

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

MARCO CRANE & RIGGING
10168 Channel Road
Lakeside, CA 92040

Employer

Docket No. 01-R3D2-3329

**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 Marco Crane & Rigging (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

On May 10, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation inspection at a place of employment maintained by Employer at 8775 Costa Verde Boulevard, San Diego, California (the site). On August 6, 2001, the Division issued a citation to Employer alleging a serious violation of section 4999(h)(1) [Holding the load] of Title 8, California Code of Regulations¹, with a proposed civil penalty of \$2,700.

Employer filed a timely appeal contesting the existence and classification of the alleged violation, the reasonableness of both the abatement requirements and the proposed civil penalty, and raising twelve affirmative defenses.

On April 9, 2003, a hearing was held before Jack L. Hesson, Administrative Law Judge (ALJ), in San Diego, California. Ron Medeiros, Attorney, represented Employer. David Pies, Staff Counsel, represented the Division.

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

On July 8, 2003, the ALJ issued a decision denying Employer's appeal and assessing a civil penalty of \$2,700 for the violation.

On August 12, 2003, Employer filed a petition for reconsideration. The Division did not file an answer. The Board took Employer's petition under submission on October 1, 2003, and stayed the decision of the administrative law judge pending a decision after reconsideration.

EVIDENCE

On May 10, 2001, an employee of Employer was using a lattice boom crane as part of a process to assemble a larger tower crane. During the assembly process, an accident occurred when the load slipped resulting in injury to two iron workers on the tower crane. After investigating the accident the Division cited Employer for a serious violation of section 4999(h)(1), alleging that the drum holding mechanism had not been properly engaged despite the fact that the load was held for a "considerable time" prior to the accident.

Mel Dunn (Dunn), the inspecting officer for the Division, conducted an accident investigation at the site. Dunn explained that in order to complete the assembly process of the tower crane, separate "jib" sections must be hoisted into position by the lattice boom crane, at which point the sections are bolted together by iron workers on the fixed tower crane. However, when attaching jib sections, the iron workers must first bolt the "butt pins" while the load is held at an angle, and then direct the crane operator to hoist the jib into a horizontal position to secure the top pins.

Dunn testified that the iron workers had set the "butt pins" of the last jib section and were in the process of aligning the jib to bolt the top pins. The Employer's Crane Operator, Marshall Sanders [Sanders], told Dunn that he was receiving directions through a telephone system and thought he had "dogged out", or set an additional brake mechanism, when he was told by the iron workers to stop hoisting the load. However, after Sanders removed his foot from the brake the load slipped, resulting in minor injuries to two iron workers on the jib. Although he never asked Sanders for a time estimate, Dunn concluded that the last section of the jib was being held by the smaller crane for 15 to 30 minutes immediately prior to the accident.

Edward Stanton (Stanton), manager for Coker Equipment Inc., testified that he was on the tower crane prior to the accident, but left to retrieve a fax after the first two pins had been set. Stanton estimated that his absence from the crane was in excess of twenty minutes, and that he returned to the site to observe the position of the load immediately prior to and immediately after the accident. However, Stanton stated that after the accident, Sanders told him that he removed his foot from the brake to reach for a radio when he noticed that the load had slipped.

Sanders, who has twenty years of experience operating cranes, testified that while placing jibs he has to rely on signals and radio directives from iron workers to precisely align the holes of the jib for the bolting process to be completed. According to Sanders, immediately prior to the accident, he received a signal over the radio to hoist up the load after moving the jib to the left. After complying with this request, he was then told to stop hoisting, which he did. However, with the load suspended, Sanders was given an incomprehensible communication over the radio. Believing he had “dogged out” the brake, Sanders took his foot off the brake to reach for the radio to clarify the iron worker’s request, at which point he noticed that the drum was turning and reapplied the brake. Sanders testified that it was a matter of seconds between the time he halted the load and when he noticed that the load had slipped.

ISSUES

1. Is section 4999(h)(1) so vague as to be unenforceable?
2. Did Employer’s actions constitute a violation of section 4999(h)(1)?
 - a. Does section 4999(h)(1) apply to the circumstances of this case?
 - b. Was Employer in violation of section 4999(h)(1)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. Section 4999(h)(1) is not so Vague as to be Unenforceable.

Section 4999(h)(1) reads as follows:

When a load of any kind is to be suspended for any considerable time, the drum holding mechanism shall be used in addition to the brake which shall also be applied.

