

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

*In the Matter of the Appeal of:*

**SMUD**  
**P.O. Box 15830, B-203**  
**Sacramento, CA 95852**

Employer

**DOCKET(s) 08-R2D1-4887**  
**through 4889**

**DECISION**

**Background and Jurisdictional Information**

Employer is a municipal utility provider. Between August 18, 2008, and October 31, 2008, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Gary R. McIver, Jr. (McIver) conducted an accident investigation at a place of employment maintained by Employer at Madison Avenue near Mariposa, Citrus Heights, California (the site). On December 1, 2008, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations:<sup>1</sup>

| <u>Citation/Item</u> | <u>Section</u>   | <u>Classification</u> | <u>Proposed Penalty</u> |
|----------------------|--|-----------------------|-------------------------|
| 1/1                  | 2940.7(d)(1)(A)  | Serious               | \$6,750                 |
|                      | [failure to ensure a digger derrick truck was not left unattended while a power pole was suspended]                |                       |                         |
| 2/1                  | 5002   | Serious               | 6,750                   |
|                      | [failure to ensure a job was controlled in a manner that did no expose employees to the hazards of overhead loads] |                       |                         |
| 3/1                  | 4999(b)(1)   | Serious               | 18,000                  |
|                      | [failure to ensure that a load was properly attached by means of slings or other suitable and effective means]     |                       |                         |

Employer filed timely appeals contending that the safety orders were not violated, the classifications were incorrect, and the proposed civil penalties unreasonable. Employer attached a list of defenses.

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

This matter came on regularly for hearing before Barbara R. French, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Sacramento, California, on November 5, 2009. Employer was represented by Robert Peterson, Esquire. The Division was represented by Allyce Kimerling, Staff Counsel. Oral and documentary evidence was introduced by the parties and the matter was continued for further hearing. On April 28, 2010, the parties decided to submit the matter, and established a briefing schedule which allowed for a submission date of June 10, 2010, which date was extended upon the undersigned ALJ's own motion to August 23, 2010.

### Law and Motion

The parties stipulated that as a result of the accident, the injured employee (Josh Ferrell) received a serious injury within the meaning of §330(h). The parties stipulated that the proposed civil penalties for Citations 1 and 2 were properly proposed and calculated in accordance with the Division's policies and procedures.

#### Docket No. 08-R2D1-4887

Citation 1, Item 1, Serious, §2940.7(d)(1)(A)

#### Docket No. 08-R2D1-4888

Citation 2, Serious, §5002

#### Docket No. 08-R2D1-4889

Citation 3, Serious, §4999(b)(1)

### Summary of Evidence

In Citation 1, Employer was cited for failing to ensure that a digger derrick truck was not left unattended while a load was suspended.

In Citation 2, Employer was cited for failing to ensure that operations were conducted in a manner that avoided exposure of employees to the hazards of overhead loads.

In Citation 3, Employer was cited for failing to ensure that a load was attached to the hook by means of slings or other suitable and effective means.

Adam Cole (Cole) testified for the Division that he is a pre-apprentice journeyman lineman in the electrical field. He undertook an apprenticeship with SMUD for 3 ½ years consisting of "on the job training" and 8 months

"work on the ground." He received training at a school for 10 weeks. Through an apprenticeship program an apprentice lineman becomes a journeyman lineman.

On July 31, 2008, Cole was working on a five member on-call line crew when the crew was assigned to replace two 45-foot wooden power poles that were hit and broken by a car at the same location. Cole and the crew, which included Ferrell, the employee who was later struck by a falling power pole, arrived at the scene around 5:00 AM. Cole identified the truck the crew was using (photograph Exhibit 4) as a digger derrick truck or line truck, which has "claws" or "pole grabbers" over the cab to guide the pole. According to Cole, the grabbers keep the top of the pole from moving around as it is installed in the ground. He identified photograph Exhibit 8 as a drawing of the scene. Cole identified various components of the digger derrick on photograph Exhibit 5; and Exhibit 6, a close-up of the winch line depicted in Exhibit 5. The winch line, a drum with rope, powered by the truck engine and hydraulics, is used to lower or lift objects.

