as prescribed by the manufacturer. Therefore it must be found that Employer complied with the cited safety order, section 1616.3, subdivision (a)(1).

The Division took the position that only the capacity of the T-handle was identified. The Division argued that tags were required⁶. The manufacturer did not require tags to be attached to the chain links, and the safety order does

⁵ Exhibit 6. The T-handles were also called toggles.

⁶ The chains came with tags from the manufacturer. The only information on the tags was the name of the manufacturer, Ketten-Walder.

not specifically require tags. T-handles were attached to the chain links, just as a tag would be attached. Therefore, it cannot be found that tags were required or that affixing the information on the T-handles was inadequate.

Accordingly, Citation 1, Item 1 is dismissed and the penalty is set aside.

2. Was Employer required to have its sheet-pile chains inspected by a specialist where they had been in use for less than 12 months?

Section 1613.9 states:

Inspections. General.

- (a) Any part of a manufacturer's procedures regarding inspections that relate to safe operation (such as to a safety device or operational aid, critical part of a control system, power plant, braking system, load-sustaining structural components, load hook, or in-use operating mechanism) that is more comprehensive or has a more frequent schedule of inspection than the requirements of this Article shall be followed.

Section 4 of Ketten-Wälder's instructions for sheet-pile chains⁷, titled "Maintenance" stated, "A specialist must inspect the chain at intervals depending on the frequency of use; in any case, however, after 12 months at the latest."

The opening paragraph of the Operations Manual stated that periodic test procedures for the chains must be performed in accordance with the Essential Health and Safety Requirements of the EC Directives. These tests were in addition to the visual inspections required before each use.

A fundamental rule of construction and interpretation is to determine the intent of the author. (See *Michael Paul Company, Inc.*, Cal/OSHA App. 97-3320, Decision After Reconsideration (May 30, 2011), citing *T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 277.) The intent prevails over the letter. (See *Lungren v. Dukmejian* (1988) 45 Cal.3d 727, 735). A document is construed by reading it as a whole. (See *In re Estate of Garrett* (2008) 159 Cal.App. 4th 831, 836; *People v. Belton* (1979) 23 Cal.3d 516, 526.) It is presumed that a manufacturer intends to use words and phrases regarding any one machine. (See *Stone Street Capital, LLC v. California State Lottery Com'n* (2008) 165 Cal.App. 4th 109, 118).

The alleged violation description reads as follows:

⁷ Exhibit 4, page 2

Employer was not able to produce documentation of inspections on sheet-pile chains showing those had been accomplished as required by the manufacturer, Ketten-Wälder Chain Technology.

As of March 12, 2013, Employer had owned the chains for more than 12 months, but had used the chains for less than 12 months.⁸ A special annual inspection by a specialist as described by the Operations Manual had not been performed.

Intervals for testing may be expressed in terms of either amount of use or passage of time. Every time the Operations Manual⁹ specifies intervals for inspection or testing, it refers to amount of use, not passage of time. For example, it states that “prior to first *use*” [emphasis added] a user must verify that the stated lifting capacity on the chains must be indicated and correspond to the documentation. The opening paragraph states that the manufacturer’s declaration of compliance “shall become void in case” periodic test procedures “are not performed regularly.” Specifically, the manual states that inspection intervals depend on the “frequency of *use*; [emphasis added].” A rule of word usage is the implication of parallel expression. Thus, the word “use” is implied after the phrase “12 months” in the second portion of the sentence as follows: “in any case, however, after 12 months [of use] at the latest.”

It is found that because the chains had not been in use for more than 12 months, an inspection by a specialist was not required. Therefore, Employer was in compliance with the manufacturer’s requirements and the requirements of the safety order. DOSH did not meet its burden of proof.

Accordingly, Citation 1, Item 3, is dismissed, and the penalty is set aside.

3. Did Employer hoist piles without the use of hooks?

Section 1600, subdivision (s), states:

Pile Driving.

(s) Hoisting of piling shall be done by hooks provided with a means to prevent accidental disengagement or a shackle shall be used in place of a hook.

The alleged violation description reads as follows:

⁸ Associate Safety Engineer Thurman Randall Johns (Johns) testified that Safety Director Harold DeTinne told him that Employer’s sheet-pile chains in use on March 13, 2013, were purchased in 2011 and put in use in 2012. DeTinne testified that at any one time, Employer owned four chains. Two were in use, and two were new, unused chains. Once chains were put into use, they were replaced before they had 12 months of use.

⁹ Exhibit 4

On 3/13/2013 employer was found to have been hoisting piles at the job site without using hooks or shackles to prevent accidental disengagement.