Employer argues that section 4999(h)(1) is so vague as to be unenforceable because the regulation provides no definition or guidelines as to what constitutes “considerable time”. Employer argues, therefore, that it is not able to deduce what the requirements of the regulation are.

Before determining the validity of the regulation, the Board finds it necessary to analyze the statutory language of section 4999(h)(1). Although Employer argues that the language “considerable time” alone makes the regulation unenforceably vague, a phrase will not be analyzed in isolation, and thus must be viewed in the context of the surrounding language. *Teichert Construction*, CAL/OSHA App. 98-2512, Decision After Reconsideration (March 12, 2002).

Section 4999(h)(1) applies to a load which is “**to be** suspended for any considerable time.” The Board must infer a deliberate choice by the Standards Board in its use of the words “to be suspended” because the Board, in construing regulations, will give every word some significance, leaving no part useless or devoid of meaning. *Orange County Scaffold, Inc.* CAL/OSHA App. 99-223 (March 8, 2002).

Accordingly, in giving full effect to the language enacted, the Board interprets the words “to be suspended” as referring to a future condition where a load is held without movement for a considerable time. Under this interpretation, the safety order imposes an obligation to anticipate how long a load will be suspended since it requires that an assessment be made regarding the length of time a load will be held. If such suspension is to be maintained for a considerable time, the obligation to apply the drum holding mechanism in addition to the brake is invoked.

The Board’s interpretation of the language is consistent with the preventive purposes of the Act. See *Janco Corp.*, CAL/OSHA App. 99-565 (Sept. 27, 2001). If the regulation had been drafted to apply to a load which “is suspended for a considerable time” an ordinary reading would have revealed that the regulation is to be applied based on the actual time of suspension. However, since the Standards Board inserted the words “to be” prior to the word “suspended”, a reasonable inference is that the Standards Board intended that an assessment or evaluation be made prior to or at the time a load is held without movement.

Additionally, the phrase “considerable time” also requires interpretation. According to Webster’s New World Dictionary and Thesaurus (2nd ed. 2002), “considerable” is defined as “much or large”. As this definition provides no guidelines regarding how this phrase is to be applied, the Board must analyze the intent of the Standards Board in drafting section 4999(h)(1).

Initially, a reading of the regulation reveals that the Standards Board’s intent was to protect employees from the hazards associated with suspended loads. However, by including the phrase “considerable time”, the Standards Board established a condition for application of the regulation. The Board finds that the inclusion of this conditional phrase was meant to distinguish between loads based on the anticipated length of time which that load is to be suspended. The Board believes the Standards Board sought to make this distinction because they recognized that the danger of a suspended load varied depending on the circumstances in which a load is to be held.

Therefore, according to the Board’s interpretation of section 4999(h)(1), the Board finds that the regulation will apply based not on the actual time of suspension, but on whether a crane operator could have reasonably anticipated, under the circumstances, that the load would be held for a

“considerable time”.² Circumstances which should be taken into consideration in determining whether the “considerable time” threshold has been met include, but are not limited to, proximity of the load to employees, the height at which the load is suspended, the type of load, the purpose for which the load is suspended, and the operation being performed with the load. If the required assessment of the circumstances reasonably indicates that a load will be held for a “considerable time”, then the duty to utilize the drum holding mechanism exists.

Next, in determining whether section 4999(h)(1) is so vague as to be unenforceable, the Board will analyze whether the regulation provides employers fair warning of the conduct required to avoid a violation. *Department of Transportation*, CAL/OSHA App. 79-1039, Decision After Reconsideration (Oct. 16, 1980). *Rodoni-Becker Co., Inc.* CAL/OSHA App. 75-651, Decision After Reconsideration (Oct. 31, 1977). Accordingly, by providing that a drum holding mechanism be applied when a load is to be suspended for a considerable time, section 4999(h)(1) affords employers fair notice of what conduct is required of them in order to comply with the regulation. Therefore, the Board finds that section 4999(h)(1) is not so vague as to be unenforceable because it provides employers fair warning of the conduct required to avoid a violation.

2. Employer’s Actions did not Constitute a Violation of Section 4999(h)(1).

a. Section 4999(h)(1) Applies to the Circumstances of this Case.

Employer contends that section 4999(h)(1) did not apply to the accident for which Employer was cited because Sanders was not holding the load static at the time of the accident. Instead, Employer argues that Sanders was in fact hoisting the load immediately prior to the accident. As such, Employer believes either section 4999(c) [Moving the load]³ or section 4999(e) [During hoisting]⁴ was the more appropriate regulation to cite Employer for.