To place a pole into a hole in the ground, the crew would unstow the boom, which has three stages; lift the boom up to have some of the stages go forward; lower the winch line; attach the winch line to the lower end (the butt or bottom) of the pole; and winch-up to stand the pole up. The boom directs the position of the pole. The grabbers are not used to lift the pole without a winch since it "wouldn't be secure." To secure the load, "you have to get the digger derrick on it with a winch line to keep the pole up in the air." If the pole is not in the ground, it has to be supported with a rope or by the grabbers on the digger derrick truck.

The crew was at the site for 15 minutes to ½-hour before the accident. During that time, no one had attached the accident pole to the winch but Cole was "getting ready to do it." The crew foreman, Greg Smelser (Smelser), was by the first pole repairing an underground line approximately 500-feet away from the accident pole at the time of the incident. Cole helped repair the first pole and then went to the broken accident pole. The butt of the pole was sheared off at the sidewalk level. The pole was broken in two places with the top of the pole still hanging from cross arm bolts attached to two de-energized high voltage and low voltage lines 15 to 20-feet in the air. The middle of the pole was lying at an angle touching the ground. Two ropes were tied to the lower broken piece.

Carl Keehn (Keehn) attached the grabbers to the pole but it was "floating in the air" since the winch was not attached to lower the pole to the ground - "they never got to it." The area below the pole was not barricaded. The crew had not been told to stay away from the area. To attach the winch, they had to wrap a steel sling or steel rope with "eyes" (an oblong loop) at each end around the pole. Cole got into the bucket of a bucket truck (not the digger derrick) and transferred two high voltage lines to the new pole. Keehn took 5 to 10 minutes

to remove the low voltage line from the broken pole. Cole then went to rig the pole with a sling so he lowered the boom by 10-feet while he was still in the bucket. He called to Ferrell to pass him a steel sling rope but it was too long and since it was "late at night, and they had a long day", he wanted to call for a 5-foot long sling rather than use a 12-foot sling. He intended to secure the pole to the winch line with a sling.

Just before the accident in question, Cory Smith (Smith) went towards the controls seat in the digger derrick truck so they could lower the pole with the winch line but he never got to them before the accident. When the low voltage wire holding the broken pole was removed by Keehn, the pole slipped through the grabbers, fell, and hit Ferrell. The grabbers did not open but the opening between the grabber's tongs was wide enough for the pole to slip through.

Josh Ferrell testified for the Division that before the accident he was enrolled to go to pre-apprentice school for a year. Ferrell stated that he does not have any current recall of what he was doing prior to the accident except that at some point he was directly underneath the pole to be repaired.

Gary McIver testified for the Division that he has been with the Division for nine years and is now a senior safety engineer. He has conducted approximately 1,100 investigations of which 300 to 350 involved accidents. He described his work history, training and educational background. McIver sent a document request form to Employer and received a copy of the operator's manual for the digger derrick, which McIver identified as Exhibit 3, which contains safety rules on page 3. Pages 54 and 55 of the manual state that the "pole guide tongs are intended to be used as a guide only." Among the safety rules, it states: "Do not use the pole guide to clamp the pole tightly or to lift any of the pole weight."

McIver cited Employer in Citation 1 since the digger derrick - a utility truck - was left unattended while a load (a telephone pole) was suspended during the pole repair operations. Although the grabbers were on the broken pole the winch line was not attached. McIver stated that the safety order requires that "the controls to move the grabbers can't be left unattended" when lifting a load.

McIver classified the violation as serious since in his opinion there is a substantial probability of a serious injury if someone is hit by 1/3 of a 600 lb. pole; in fact it "would most likely kill someone." A typical wooden telephone pole weighs 300-lbs. according to what McIver learned on an internet search. He has investigated three fatalities where a tree hit someone; and three serious injuries from a small object falling on someone. McIver interviewed Smelser, who identified himself as a foreman, and some of the crew. He said that "they" told him that the load was held by just the grabbers and the electrical lines for "at least 15 minutes" but, when asked by the undersigned ALJ, he could not

recall who said that. McIver opined that Smelser should have known that the load was not properly attached with a winch and sling.

