

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

In the Matter of the Appeal  
of:

**OLDCASTLE PRECAST, INC.**  
2020 Goetz Road  
Perris, California 92570

Employer

**IMS 1025083**

**DECISION**

**Statement of the Case**

Oldcastle Precast, Inc. (Employer) is a manufacturer specializing in precast concrete products.<sup>1</sup> Beginning January 26, 2015, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Alfred Varela<sup>2</sup> (Varela), conducted an accident inspection at a place of employment maintained by Employer at 2020 Goetz Road, Perris, California (the site). On May 29, 2015, the Division cited Employer for a serious accident-related violation for failing to ensure that a sling being used to hoist material was set to avoid slippage.<sup>3</sup>

Employer filed a timely appeal contesting the existence of the alleged violation, the classification and the reasonableness of the proposed penalty. Additionally, Employer pleaded numerous affirmative defenses.<sup>4</sup>

This matter came regularly for hearing before Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board at Riverside, California on March 10, 2016. Attorney Robert Peterson, of Peterson Law Corporation, represented Employer. Staff Counsel Melissa Peters represented the Division. The matter was submitted for decision on April 11, 2016. The submission date was extended to September 14, 2016, on the ALJ's own motion.

**Issues**

1. Did Employer set the sling to avoid slippage?

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<sup>1</sup> Oldcastle Precast, Inc. pours concrete for catch basins, manholes and box covers. This is also known as precasting.

<sup>2</sup> Varela was promoted to District Manager of the Long Beach office after the instant citations issued.

<sup>3</sup> The safety order allegedly violated was California Code of Regulations, Title 8, section 5042 subdivision (a)(6) with a proposed penalty of \$18,000.

<sup>4</sup> Except as otherwise noted in this Decision, Employer failed to present evidence in support of its pleaded affirmative defenses, and said defenses are therefore deemed waived. (See, e.g. *Central Coast Pipeline Construction Co., Inc.* Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980 [holding that the employer bears the burden of proving all of the elements of the Independent Employee Action Defense.]) Employer withdrew the Independent Employee Action Defense.

2. Did the Division establish a rebuttable presumption that the violation in Citation 1, was serious?
3. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?
4. Was there a causal nexus between the violation and the occurrence of the employee's injury?
5. Was the proposed penalty reasonable?

### **Findings of Fact**

1. Cal/OSHA Associate Safety Engineer Alfred Varela (Varela) opened an accident investigation at 2020 Goetz Road, Perris, California, on January 26, 2015.
2. On January 19, 2015, Employer's employee, Raymond Brummet (Brummet) was assigned the task of lifting a steel double door hatch, weighing approximately 450 pounds, into a concrete mold.
3. The lifting equipment mechanism used was a Verlinde 10 ton electric gantry crane and rigging with a 4 hook nylon sling.
4. The steel hatch had been delivered to Employer upside down on a pallet.
5. Brummet had no training on how to set rigging when lifting an upside down hatch with no rigging points.
6. Brummet used two of the four hooks on the slings and attached them to the reinforced metal or fins<sup>5</sup>.
7. On January 19, 2015, two hooks and the sling slipped off of the fins, causing the hatch door to fall onto Brummet's right leg which resulted in a fracture. Employer failed to ensure that the sling was set to avoid slippage.
8. Employer failed to provide necessary training to Brummet, and failed to adequately supervise Brummet at the jobsite.
9. Failing to ensure that a sling is set to avoid slipping during hoisting or lifting operations creates a realistic possibility of serious physical harm from falling loads.
10. Employer's failure to ensure that the sling was set to avoid slippage was a significant factor leading to Brummet's serious injury.
11. The penalty associated with the citation was calculated in accordance with the Division's Policies and Procedures.<sup>6</sup>

### **Analysis**

#### **1. Did Employer set the sling to avoid slippage?**

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (March 27, 2006); *Howard J. White*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted 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

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<sup>5</sup> Fins are reinforced steel as depicted in Exhibit 7. Brummet circled the fins in red on Exhibit 7.

