

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

MARIN STORAGE AND TRUCKING
dba RELIABLE CRANE
801 Lindberg Lane
Petaluma, CA 94952

Employer

Docket No. 01-R1D5-3833

**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 granted the petition for reconsideration filed in the above-entitled matter by the Division of Occupational Safety and Health [Division], makes the following decision after reconsideration.

JURISDICTION

Between June 19 and 21, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation based upon observed unsafe conditions at a place of employment maintained by Employer at 1300 Farmers Lane, Santa Rosa, California (the site). On September 21, 2001, the Division issued a citation to Employer alleging general violations of section¹ 3381(a) [head protection] and section 5002 [avoiding exposure of employees to the hazard of overhead loads] with a proposed civil penalty of \$300 for each alleged violation.

Employer filed a timely appeal contesting the existence and classification of the violations and the reasonableness of both the abatement changes required and the proposed civil penalties. Employer also raised 12 affirmative defenses.

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

On October 18, 2002, a hearing was held before Dennis M. Sullivan, Administrative Law Judge (ALJ), in Santa Rosa, California. Ron Medeiros, Attorney, represented Employer. Amy Martin, Staff Counsel, represented the Division.

On December 9, 2002, the ALJ issued a decision granting Employer's appeal.

On January 9, 2003, the Division filed a petition for reconsideration. Employer filed an answer on January 28, 2003. The Board took the Division's petition under submission on February 24, 2003.

**FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION**

Employer was at a job site assisting in the removal of a large fluorescent light fixture. Employer furnished a truck-mounted crane and the crane operator. Division Compliance Office Doug Woods [Woods] observed two men at the site. They were not wearing hard hats and they appeared to be under a load suspended by the crane. The two men identified themselves to Woods as employees of Glennco, a different employer at the site. According to Woods one man said his name was Fred Hall [Hall], the other man said he was a superintendent for Glennco and that Hall was his worker. Woods issued a citation to Employer because it had created the hazard. A "creating employer" at a multi-employer worksite may be liable for the substantive violation pursuant to section 336.10.

The critical question presented to the ALJ and in the Petition for Reconsideration is whether the Division established that an employee of any employer was exposed to the load lifted by Employer's crane operator. The Appeals Board has considered the decision of the ALJ and the record and finds that the ALJ addressed each issue raised by the petition. The Board agrees with the ALJ that the circumstantial evidence presented by the Division, to the effect that men at the site were working cooperatively, did not tend to prove that the person under the load was an employee. Moreover, the only evidence on that point was hearsay.

On that basis, the Board affirms the ALJ's summary of evidence, rulings, findings, and conclusions and adopts the decision in its entirety. The ALJ's decision is attached hereto and incorporated herewith.

DECISION AFTER RECONSIDERATION

The ALJ's decision granting Employer's appeal from Citation 1, Items 1 and 2 is affirmed and consequently no civil penalty is assessed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: November 20, 2003