McIver cited Employer in Citation 2 since the load (a broken telephone pole) was suspended over an employee when it was not supported or secured. In response to a request for documents, McIver received Employer's Incident Investigation (In Exhibit 10), which indicated that Ferrell was assisting the line crew working above who were in the process of transferring the lines from the broken pole to the replacement pole. He was kneeling at the base of the replacement pole when the suspended broken pole slipped through the grabbers and hit him.

McIver classified the violation as serious since there is a substantial probability of a serious injury if someone was hit by the broken pole. Employer should have known of the violations since Employer's supervisor was at the site. The violation in Citation 3 was accident-related since had the load been attached to the sling by a hook it would not have fallen and caused a serious injury.

On cross examination, McIver stated that he took photograph Exhibit 4, which depicts the accident digger derrick; Exhibit 5, which depicts a close up of the boom; Exhibit 6, which depicts the winch line of a drum; and Exhibit 7, which shows the labels on the truck. McIver identified Exhibit 8 as a drawing that he received from Employer.

### Citation 1

#### Findings and Reasons for Decision

**The controls for a pole guide (grabbers) on a digger derrick truck were left unattended while the pole guide tongs were clamped around a broken power pole (the load) which was suspended by the conductors from several electrical lines and partially supported by the pole guide during a pole repair operation. The Division established a violation of §2940.7(d)(1)(A), by a preponderance of the evidence.**

**The Division established that the violation was properly classified as serious where it proved that there was a substantial probability of serious physical harm or death if the heavy utility pole fell on an employee. Employer failed to establish its lack of knowledge of the violation. The violation was properly classified as serious.**

## The Violation

Section 2940.7(d)(1)(A) states that:

Such devices (crane, boom, derrick, hoist, or winch) shall not be left unattended while a load is suspended, unless the load is suspended over water, a barricaded area, or is blocked up or otherwise supported from below during repairs or emergency.

It is undisputed that the load was not suspended over water, a barricaded area, or was blocked up or otherwise supported from below during any repairs or emergency.

"In Appeals Board proceedings, the Division has the burden of proving a violation, including the applicability of the safety order, by a *preponderance of the evidence*."<sup>2</sup> (footnote added) (*Alfredo Annino/Alfredo Annino Construction, Inc. of Nevada*, Cal/OSHA App. 98-311, Decision After Reconsideration, (April 25, 2001); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

The parties stipulated that as a result of the accident, Ferrell suffered a serious injury within the meaning of the definition in §330(h).

In a case involving potential exposure to overhead and/or suspended loads, the Board has discussed exposure as follows. In *Kenko, Inc.*, Cal/OSHA App. 92-713, Decision After Reconsideration (Oct. 31, 1995), the Board stated:

To establish a violation of section 1541(e), the Division must establish that one or more employees of an employer were "underneath loads handled by lifting or digging equipment." If an employee is underneath a suspended load, s/he would necessarily also be within the zone of danger of that load, since, more likely than not, the employee could be injured if the load fell. [Citation omitted.] In the above case, the Board recognized that, to prove unlawful exposure, the Division need not prove that an employee be "directly" under the load, only that he was in an area where he could be injured if the load fell.

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<sup>2</sup> "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed 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 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, review denied.) Full consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence, including that which has been produced by the defendant. (*Id.*)

As noted in Employer's Incident Investigation report (Exhibit 10), Ferrell was working on the ground at the base of the replacement pole while the line crew above was in the process of transferring the lines from the broken pole to the replacement pole. He was kneeling at the base of the replacement pole when the suspended pole slipped through the grabbers and hit him. Hence, Ferrell was in the zone of danger created by the suspended load.