<sup>6</sup> The Division and Employer stipulated to this during the hearing.

evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal. App. 4<sup>th</sup> 472, 483.)

The Division cited Employer for a violation of section 5042, subdivision (a)(6) which provides as follows:

- (a) Whenever any sling is used, the following practices shall be enforced:  
[....]  
(6) Slings shall be set to avoid slippage.

Citation 1, Item 1 alleges as follows:

Prior to, and during the course of the inspection, the employer did not ensure, whenever any sling is used, the following practices shall be enforced: slings shall be set to avoid slippage. As a result, on or about January 19, 2015 an employee was seriously injured when the sling attached to a 4x4 galvanized metal hatch, slipped off as it was being lifted and fell on the employee's right leg causing serious injuries.

The Safety Orders do not define "slippage". Therefore, its ordinary dictionary meaning is used to interpret the Safety Order's commands. "*Slippage*" is "an act, instance, or process of slipping." [Merriam-Webster's Collegiate Dictionary, (10th Edition 1999). "to let loose from a restraining leash or grasp; to disengage from instead of hauling..." (Citation)

In order to prove a violation, the Division has the burden of establishing that a sling was used. Raymond Brummet (Brummet), Laborer testified that he was assigned the task of lifting a steel double door hatch weighing approximately 450 pounds into a concrete mold. The steel double door had been delivered to Employer upside down on a pallet. Brummet, along with the help of Michael Hodges (Hodges), Laborer, were attempting to lift the steel double door with a Verlinde 10 ton electric fixed Gantry crane equipped with a rigging/sling and a hook. Element one is satisfied.

The second element that the Division must prove is that the sling was not set to avoid slippage. Brummet credibly testified that he and Hodges attempted to use the sling attached to the gantry crane in order to lift and flip the steel double door. Brummet testified that this was the first time that he had an assignment like this in his 2 years with the Employer. Brummet testified that a sling with 4 hooks extended from the Gantry crane. He testified that the metal hatch doors did not have intended rigging points. Because of this, Brummet did not secure all 4 hooks. Instead, Brummet attached 2 of the hooks to reinforced metal or fins on one side of the steel double door. (See Exhibit 7) Brummet testified that one hook and the sling slipped off of the fins then the other hook came off. According to Brummet, the metal cover/hatch door then fell down and broke his right leg below his knee. (See Exhibit 7 and Exhibit A) Brummet testified that the two slings were just like the ones depicted in Exhibit 10<sup>7</sup>. Neither party called the only other witness to the accident, Hodges to testify<sup>8</sup>.

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<sup>7</sup> Employer argues that the pictures in Exhibits 6-10 did not represent the accident scene. Although the Division's pictures in Exhibits 6-10 may not have recreated the accident site with one hundred per cent accuracy, the Division can only recreate the scene as they learn the information from Employer's witnesses such as Plant Manager Miller. Additionally, the Employer told Varela that the hatch cover involved in the accident had been shipped away prior to the investigation.

Based on the foregoing, the Division established by a preponderance of the evidence that Employer violated Section 5042 subdivision (a)(6).

**2. Did the Division establish a rebuttable presumption that the violation was serious?**

Labor Code § 6432, subdivision (a) 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 term “realistic possibility” means that it is within the bounds of human reason, not pure speculation. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).) The occurrence of a serious injury is proof that a serious injury is a realistic possibility.

District Manager Alfred Varela (Varela)<sup>9</sup> testified based upon his education, training<sup>10</sup>, and over 22 years of experience in the health and safety field. Varela testified that his division-mandated training is current. He conducted a prior injury investigation with this same Employer where a heavy object fell on a worker causing a compound fracture. Opinions that are sufficiently supported by education, training, or experience are sufficient to support a finding. (See *Home Depot USA, Inc. #6617*, Home Depot, Cal/OSHA App. 10-3284, Decision After Reconsideration (Apr. 8, 2010).) Therefore under Labor Code section 6432 subsection (g), Varela is deemed competent to offer testimony to establish each element of the serious violation.