The word “hook” is not defined in the safety orders. Absent ambiguity, the ordinary meaning of words¹⁰ is used to interpret safety orders. (*California State Restaurant Association v. Whitlow* (1976) 58 C.A.3d 340.) The dictionary may be used to obtain the ordinary meaning of a word. (*Key Energy Services, LLC*, Cal/OSHA App. 13-2239, Denial of Petition for Reconsideration (Dec. 24, 2014) p.3, citing *Stamm Theatres v. Hartford Casualty Ins. Co.*, (2001) 93 Cal.App. 4th 531, 539; *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement*, (2011) 192 Cal.App. 4th 75, 82.)

The *McGraw-Hill Dictionary of Scientific and Technical Terms*, Sixth Edition (2003) page 1008, defines the word “hook” within the field of design engineering¹¹ as “A piece of hard material, especially metal, formed into a curve for catching, holding, or pulling something.”

In accord is Webster’s Third New International Dictionary of the English Language Unabridged, Merriam-Webster, Inc. (1986), page 1088, which defines “hook” in the relevant sense¹² as “A piece of metal or other hard or tough material formed or bent into a curve or at an angle for catching, holding, sustaining, or pulling something.”

Based on the ordinary definition of “hook,” the essence of a hook is a curve. Other objects could catch, hold, or pull something, but they would not be hooks. Here, Employer used a T-handle in the shape of the capital letter “T”¹³ with the vertical part shorter than the horizontal part for hoisting steel piles. The T-handle does not have any curves. Without curves, it does not meet the ordinary definition of “hook.”

Additionally, a hook alone does not satisfy the safety order. The safety order requires the hook to have “a means to prevent accidental

¹⁰ The California Supreme Court has directed the Appeals Board to liberally interpret legislation to promote healthful and safe working environments. (*Carmona v. Division of Industrial Safety* (1975) 13 C.3d 303.). The Appeals Board has extended this doctrine to apply to safety orders. (*Golden West Homes, Riverside Division*, Cal/OSHA App. 78-1095, Decision After Reconsideration (Nov. 19, 1984).) The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies. (*Michael Paul Company, Inc.*, Cal/OSHA App. 97-3320, Decision After Reconsideration (May 30, 2001); *Barnard Engineering Co., Inc.*, Cal/OSHA App. 81-0241, Decision After Reconsideration (May 28, 1982).)

¹¹ “Design Engineering” is defined as “The branch of engineering concerned with the design of a product or facility according to generally accepted uniform standards and procedures, such as the specification of a linear dimension, or a manufacturing practice, such as the consistent use of a particular size of screw to fasten covers.”

¹² Definition 2a.

¹³ Exhibits 6, A, D. The manufacturer called them toggles.

disengagement.”¹⁴ Assuming, as Employer contends, that the T-handle is a hook, there is no means to prevent accidental disengagement. Therefore, it cannot be found that Employer was hoisting piles by hooks provided with a means to prevent accidental disengagement as required by section 1600, subdivision (s).

Employer conceded that shackles were not used in place of hooks.

Therefore, the Division established a violation of section 1600, subdivision (s).

Employer argued that the cited section did not apply to Employer’s machine because it was a pile driving and extracting vibrator¹⁵, not a traditional crane with a pile driving attachment¹⁶ described in section 1600, subdivision (i)(2)¹⁷. Section 1600 comes under Article 12, titled “Pile Driving and Pile Extraction.” Section 1600, subdivision (s) by its language, refers to all pile driving. No safety order limits the application of section 1600 to pile driving performed only by cranes¹⁸. It must be found that the cited safety order applies to Employer.

Employer asserted the affirmative defense that a more specific safety order applied, specifically section 1600.1, which provides as follows:

(b) The provisions of Subsection 1600(i) shall apply to the [pile] extraction process.

Here Employer was extracting piles. When an employer defends against a safety order on the grounds that another order more closely addresses the facts, the employer must demonstrate that the more specific safety order is inconsistent. (*Bostrom-Bergen Metal Products*, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003), citing *Gas and Electric Company*, Cal/OSHA App. 82-1102, Decision After Reconsideration (Dec. 24, 1986); *The Herrick Corporation*, Cal/OSHA App. 99-786, Decision After Reconsideration (Dec. 18, 2001) p. 6, citing *Wetsel-Oviatt Lumber Company*, Cal/OSHA App. 94-1462, Decision After Reconsideration (Apr. 12, 2000).)

¹⁴ This is essentially a safety hook, which is defined as “A hook with a safety latch or arrangement to close the throat of the hook, in such manner as to prevent slings or load attachments from accidentally slipping off the hook” in section 4885, part of Group 13, Cranes and Other Hoisting Equipment.

¹⁵ Exhibit B

¹⁶ Exhibit E

¹⁷ Section 1600(i)(2) provides: (A) When driving with a crane-suspended vibratory pile hammer, the person operating the remote on/off clamp switch shall be in direct visual contact with the signal person. (B) The exciter (vibratory pile hammer) shall not be unclamped from the pile when there is any line pull on the suspension or when the pile hammer is still vibrating.