Employer contends that the cited safety order is not applicable to Employer's digger derrick truck. It maintains that Employer's digger derrick truck is a **truck** to which §2940.7(c)(1)<sup>3</sup> is applicable (although it has the capacity to lift materials like a **digger derrick**); that it was functioning as a **truck** at the time of the accident (and not being used in a lifting capacity); and that it was not in violation of any of Articles 91 through 100 of the GISO's. Hence, it concludes that at the time of the alleged violation Employer's digger derrick truck was functioning only as a truck. Employer explains further that although the digger derrick truck "incorporated the use of a lifting device - a winch, line and hook - the truck was not being used in a lifting capacity - as a crane - at the time of the accident." (Employer's Post-Hearing brief, at pg. 4). In other words, it was not "hoisting" a load at any time and thus, the truck was not a "hoisting device" for purposes of enforcement of §2940.7(d)(1)(A).

This somewhat circuitous argument is not compelling since it ignores the fact that the grabbers were holding (and as discussed further below) partially supporting, the suspended broken pole while the line crew was transferring the lines to a replacement pole.

Employer argues just the opposite: that the suspended parts of the broken pole were being supported solely by the overhead high and low voltage lines. Since no load was suspended by the truck at the time of the violation alleged in Citation 1, there was no "unattended" load, and "the cited safety order had not yet come into play." (Employer's Post-Hearing brief, at pg. 8). It is undisputed that the broken portion of the pole was never connected to the winch line of the digger derrick. However, the grabbers or "pole guides" were being used. Employer argues that "they were only being used to keep the broken, suspended portion of the pole from swaying"; they were not supporting the pole; nor was any part of the Altec truck actually supporting the broken pole. (Employer's Post-Hearing brief, at pg. 7).

The Division counters that subsection (d)(1) of §2940.7 explicitly covers cranes, booms, derricks, hoists and winches like the derrick with winch that was on Employer's digger derrick truck. A derrick is defined in §4885, GISO

<sup>3</sup> Section 2940.7(c)(1) states, in pertinent part, that:

(1) Derrick trucks, cranes and other lifting equipment shall comply with Article 91 through 100 of the General Industry Safety Orders ...

Article 91, as a device "...used with a hoisting mechanism and operating rope, for lifting or lowering a load and moving it horizontally." That same section defines "hoist" as: "An apparatus for raising or lowering a load by the application of a pulling force", and the definition for a "hoisting machine" in that section includes derricks.

Factually, the Division points out that the grabbers were at least partially supporting the broken pole along with the overhead electrical lines. It reasons that the crew would not have put the grabbers around the damaged pole unless they intended that it support or hold the pole since the broken pole was not going to be reinserted into a fresh hole in the ground like a new, useable utility would be. The Division argument is well taken.

Exhibit 3, the Operator's manual for the Altec digger derrick, defines a "pole guide" as: "...a mechanism at the tip of a boom used for guiding and stabilizing a utility pole while using the winch line to raise or lower the pole." Under the section in the manual for the use of a pole guide (Exhibit 3: Pgs 54 - 55), it describes their purpose:

The pole guide may be used, along with the winch and boom flares, to set a pole. The pole guide tongs open to encircle the pole and close around the pole to keep it in position. The pole guide can be tilted forward and back to maintain the tongs horizontal to the midsection of the pole.

The pole guide tongs are intended to be used as a guide only. When handling a pole, let the boom flares take most of the pressure of the pole and use the winch line to do the lifting. Do not use the pole guide to clamp the pole tightly or to lift any of the pole weight.

As designed, the pole guide tongs open to encircle the pole and close around the pole to keep it in position. Employer argues that because Cole testified that *the pole in falling had slipped through the grabbers* that the grabbers were *not* clamped securely to the pole or "partially supporting" the pole. However, the manual also states that the pole guide can be tilted forward and back to maintain the tongs horizontal to the midsection of the pole. There is no evidence on this record that the tongs were being maintained horizontal to the midsection of the pole. This could account for why the pole slipped through the grabbers. Under the section on boom flares (Exhibit 3: Pg 55), it states: "... The boom flares are designed to take the majority of the pole's weight when handling a pole." From these rules, it can reasonably be inferred that the grabbers, when clamped around the pole, take some of the weight or pressure of the pole while keeping it in position whereas "the boom flares take most of the pressure of the pole" when a pole is being set.

