

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

In the Matter of the Appeal of:

TRADEMARK CONSTRUCTION CO. INC.  
35-325 Date Palm Dr., Suite 225  
Cathedral City, CA 92234-7009

Employer

Dockets 12-R4D1-0096 and 0097

**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 by Trademark Construction Co. Inc. (Employer) matter under submission, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on September 19, 2011, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a construction site in Los Angeles, California maintained by Employer. On December 21, 2011, the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>1</sup>

Citation 1 alleged a serious violation of section 1613.7 [continued use of crane after contact with overhead power lines]. Citation 2 alleged a serious violation of section 2946(b)(1) [minimum 10-foot clearance impaired by rope of tower crane].

Employer filed timely appeals of the citations. Employer did not appeal the citations' classification or reasonableness of the penalties.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on May 8, 2013. The Decision denied Employer's appeal.

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<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division filed an answer to the petition.

### **ISSUE**

Did the ALJ correctly find that the Division demonstrated violations of sections 1613.7 and 2946(b)(1)?

### **EVIDENCE**

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

On September 16, 2011, a report of a crane making contact with a power line was made to the Division. Safety Engineer Jose Cedro (Cedro) was assigned to inspect the matter, and visited the worksite on September 19, 2011. Cedro conducted an opening conference with representatives of the general contractor, Alpha Construction, as well as with Richard Wilson (Wilson), the CEO of Employer, a framing subcontractor on the job who had leased the crane from Coast Crane Company (CCC).

Cedro interviewed the crane operator who had been involved in the incident, Art Velasquez (Velasquez).<sup>2</sup> Velasquez told Cedro that no one told him to stop using the crane after the incident. He explained that he had been retrieving a trash container from the four story building under construction. The container was lowered to the ground. Velasquez emptied the trash container with a Gradeall and then set it back down. However, after emptying the trash with the Gradeall he set it down in a different spot than where it was originally lowered to the ground with the crane. Using the crane, Velasquez tried to pick up the trash bin to place it back on the roof. As he maneuvered, there was an electrical arc flash from the nearby power lines.

Frank Ramirez (Ramirez), an employee of CCC, was called to the site to inspect the crane, which was owned by CCC. He received a call from his supervisor, Pablo Hernandez (Hernandez) at around 8 a.m., and with traffic

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<sup>2</sup> In Employer's petition for reconsideration, Employer appears to make a hearsay objection to statements made by Velasquez to Cedro. The ALJ found in a footnote on p. 2-3 that Velasquez's statement was a declaration against interest, as he was deceased at the time of the hearing. Employer in its petition states that "Velasquez's statement is hearsay and Velasquez was alive and employed in Yucaipa, California" (Employer Petition, p. 2). The ALJ relied on a statement of Employer's representative, Richard Wilson, at hearing, in finding Velasquez to be deceased; the Division objected to Employer's attempt to submit Velasquez's daily report from September 16, 2011, and in response, Employer stated that Velasquez was no longer alive, specifically, that Velasquez had been in poor health at the time of the accident and had passed away some time thereafter. We will assume, without deciding, that the ALJ's ruling on hearsay is proper, as our decision does not rest on Velasquez's statements. Employer does not explain the apparent discrepancy in the petition for reconsideration.

arrived at the worksite around 9:30 that morning. Upon arrival Ramirez saw that the crane was in operation and was offloading materials from a truck. He told Velasquez the crane would need to be put out of service for an investigation and first checked the crane's weathervane settings.<sup>3</sup> Ramirez concluded the weathervane settings were correct and did not cause the crane to hit a power line. He then examined the hoist cable, and was able to visually see damage. (Ex.s 5D, 5E). Ramirez found the damage was from the hoist cable striking a power line; in his opinion, there was no other accident that would cause similar damage.

Ramirez marked the damaged area with paint. He recalled Wilson asking him what had happened and responding that Velasquez stated that an arc had hit the spreader bar. Richard Rios (Rios) from CCC also visited the worksite on the day of the incident, and concurred in Ramirez's assessment that the damage to the hoist cable was due to contact with an electrical arc or by actual contact with the power lines. According to Rios, in his experience, which included several other inspections of cranes being struck with power lines, no other damage looks like the damage caused by contact with electricity.

Ramirez stated that there was a danger of the cord being cut through completely if the crane continued to operate. In that case, the load could be lost, leading to an injury of someone under the load. Rios also noted that continued operation of the crane could cause further damage.

Daniel Haerle (Haerle), an Electrical Distribution Mechanic Supervisor from the electric trouble section unit with the Los Angeles Department of Water and Power (LADWP) responded to a call on September 16 of "lights out" in the area near the construction project where the crane incident occurred. Approximately 1430 LADWP customers in the area lost power. Haerle stated the power line was running 4800kV, and based on his knowledge and experience, did not believe an arc could be created from the line to a crane that was more than 10 feet from the line. Specifically, Haerle stated that in order to create the power outage, the crane had to somehow push the outermost conductor away from the power pole and into the middle conductor, thereby causing a short circuit.<sup>4</sup> According to Haerle, a 10 foot arc would be impossible on the type of circuits used by LADWP. Haerle also stated that the type of damage from the wires being struck could vary, and that he would expect there to be pitting to the cables of the crane.