Varela conducted an opening conference with Plant Manager Jim Miller (Miller). According to Varela, Miller and other employees were present but he did not get the names of all the employees. Varela testified that Plant Manager Miller told him the cover/door in the accident was similar to the one depicted in Exhibits 6 through 10. Varela testified that he took the pictures depicted in Exhibits 6 through 10 based on his interview with Miller. Varela testified that someone in the group (he was not sure if it was Miller) explained that Brummet placed the hooks on the frame and the sling slipped and fell. Varela also interviewed the only witnesses to the accident, Brummet and Hodges.

Varela’s opinion was that he classified the violation as serious because serious physical harm was a realistic possibility in lifting a 450 pound hatch without failing to ensure that the slings were set to avoid slippage. The most likely injuries would result in hospitalization for days. Here, Brummet was hospitalized for days which included surgery. The fact that a serious

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<sup>9</sup> Varela earned a Bachelor of Science in Business and Economics and a Bachelor of Arts in Spanish from St. Mary’s College of California in December 1981. In 1993, he was hired by the State Compensation Insurance Fund (SCIF) as a loss control consultant, which is a safety consultant hired to assist employers with their safety programs. In March 2012, he left SCIF and began working for Cal/OSHA. He was promoted to District Manager in June 2015. He has conducted approximately 150 investigations. 70 to 80 of those investigations were accident investigations.

<sup>10</sup> At the time of hearing, Varela was current in all of his Division mandated training.

injury occurred here establishes that a serious injury is not speculative. The hazard created by the violation is that assigning an employee to lift a 450 pound hatch cover that has no intended rigging points and failing to ensure that the slings do not slip could cause serious physical harm or death.

Varela is also competent, based on his education and experience, to render an opinion regarding realistic possibility of injury. Varela credibly testified that there was a realistic possibility of injury due to the hazard of lifting a 450 pound hatch without failing to ensure that the slings were set to avoid slippage. Given the hazard of failing to ensure that the slings were set to avoid slippage, there is a reasonable possibility of serious physical harm or death.

The realistic possibility of serious physical harm combined with existence of the actual hazard caused by the sling slipping is well within the definition of “serious” set forth in section 6432. The Division established a rebuttable presumption that the violation was properly classified as serious.

**4. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?**

Employer appealed the serious classification of the violation. Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to Employer to rebut the presumption.

Section 6432, subdivision (c), provides as follows:

If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

- (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).
- (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Failing to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (See *Davis Development Company*, Cal/OSHA App. 10-3360, Decision After Reconsideration (June 18, 2014).)

Employer argued that it lacked knowledge because there was no supervisor of Brummet present on the jobsite to offer advice or instructions regarding how to lift, to flip or turn over, the hatch in question. Here, Brummet credibly testified that Miller was running late on the morning

of the accident and via telephone assigned him the task to flip over a 450 pound metal cover that had no intended rigging points. According to Brummet, he had no training on the assignment given to him by Miller. Brummet testified that he had never encountered a job task such as the one that resulted in his injury. Brummet testified that he had two supervisors, Dave Rios (Rios) and Abraham Padillo (Padillo). Miller would assign him work if Rios and Padillo were not present. Brummet testified that both of his supervisors were off site on the day of the accident and as a result, the supervisor who assigned him the task of flipping the hatch was Miller. Here, Employers' failure to adequately supervise Brummet to ensure his safety was equivalent to failing to exercise reasonable diligence, and does not excuse a violation on a claim of lack of employer knowledge.

Employer failed to demonstrate that it did not, and could not, with the exercise of reasonable diligence, have known of the violations that existed at the time of the investigation. Here, Employer offered no credible evidence of steps that it took to anticipate and prevent the violation. Employer failed to meet its burden to rebut the presumptions that the violations were properly classified as serious. As a result, the serious classification of Citation 1 is sustained.