The testimony of the SMUD employee witness, Cole, who was at the scene at the time of the accident, supports the Division's assumption (as stated in its Post-Hearing brief at pg. 6) - that the grabbers were placed around the upper broken section of the pole to "hold" the pole. As Cole stated: "the grabbers keep the top of the pole from moving around as it is put into the ground." He also testified that: "If the pole is not in the ground, it has to be supported with a rope or by the digger derrick truck with grabbers around it."

The Board has previously held reasonable inferences<sup>4</sup> can be drawn from the evidence introduced at hearing. *Inc.*, Cal/OSHA App. 93-2084, Decision After Reconsideration (Dec. 22, 1997).) Here, it can reasonably be inferred that the grabbers were being used in this instance to stabilize the broken pole and to keep it from "moving around" even though (as discussed above) it was not going to be set in the ground. In order to keep the pole from moving around, the tongs had to have been set up against and around the circumference of the pole, even if they were not gripping it tightly.

"The controls for the pole guide are on the lower control and the radio controls transmitter" on the digger derrick. (Exhibit 3: Pg 55; Unit Specifications: pg. 5) The derrick was left unattended - with no one at the pole guide controls - while the broken pole (the load) was suspended by the electrical wire and held by the grabbers. Cole testified credibly that just before the accident, crew member Smith was going to (or headed for but had not yet reached) the controls seat in the digger derrick truck so he could lower the pole with the winch line once the line was in place. Therefore, the Division established a violation of §2940.7(d)(1)(A), by a preponderance of the evidence.<sup>5</sup>

### **The Serious Classification**

"... For a serious violation, the Division must prove that there was a substantial probability that the violation could result in serious physical harm or death.<sup>6</sup> "Substantial probability" refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation.<sup>7</sup> The evidence must, at

<sup>4</sup> "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." [Evidence Code § 600(b)]

<sup>5</sup> "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed 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 evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001).)

<sup>6</sup> Labor Code Section 6432(a).

<sup>7</sup> *Id* section 6432(b).

a minimum, show the types of injuries that would more likely than not result from the violative condition.<sup>8</sup> A serious violation shall not be deemed to exist, however, if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.<sup>9</sup> (*Architectural Glass & Aluminum Co., Inc.*, Cal/OSHA App. 01-5031, Decision After Reconsideration (March 22, 2004).) Lack of knowledge of the violative condition constitutes a defense to the classification and not to the violation itself. (*Desilva Gates Construction*, Cal-OSHA App. 01-2741, Decision After Reconsideration (Dec. 10, 2004).)

The presumed accident is the load falling from someone not attending the suspension controls. Here, the Division's safety engineer testified credibly that if someone was hit with a 200 lb. wooden utility pole (one third of the 600 lb. broken pole), there was a substantial probability of serious physical harm or death - death being the more likely result. McIver based his opinion in part on three fatality investigations he conducted where someone was hit by a falling tree. The Division unrefuted evidence establishes the first element of the serious classification.

Employer failed to establish its lack of knowledge of the violation. As the Board stated in *Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April 1, 2003):

"Consistent with our recent holding in *Sunrise Window Cleaners*, Cal/OSHA App. 00-3220, Decision After Reconsideration (Jan. 23, 2003), to prove that an employer could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it."

When McIver interviewed Smelser, who identified himself as a foreman, Smelser told him that the load was held up just by the grabbers and the electrical lines for "at least 15 minutes" prior to the accident. Smelser's statement to McIver is hearsay. Section 376.2 of the Board's Regulations provides that where a timely objection is interposed, hearsay that would be inadmissible in a civil proceeding can only be used to supplement or explain other evidence but is not sufficient in itself to support a finding of fact. Here, Employer was granted a standing objection to all hearsay.

A review of the exceptions to the hearsay rule set forth in the Evidence Code reveals that admissions of Employer would be admissible over objection

<sup>8</sup> *Capital Building Maintenance Services, Inc.*, Cal/OSHA App. 97-680, Decision After Reconsideration (Aug. 20, 2001), relying on *Findly Chemical Disposal, Inc.*, Cal/OSHA App. 91-431, Decision After Reconsideration (May 7, 1992).