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<sup>3</sup> When a crane is in "weathervane" mode, as described by testimony, it is free to coast or sway beyond the distances set in top tracing. This function ensures that the crane is able to withstand heavy winds.

<sup>4</sup> Haerle explained that the power lines are a delta system, rather than a Y system, which means they have no relationship to ground. Haerle stated that a ten foot arc is impossible; if it was able to jump 10 feet to the crane it would easily jump 15 inches to the adjacent phase which has more voltage potential.

Employer called Terry Pearson (Pearson) of Flash Industries to testify. Pearson's company services hoisting equipment, including Gradealls and cranes for Employer and other builders. Pearson was present when Jason Denning of Cal/OSHA initially inspected the crane and set the top tracing limits.<sup>5</sup> (Ex. A). He received a call from Wilson on September 16, 2011, asking him to visit the worksite and inspect a crane that had been hit by an arc or had made contact with a power line. Pearson arrived at the site from Venice at 8:15 or 8:20 a.m. He completed an inspection of the crane and marked the three damage points with orange tape (or paint) and concluded that the damage had been caused by pinch points rather than electrical contact.<sup>6</sup> He did not find any electrical damage to the crane's electrical systems, and the damage did not look similar to the one prior instance of electrical damage to a crane Pearson had seen.

Pearson concluded that there would not be catastrophic failure if the crane continued in use. He had Velasquez test capacity by lifting 2000 pounds of lumber from a truck, some of the last work left on the site for the crane which was scheduled to be disassembled and removed on September 20. Pearson did not recall if he spoke to anyone from CCC, did not recall what time he left the jobsite, and neither Employer nor Pearson had a copy of his September 16, 2011 inspection report.

### **DECISION AFTER RECONSIDERATION**

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration and the Division's answer to it.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

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<sup>5</sup> Top tracing limits set the physical boundaries of where the crane can go.

<sup>6</sup> Paint or tape markings made by either Ramirez or Pearson do not appear to be visible in the photographic exhibits.

Employer petitioned for reconsideration on the basis of Labor Code section 6617(c) and (e).

### **Citation 1**

Citation 1 alleges a serious violation of section 1613.7, which reads as follows:

#### Inspections- Severe Service

Where the severity of use/conditions is such that there is a reasonable probability of damage or excessive wear (such as loading that may have exceeded rated capacity, shock loading that may have exceeded rated capacity, prolonged exposure to a corrosive atmosphere), the employer shall stop using the equipment and a qualified person shall:

- (a) Inspect the equipment for structural damage to determine if the equipment can continue to be used safely.
- (b) In light of the use/conditions determine whether any items/conditions listed in Section 1613.6 need to be inspected; if so, the qualified person shall inspect those items/conditions.
- (c) If a deficiency is found, the employer shall follow the requirements in subsections 1613.6(d) through (f).

The Division's citation alleges that Employer, on the morning of September 16, 2011, did not stop use of the crane, but continued the crane in use until inspection later in the afternoon.

The evidence establishes that Velasquez, through operation of the crane, created either contacted with the electrical wires, or came into close enough proximity to cause an arc flash. The un rebutted testimony of Haerle, an employee with LADWP with knowledge of the power lines in the area of the accident, suggests that contact was the only possible way in which the accident could occur. CCC's accident report also suggests that actual contact was the likely cause of the accident. The report states:

Operator initially stated that he was lifting a debris box from grade with the jib slightly offset towards the power lines from being directly vertical over the center of the load. He stated that when he picked the load it swung towards the power line and he thought either the spreader bar he was using, or the rigging below the spreader bar, contacted the power line. A large electrical arc was observed and a power line transformer was blown. Later the operator said that at the time of the accident he did not have a

load on the hook and that the crane swung towards the power line on its own. (Ex. 6).

Testimony from the two CCC employees who inspected the cable, as well as Haerle and Cedro, establish that the pitting in the crane's cable was caused by electricity. Testimony also demonstrated that the damage to the cable reduced the strength of the cable. Cedro used the photographs in evidence to illustrate how several strands in the cable had broken due to the electrical contact. (Ex. 5D). He testified that if the same strands had also broken at other points along the cable where electrical contact occurred, the wire strength would be cut by up to one half. (Ex. 5E). Cedro explained that this could ultimately lead to a load falling in an area where an employee was working, resulting in death or serious injury.

Employer argues in its petition for reconsideration that it took the crane out of service after an arc flash occurred, and summoned Pearson of Flash Industries to inspect the crane as a "qualified person". Pearson, finding no electrical damage and only three "pinch points" on the wire rope cable, deemed the crane fit for light usage loads.