¹⁸ Section 1610.1 sets forth the scope applicability of Article 15, “Cranes and Derricks in Construction.” These limitations do not apply to Article 12. However, section 1610.1, subdivision (a) specifically provides that those orders apply to dedicated pile drivers. As employer’s machine was a dedicated pile driver, the crane orders apply.

Employer has the burden of proof. (*Gal Concrete*, Cal/OSHA App. 89-317, Decision After Reconsideration (Sept. 27, 1990).) Employer has not shown that only section 1600, subdivision (i) applies or that it is inconsistent with section 1600, subdivision (s). As section 1600.1 is not inconsistent with section 1600, Employer's defense fails.

Employer argued that T-handles were safer than hooks, and, therefore the safety order was not violated. An employer may not substitute its own safety measures for those required by the applicable safety order. (*Hollander Home Fashions*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 13, 2012), citing *Empire Pro-Tech Industries*, Cal/OSHA App. 07-2837, Denial of Petition for Reconsideration (Aug. 19, 2008).) If Employer believes 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).)

4. Was the violation of section 1600, subdivision (s) 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 violation was failure to use hooks provided with a means to prevent accidental disengagement. The hazard associated with the violation is that the pile will fall and strike an employee. Here, a pile weighing about 6,000 pounds fell while being hoisted. The pile struck the cab, injuring the operator. He suffered five broken ribs, a fractured skull and a concussion. His injuries caused him to be hospitalized for four days. Therefore, his injury was serious.

Although the pile in question fell because the chain holding the pile broke, the hazard is the same hazard addressed by the safety order—a pile that falls due to the lack of a hook. The occurrence of a serious injury caused by

the actual hazard is proof that a serious injury is a realistic possibility. Accordingly, it must be found that serious injuries are a realistic possibility as a result of the actual hazard created by Employer's failure to use hooks provided with a means to prevent accidental disengagement, and failure to use shackles.

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

Employer stipulated that the \$5,060 penalty for Citation 2 was calculated in accordance with the Division's policies and procedures. Accordingly, the serious classification of Citation 2 is affirmed and a penalty of \$5,060 is assessed.

Conclusion

Citation 1, Items 1 and 3 are vacated and the penalties are set aside. The Division's withdrawal of Citation 1, Item 2 is affirmed. Citation 2 is affirmed and a penalty of \$5,060 is assessed.

Decision

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

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

DALE A. RAYMOND
Administrative Law Judge

DAR: ao

Dated: June 26, 2015

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
W A RASIC CONSTRUCTION COMPANY INC
Dockets 13-R3D1-2951 and 2952**

Date of Hearing: April 30, 2015

Division's Exhibits—Admitted

Exhibit Number	Exhibit Description	
1	Jurisdictional Documents	X
2-1	Photo—entire accident scene	X
2-2	Photo—pile and fallen cab	X
2-3	Photo—close up of pile and cab	X
2-4	Photo—identification plate on ABI	X
2-5	Photo—chain with broken chain link	X
2-6	Photo—close up of insertion points for T handle	X
2-7	Photo—close up of broken chain link	X
2-8	Photo—close up of break in chain link	X
3	Resume—Thurman R. Johns	X
4	Manufacturer's Operating Instructions for Sheet-Pile Chains	X
5	Form C-10, Proposed Penalty Worksheet	X
6	Photo—close up of T handle	X

Employer's Exhibits—Admitted

Exhibit Letter	Exhibit Description	
A	Photo—hammer head with chains attached	X
B	ABI Manual	X
C	Photo—T handle after insertion into hole in hammer head	X
D	Photo—T handle being inserted into hole	X
E	Photo—Pile driver and crane	X
F	Photo—holes in pile	X

Witnesses Testifying at Hearing

1. Thurman Randall Johns
2. Harold Gene DeTinne

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.

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

W A RASIC CONSTRUCTION COMPANY, INC.
Dockets 13-R3D1-2951 and 2952

Abbreviation Key: Reg=Regulatory
 G=General W=Willful
 S=Serious R=Repeat
 Er=Employer DOSH=Division

IMIS No. 315533349

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R3D1-2951	1	1	1615.3(a)(1)	G	ALJ vacated violation		X	\$375	\$375	\$0
		2	1615.3(a)(3)	G	DOSH withdrew as duplicative of Cit. 1, Item 1		X	750	0	0
		3	1613.9(a)	G	ALJ vacated violation		X	750	750	0
13-R3D1-2952	2	1	1600(s)	S	ALJ affirmed violation	X		5,060	5,060	5,060
Sub-Total								\$6,935	\$6,185	\$5,060

Total Amount Due*

\$5,060

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: *Please do not send payments to the Appeals Board.*

All penalty payments should be made to:

Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call (415) 703-4291 if you have any questions.

ALJ: DR/ao
 POS: 06/26/2015