<sup>9</sup> Labor Code Section 6432(c).

in a civil action. (See Evidence Code §1222<sup>10</sup>) Admissions adverse to an employer made by a representative of that employer are an exception to the hearsay rule and may support a finding of fact. (*Macco Construction*, Cal/OSHA App 84-1106, Decision After Reconsideration (Aug. 20, 1986).) As stated in *Western Commtower, Inc.*, Cal/OSHA App. 95-2804, Decision After Reconsideration (July 19, 2000): "In the case of admissions—regardless of whether they be personal, adoptive, or authorized—the normal testimonial qualification of personal knowledge is dispensed with. The underlying theory is that a party would not make, adopt, or authorize a statement against his interest unless he was satisfied that it was reliable." (citing to 1 Witkin, Cal. Evidence (3rd ed. 1986) The Hearsay Rule, §641, p. 628.)

Cole testified credibly that the crew was at the site for 15 minutes to ½-hour before the accident. It can reasonably be inferred that at beginning of that 15 minutes period, Keehn attached the grabbers to the broken pole since this had to precede Cole's attempted to set up a sling on the pole to which to hook the winch line. Cole also stated that at the time of the accident, Smelser was 500-feet away by the first damaged pole. However, during the first 15 minutes to ½ hour timeframe, Smelser had a reasonable opportunity to have detected that no one was at the guide pole controls while the grabber was holding the pole. He admitted to McIver that the load was held by just the grabbers and the electrical lines for at least 15 minutes. Employers have an obligation to use reasonable diligence to detect violative conditions. *Bragg—Crane & Rigging*, Cal/OSHA App. 01-2428, Decision After Reconsideration (June 28, 2004); *Fibreboard Box & Millwork Corp.*, Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991).)

Employer did not put on any evidence to the contrary or refute the Division's proof. Hence, it can reasonably be inferred that Employer knew, or with the exercise of reasonable diligence, could have known that the digger derrick controls for the grabbers were left unattended while the load was suspended and not properly attached with a sling and winch line. Therefore, the violation was properly classified as serious.

## Citation 2

### Findings and Reasons for Decision

**An employee was working on the ground at the base of a replacement pole in the vicinity of a broken utility pole suspended from overhead electrical lines. In order to control**

<sup>10</sup> Evidence Code § 1222 states that: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authorization or, in the court's discretion, as to the order of proof, subject to the admission of such evidence."

the job and avoid exposure of employees to the hazard of the overhead load, the grabbers of a digger derrick truck were used to stabilize and partially support the broken pole while the crew attempts to attach a sling to the pole. The truck was not being used as a crane to suspend, move, or pass the load directly over employees or their work space. The Division failed to establish a violation of §5002, by a preponderance of the evidence.

Section 5002 of the Crane Safety Orders, states that:

Operations shall be conducted and the job controlled in a manner that will avoid exposure of employees to the hazard of overhead loads. Whenever loads must be passed directly over workers, occupied work spaces or occupied passageways, safety type hooks or equivalent means of preventing the loads from becoming disengaged shall be used.

It is undisputed that the crew was engaged in replacing a broken utility pole (the load) using a digger derrick truck and other mobile equipment when in the process of attaching a steel sling to the overhead load to connect it to the derrick's winch line.

Employer contends that the Altec digger derrick truck was not a crane or other hoisting device, and therefore, not subject to the mandates of the Crane Safety Orders. However, as the Division points out in its Post-Hearing brief (at pg. 7), §5002 is part of GISO Article 98, whose scope is defined in §4990. That section states: "These orders apply to all crane, hoist, and derrick operations except when orders of a specific nature apply." The Division's conclusion that §5002 applies to the derrick on Employer's digger derrick truck appears to be correct, and is adopted for purpose of this Decision.