### **5. Was there a causal nexus between the violation and the serious injury?**

In order for a citation to be classified as accident related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury. (*MCM Construction, Inc.* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016), citing *Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011).)

The record supports a finding that Employer failed to ensure that the sling was set to avoid slippage. The record also supports a finding that if the rigging of the hatch had been set on intended rigging points the sling would not have slipped and the hatch door would not have fallen on Brummet, which resulted in his broken leg. The evidence shows that the door hatch weighed approximately 450 pounds. The heavy door hatch had slings which were not set to avoid slippage and thus caused the door to fall and injure Brummet.

Here, Employer's failure to ensure that the sling was set to avoid slippage led to Brummet's injury. The Division has met its burden to demonstrate a causal nexus between the violation of section 5042 and Brummet's injury. As a result, the accident-related characterization of the citation is sustained.

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

At the hearing, Employer stipulated that the penalty associated with the

Citation was calculated in accordance with the Division's Policies and Procedures.<sup>11</sup>

**Conclusion**

The evidence supports a finding that Employer violated section 5042, subdivision (a), by failing to ensure that a sling was set to avoid slippage. The Division established the serious classification and the accident-related characterization of the violation. The proposed penalty is reasonable and correctly calculated.

**Order**

It is hereby ordered that the Citation is upheld and the associated penalty of \$18,000 is sustained as indicated above and as set forth in the attached Summary Table.

Dated: October 12, 2016



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**JACQUELINE JONES**  
Administrative Law Judge

JJ:lgf

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<sup>11</sup> Pursuant to the stipulated agreement of the parties the penalty of the citation was correctly calculated at \$18,000, as reflected in Exhibit 18.

## SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**OLDCASTLE PRECAST, INC.**  
**Docket 15-R3D3-2148**

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

IMIS No. 1025083

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
15-R3D3-2148	1	1	5042(a)(6)	S A/R	Affirmed as set forth in Decision.	X		\$18,000	\$18,000	<b>\$18,000</b>
								\$18,000	\$18,000	<b>\$18,000</b>

**Total Amount Due\***

(INCLUDES APPEALED CITATIONS ONLY)

**\$18,000**

<p>NOTE: Payment of final penalty amount should be made to: Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142</p>
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\*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: JJ/lgf  
POS: 10/12/2016

**APPENDIX A  
SUMMARY OF EVIDENTIARY RECORD**

**OLDCASTLE PRECAST, INC.**

**Docket 15-R3D3-2148**

**DATE OF HEARING: March 10, 2016**

**DIVISION'S EXHIBITS- Admitted**

<b><u>Exhibit Number</u></b>	<b><u>Exhibit Description</u></b>
1.	Jurisdictional Documents
2.	Photocopy of Photo <sup>12</sup> of Employer location
3.	Photo of the North and South Gantry Cranes
4.	Photo of the top part of the Gantry Crane
5.	Photo of chain with lifting cable-circled in red
6.	Photo 4 x 4 flat top
7.	Photo of metal hatch
8.	Photo of hooks that join the chain hoist
9.	Photo hooked to latch
10.	Photo is close-up of hooked to latch
11.	Rigging safety training roster
12.	Safety training attendance
13.	Risk reduction targets
14.	Form 36
15.	Business license
16.	Document Request Form
17.	1BY
18.	Division's C-10 Penalty Proposed Worksheet

**EMPLOYER'S EXHIBITS – Admitted**

<b><u>Exhibit Letter</u></b>	<b><u>Exhibit Description</u></b>
A.	Narrative Summary
B.	Investigation Summary

**Witnesses Testifying at Hearing**

Raymond Brummet

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<sup>12</sup> All photographs are photocopies.

*Jones*

Alfred Varela

**CERTIFICATION OF RECORDING**

I, Jacqueline Jones, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled 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.

Dated: October 12, 2016

*Jacqueline Jones*

—  
**Jacqueline Jones**  
—  
Administrative Law Judge