A "qualified person" is defined in the Construction Safety Orders as: A person designated by the employer who by reason of training, experience or instruction has demonstrated the ability to safely perform all assigned duties and, when required, is properly licensed in accordance with federal, state, or local laws and regulations. (Section 1504).

While Employer believes Pearson to have the on-the-job experience necessary to properly inspect a crane for structural damage and determine if it may continue in use, the Division disputes that assertion. While Pearson is an individual with working knowledge of various types of construction equipment, his experience with crane accidents involving electrical arc flashes is limited, as is his training. Pearson had only seen one crane accident involving high voltage electrical damage, five to six years prior to the incident at issue, and had attended only one training on cranes 17 years before the accident. Pearson admitted he was unfamiliar with the regulatory requirements of crane inspections. (See, for example, section 1613.10 Inspections - Wire Rope). Pearson testified that he was not present during the inspection conducted by CCC, and that he would defer to a recommendation by CCC that the crane was not safe for use. While Pearson's intentions may have been good, his relative inexperience with this kind of accident and lack of knowledge of the rules and regulations made him unfit to fill the role of "qualified person" in this instance of a crane interacting with high voltage equipment.

By failing to halt operation of the crane until inspection by a qualified person could take place, Employer was in violation of section 1613.7. Employer did not appeal the classification of either citation, nor did Employer move to amend its appeal. The parties did not litigate the issue of the classification of the penalties. Thus, the serious classification is established as a matter of law. (See, *Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013).)

### **Citation 2**

Citation 2 alleges a serious violation of section 2946(b)(2), Provisions for Preventing Accidents Due to Proximity to Overhead Lines. The safety order requires:

(b) Clearances or Safeguards Required. Except where overhead electrical distribution and transmission lines have been de-energized and visibly grounded, the following provisions shall be met:

[...]

(2) The operation, erection, handling, or transportation of tools, machinery, materials, structures, scaffolds, or the moving of any house or other building, or any other activity where any parts of the above or any part of an employee's body will come closer than the minimum clearances from energized overhead lines as set forth in Table 1 shall be prohibited.

Exception: Amusement rides or attractions shall not be located under or within 15 ft. (4.57 m) horizontally of conductors operating in excess of 600 volts.

Operation of boom-type equipment shall conform to the minimum clearances set forth in Table 2, except in transit where the boom is lowered and there is no load attached, in which case the distances specified in Table 1 shall apply.

The citation alleges that the minimum ten-foot clearance (as described in Table 1) from the 4800kv power lines was impaired by the cable of the tower crane, causing an electric arc to occur.

Employer points out several facts in the record related to Citation 2 in its petition, such as Ramirez's finding that the crane's weathervane settings appeared to be properly set, and that the weathervane had been set with the assistance of a Cal/OSHA employee to keep the crane 10 feet away from the power lines. (Ex. 1). The report from CCC states,

[t]he zoning limits were checked and found to be properly functioning as set and fully operational. The crane was found to be out of weathervane mode. [...] The operator was asked to recreate the situation leading to the power line contact, but with the hook block raised above the level of the power lines, to try to determine how contact could have occurred. Again, the zoning system functioned properly and not (sic) issues with the crane were observed. (Ex. 6).

While no testimony at hearing definitively establishes what lead to the accident, the unrebutted testimony of LADWP's supervisor Haerle did provide persuasive testimony stating that in order for the electrical arc and power outage to occur, the crane had to be closer than 10 feet to the power lines. Haerle stated that it was "impossible" for a 10 foot arc to occur on these particular lines, and explained that the power outage was a result of an outermost conductor being pushed away from the power pole and into the middle conductor, causing the short circuit. Such an occurrence necessitates physical contact between the crane and the line. As discussed above, the damage to the crane's rope was described as being electrical in nature by multiple witnesses.

Haerle, a disinterested party with expertise in electric work, who supervised the employees tasked with restoring power of LADWP's customers, provided unrebutted testimony regarding the impossibility of an arc flash. Employer theorized that weather conditions may have created an errant arc flash, but no credible scientific research or empirical evidence was offered to support Employer's testimony, and the ALJ was within her authority to reject this speculation. "While other causes are theoretically possible, they do not exist for purposes of judicial review without evidence to substantiate such possibilities." (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012), citing *CA Transportation*, Cal/OSHA App. 08-2173, Denial of Petition for Reconsideration (Dec 21, 2011) [Board would be speculating without evidence in the record]; *People v. Ramos* (1997) 15 Cal. 4th 1133, 1157).

The Division was able to demonstrate by a preponderance of the evidence that Employer failed to observe the minimum clearance lines, in this instance, 10 feet, as required by section 2946(b)(2). Employer disputes the finding that there was a realistic probability of serious injury due to a violation of the safety order. As discussed above, Employer's failure to appeal the classification of the violations results in the classification being established as a matter of law.

Therefore, we affirm the result of Decision sustaining the citations.

ART CARTER, Chairman  
ED LOWRY, Board Member  
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
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