The Division did not present sufficient evidence to prove that the first mandate of the cited safety order, to wit, that the "operations shall be conducted and the job controlled in a manner that will avoid exposure of employees to the hazard of overhead loads" was not being followed.<sup>11</sup> Ferrell

<sup>11</sup> The Division can establish a violation of the first sentence independent of the second sentence's requirement. In *California Erectors, Bay Area, Inc.*, Cal/OSHA App. 93-503, Decision After Reconsideration (July 31, 1998), the Board held: "Section 5002 contains two requirements, each capable of independently supporting a violation. First, employers are to avoid exposing employees to overhead loads as the nature of the work reasonably permits. Second, when loads must be passed over employees, safety hooks (or equivalent) must be used. The issue of safety hooks and safety precautions only come into play if the employer shows that it was necessary to pass suspended loads over workers." In *R. E. Harbor & Company, Inc.*, Cal/OSHA App. 96-4029, Decision After Reconsideration (Feb. 23, 2001), the Board reiterated the same type of analysis. There, it held that the "zone of danger" is anywhere around where a 30-foot long pole (with attached arms) could fall, even if it was lifted only 18 inches from the sidewalk. Section 5002 requires first that employees in the danger zone be removed if they are

testified that the only thing he could remember is that he was directly under the broken pole at some point. His testimony is not credited due to his lack of an ability to competently recall and recount the events in question.

However, Employer's accident investigation, as stated in its Incident Report places Ferrell at the time of the accident as "kneeling at the base of the replacement pole" (Exhibit 10) while assisting the line crew overhead who were in transferring "the facilities" (Exhibit 10) from the broken pole to a replacement pole. The Division did not rebut this evidence by establishing that this was *not* the proper procedure to follow, that is, to transfer components of the electrical lines to the replacement pole before Cole, who was in the bucket truck, was able to attach the winch line to the broken pole.

The "logical time" defense provides that the requirements of any safety order will not begin to apply until the "necessary and logical time" has arrived for an employer to make provisions to correct the violation and abate the hazard. (*Nicholson Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979);<sup>12</sup> *Roland Associates Construction*, Cal/OSHA App. 90-668, Decision After Reconsideration (Jan. 6, 1992); *Mid-State Steel Erection, Inc.*, Cal/OSHA App. 84-538, Decision After Reconsideration (Mar. 14, 1986).) The defense is premised on the notion that a safety order should not come into play until the point is reached where the conduct it requires no longer creates a greater hazard than the conduct it forbids. (*California Erectors, Bay Area, Inc.*, Cal/OSHA App. 91-1191, Decision After Reconsideration (Nov. 2, 1994).)

Ferrell was assisting with the replacement pole while the crew was attempting to stabilize the broken pole and lower it in a controlled manner to avoid the hazard that it could fall and injure someone. Cole had planned out how and where to attach the sling to the pole, as shown in the diagram in Exhibit 8, and ropes had been placed on the lower sections of the pole. He described what normally occurs when a utility pole is placed into a hole in the ground, as follows: after the boom is lifted up and the winch line is attached to the lower (butt) end of the pole then the digger derrick would "winch-up to stand the pole up." If the pole is not in the ground, Cole stated that it has to be supported with a rope or by the digger derrick truck with grabbers around it. That is what was done here.

As to the second mandate in the standard, although Farrell was working in the vicinity underneath under the load, the load never moved and was not passed over him or his work space. The pole remained stationary until the bolts were disconnected from the electrical lines and then it slipped through

not performing a required function in the area. If not removed, there is a violation. If they must be there, employer must use safety hooks to prevent the load from being disengaged.

<sup>12</sup> As with all affirmative defenses, the employer, not the Division, has the burden of proving that it applies to the case in question. (*Kenko, Inc.*, Cal/OSHA App 91-1327, Decision After Reconsideration (Mar. 31, 1993).)

the pole guide's tongs and fell. The language in the standard states, in part, that: "Whenever loads must be passed directly over workers, occupied work spaces ..." (underline added). Although the load was poised overhead because the top parts of the broken pole were suspended from the electrical lines by the bolts connecting the pole to the overhead wires, the crew was in the process of attaching the digger derrick's winch line to the load (via a sling) when the bolts were detached and the load fell.