A reading of both section 4999(c) and section 4999(e) reveals that each regulation applies to loads which are in motion. Although the assembly

² Section 4999(h)(1) contains no language which suggests that the regulation applies only at the time suspension commences. Therefore, if a crane operator, under the circumstances, could not have reasonably anticipated prior to or at the inception of the suspension that the load would be held for a considerable time, the regulation has not been violated. However, during this suspension, if later events occur which would lead a crane operator to reasonably anticipate that the load will from that point be suspended for a considerable time, the regulation will apply.

³ Section 4999(c) reads: “Moving the load. The individual directing the lift shall see that: (1) The crane is properly leveled for the work being performed and blocked, where necessary; (2) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches; (3) Ropes shall not be handled on a winch head without the knowledge of the operator. While a winch head is being used, the operator shall be within convenient reach of the power unit control lever.”

⁴ Section 4999(e) reads: “During Hoisting. (1) There shall be no sudden acceleration or deceleration of the moving load. (2) Inadvertent contact with obstructions shall be prevented.”

process in this case required the movement and hoisting of the load in order to precisely align the jib, Sanders revealed that the load was being held without movement, and therefore in a suspended state, at the time of the incident.

Sanders testified that the last order he completed which he received from the iron workers constructing the tower crane was to stop the load. Accordingly, as Sanders' testimony establishes that immediately prior to the accident the load was being held in a suspended state, neither section 4999(c) or section 4999(e), both of which require movement, were applicable to Employer's circumstances.

On the other hand, section 4999(h)(1) applies to loads which are being held suspended without any movement. According to Webster's New World Dictionary and Thesaurus (2nd ed. 2002) "suspend" is defined as "to stop temporarily". According to Sanders' testimony, his final act prior to the accident was to stop the hoisting process, thereby holding the load in a suspended state. As such, the Board finds that section 4999(h)(1) was the proper regulation to cite Employer for because Sanders was holding the load in a static state immediately prior to the accident.

b. Employer did not Violate Section 4999(h)(1).

Employer disputes the Division's contention that the load was suspended for a "considerable time". Instead, Employer believes the evidence establishes that the Division erred in concluding that Sanders held the load for twenty minutes prior to the accident.

However, as previously discussed, a violation of section 4999(h)(1) is based on the anticipated time, and not actual time, of suspension. Therefore, in determining whether a violation of the regulation occurred, the Board will have to analyze that testimony which addressed what the period of suspension was reasonably anticipated to be based on the circumstances surrounding the assembly process.

Neither Dunn's nor Stanton's testimony provided insight with regard to what actions Sanders took to affect the movement of the load immediately prior to the accident. Dunn never addressed this issue and Stanton testified that although he was on the crane at the beginning of the jib assembly process, he left that site in excess of twenty minutes to retrieve a fax. Consequently, Stanton, upon returning to the base of the crane after his lengthy absence, heard a boom and then looked up to see the aftermath of the accident. Therefore, Stanton was not a witness to any activity which occurred on the crane immediately prior to the accident.

Accordingly, as neither Dunn nor Stanton could determine what activities occurred to the load immediately prior to the accident, Sanders' testimony, which was not contradicted by any witness, must be relied upon.

Sanders revealed that the assembly process required him to make a number of slight alterations to the position of the load in order to precisely line up the jib for attachment. Dunn also acknowledged in his testimony that the assembly process requires the crane operator to make certain movements to the load in order to place the jib into position for the iron workers to attach the bolts. Thus, prior to halting the load, Sanders had made, as required by the assembly process, a number of adjustments to the position of the jib.

Moreover, because of the specificity required in regard to the positioning of the jib, Sanders stated that after he halted the load, and reached for the radio to clarify an incomprehensible communication, he expected to receive a further request to move the load into its proper position. Thus, as Sanders suspended the load seconds before the accident occurred, he had already been required to make a number of slight alterations to the position of the jib. Moreover, he expected, after twenty years of experience operating cranes, that additional adjustments to the jib would be requested immediately because of the precision required. The Board finds, based on these facts, that Sanders could not have reasonably anticipated, under the circumstances, that the load would be suspended for a “considerable time”.

Accordingly, the Board concludes that Employer was not in violation of section 4999(h)(1).

DECISION AFTER RECONSIDERATION

Employer's appeal is granted and the citation and civil penalty are set aside.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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