There is no evidence that the broken top parts of the pole were ever passed, or moved, or swung directly over any workers on the ground or their occupied work space. For the reasons discussed above, it is found that the Division failed to establish a violation of §5002, by a preponderance of the evidence.

### Citation 3

#### Findings and Reasons for Decision

**Employees working with a digger derrick rig and bucket truck to replace a power pole had not attached the broken pole – the load – to the hook or placed a sling around any part of the pole in order to rig and lift the pole. The Division failed to establish a violation of §4999(b), by a preponderance of the evidence.**

Section 4999(b), which pertains to attaching the load, states in subsection (a) that:

The load shall be attached to the hook by means of slings or other suitable and effective means which shall be properly rigged to insure the safe handling of the load.

It can reasonably be inferred, as Employer argues in its Post-Hearing Brief, (at pages 10 and 11) that this crane safety order applies only when a load is to be lifted by a crane, derrick or hoist. Here, however, the broken power pole/load was never attached at any time to the winch line of the Altec truck. ~~The point where the load had to be "properly rigged" by attachment of a sling to the hook of a crane or hoisting device had yet to occur.~~

Cole testified that during the 15 minutes to ½-hour when the crew was at the site before the accident, no one had attached the accident pole to the winch. Cole was elevated in the bucket of a bucket truck "getting ready to do it." Ropes had been tied to the lower broken part of the pole. Cole described the accident pole as "floating in the air" since the winch was not attached to the pole because "they never got to it." The hook on the end of the boom, or hoist as labeled on the drawing in Exhibit 8, had not been connected to the

sling. Cole testified that he intended to secure the pole to the winch line with a sling so they could lower it to the ground.

Therefore, it is found that the Division failed to establish a violation of § 4999(b), by a preponderance of the evidence.

**Decision**

**Docket No. 08-R2D1-4887**

Employer's appeal of Citation 1, Item 1, is denied. The proposed civil penalty is vacated.

**Docket No. 08-R2D1-4888**

Employer's appeal of Citation 2 is granted and the proposed civil penalty is hereby vacated.

**Docket No. 08-R2D1-4889**

Employer's appeal of Citation 3 is granted and the proposed civil penalty is hereby vacated.

Dated: August 18, 2010  
BF:kav

  
BARBARA R. FRENCH  
Administrative Law Judge

# SUMMARY TABLE DECISION

*In the Matter of the Appeal of:*

Abbreviation Key:

**SMUD**

Reg=Regulatory

G=General

S=Serious

Er=Employer

W=Willful

R=Repeat

DOSH=Division

**Docket No(s). 08-R2D1-4887 through 4889**

IMIS No. 120206859

| DOCKET NO(S)     | CT. NO. | ITE M NO. | SECTION NO.     | TYPE | 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 |
|------------------|---------|-----------|-----------------|------|---------------------------------|-----------------|---------------|--------------------------------------|-------------------------------------|---------------------------------|
| 08-R2D1-4887     | 1       | 1         | 2940.7(d)(1)(A) | S    | ALJ sustained violation.        | X               |               | \$6,750                              | \$6,750                             | \$6,750                         |
| 08-R2D1-4888     | 2       | 1         | 5002            | S    | ALJ granted appeal; vacated CP. |                 | X             | 6,750                                | 6,750                               | \$0                             |
| 08-R2D1-4889     | 3       | 1         | 4999(b)(1)      | S    | ALJ granted appeal; vacated CP. |                 | X             | 18,000                               | 18,000                              | \$0                             |
| <b>Sub-Total</b> |         |           |                 |      |                                 |                 |               | \$31,500                             | \$31,500                            | \$6,750                         |

**Total Amount Due\***

**\$6,750**

NOTE: Payment of final penalty amount should be made to:

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

(INCLUDES APPEALED CITATIONS ONLY)

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call: (415) 703-4296 if you have any questions.

**ALJ: B.FRENCH/kav**  
**POS: 08/18/10**