

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

In the Matter of the Appeal of:

**PDM STEEL SERVICE CENTERS, INC.
3500 Bassett Street
Santa Clara, CA 95054**

Employer

**DOCKETS 13-R1D3-2446
through 2448**

DECISION

Statement of the Case

PDM STEEL SERVICE CENTERS, INC. (“Employer” or “PDM”) is a heavy carbon steel company. From May 5, 2013 through July 2, 2013, the Division of Occupational Safety and Health (the Division or DOSH), through Associate Safety Engineer Paramjeet (Pam) Sekhon conducted an inspection at 3500 Bassett Street, Santa Clara, CA (the site). On July 3, 2013, the Division cited Employer for one general violation, one accident-related serious violation, and one serious violation:¹

- Citation 1, Item 1, a general violation of Section 5049(d) (failure to use hooks with safety latches provided by manufacturer) with a proposed penalty of \$485;
- Citation 2, Item 1, an accident-related serious violation of Section 4999(c)(1) (failure to attach a load to a hook by suitable and effective means) with a proposed penalty of \$18,000;
- Citation 3, Item 1, an accident-related serious violation of Section 4999(d)(2) (failure to ensure that load was well secured and properly balanced) with a proposed penalty of \$18,000.²

On July 26, 2013, Employer filed a timely appeal contesting whether the proposed penalty was reasonable for Citation 1-1, and for Citations 2-1 and 3-1, whether the safety order was violated, whether the classification was correct,

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

² At the beginning of the hearing on December 10, 2013, the Division made an oral motion to amend the classification of Citation 3 from Serious, as the violation was originally classified, to Accident-Related Serious, which was renewed at the conclusion of the hearing. The Employer initially objected to the amendment as violative of due process, but ultimately withdrew that objection and declined the opportunity to present additional witnesses and evidence on this issue. The motion was granted.

whether the abatement requirements were reasonable, and whether the proposed penalty was reasonable. The employer also raised Independent Employee Act Defense, as well as a number of issues about the adequacy of the investigation or the citations.

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Oakland, California on December 10 and 11, 2013. The Employer was represented by E.P. Michael Karcis, Esq., McLean and McLean, LLP. The Division was represented by Cynthia L. Perez, Staff Counsel and John Cohen, Legal Fellow. Each party presented testimony, documentary evidence and filed closing and reply briefs.³ The Administrative Law Judge extended the submission date to February 23, 2015, on her own motion.

Issues

- A. Was the penalty of \$485 in Citation 1, Item 1, reasonable?
- B. Did an employee of Employer raise a load which was not attached to the hook by means of slings or other suitable and effective means to insure the safe handling of the load, in violation of Section 4999(c)(1)?
- C. Was there a realistic possibility of serious injury resulting from the hazard created by the Employer's failure to attach a sling or other means to assure safe handling the load?
- D. Was there a causal nexus between the violation and the occurrence of the injury?
- E. Was the employee who violated Section 4999(c)(1) a "supervisor"?
- F. Did the employee fail to balance and secure a load before lifting it as required by Section 4999(d)(2)?
- G. Do the hazards addressed in Citation 2, Section 4999(c)(1) and in Citation 3, Section 4999(d)(2) pertain to a single hazard?
- H. Was the abatement required for the violation alleged in Citation 2 substantially similar to the abatement for the violation alleged in Citation 3?

Findings of Fact

- 1. The penalty for Citation I, Item 1 of \$485 is reasonable.
- 2. On April 16, 2013, Alfonso Villafan (Villafan) placed the ends of two stacked steel beams directly onto a bare hook, instead of a sling or other suitable and effective means failed to use a proper lifting device to lift the beams.
- 3. Villafan's left thumb was crushed when the 1800 pound beam fell off the hook onto his thumb.
- 4. Villafan is a foreman for PDM Steel Service Center and was responsible for training the other employees, overseeing

³ Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ.

- employees for some portion of each day, and reporting safety violations.
5. Villafan failed to balance and secure a load before lifting two stacked steel beams.
 6. Serious physical harm as a result of the actual hazards created by the foreman's failure to attach a sling and secure the load before lifting two beams was a realistic possibility if the load fell from a crane.
 7. The failure to use a proper lifting device to lift the beams caused the occurrence of the injury.
 8. Failing to use a sling to secure and balance the load, alleged in Citation 2, creates the same hazard that is addressed in Citation 3, failing to balance the load.
 9. The use of a sling to secure and balance the load would have abated the violation alleged in Citation 2, and would have abated the violation alleged in Citation 3.

Analysis

A. The proposed penalty of \$485 in Citation 1, Item 1 is reasonable.

The Division cited employer for a violation of Section 5049(d).⁴ Employer did not dispute the existence of the violation and therefore the violation is established by operation of law. An issue not properly raised on appeal is deemed waived. (Section 361.3 (Issues on Appeal); *Bourgeois, Inc.*, Cal/OSHA App. 99-1705, Denial of Petition for Reconsideration (April 26, 2000); *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (December 24, 1986).); *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

The Labor Code, Section 6319(c) provides the factors which the director of the Department of Industrial Relations must include when promulgating penalty regulations: size of the employer, good faith, gravity of the violation, and history of any previous violations. (Sections 333 through 336) In *M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014), the Board held that if the Division introduces the proposed penalty worksheet and testifies that the calculations were completed in accordance with the appropriate penalties and procedures, it has met its burden to show the penalties were calculated correctly, absent rebuttal by the Employer.

The proposed penalty was appealed. Division's investigator explained the factual basis for the proposed penalty as reflected on the penalty calculation worksheet and classified the violation as "general". (Exhibit 2.) Under Section 336(b), the gravity-based penalty was \$1,500, based on medium severity. The

⁴ Section 5049 (d) provides: "Defective Hoist or Sling Hooks and Rings. Hooks and shackles shall be used in accordance with manufacturer's recommendations."

Division afforded the following penalty adjustment factors: 15% good faith credit and 10% history credit, or a reduction of 25%. Because Employer had over 100 employees no size credit was given. (Section 336(d).) The gravity based penalty was reduced by 35%. The Division's arithmetic was in error: the reduction should have been 25%, not 35%. The penalty, if correctly calculated, would be computed as follows: 25% of \$1,500 = \$1,126, not \$975; 50% of \$1,126 is \$562, when rounded down to the next lower five dollar value, which would be \$560, not \$485. (Section 336(j).) A proposed penalty of \$560 would have been reasonable, but the lower penalty proposed by the Division is not shown to be unreasonable. The proposed penalty for Citation I, Item 1 of \$485 is found reasonable and is assessed.

B. Employer failed to attach a load to a hook by means of either slings or other suitable and effective means to insure the safe handling of the load in violation of Section 4999(c)(1).

The Division cited employer for a violation of Section 4999(c)(1) of the General Industry Safety Orders:

(c) Attaching the load.

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

Citation 2, Item 1 alleges:

On or about April 16, 2013, at the above location, the Employer failed to attach a load to a hook by means of slings or other suitable and effective means which was rigged to insure the safe handling of the load. An employee injured his left thumb when the ends of two stacked steel beams were placed directly onto a bare hook, instead of a sling or other suitable and effective means, which resulted in the beam falling off the hook after being lifted and causing a serious injury to the employee's thumb.

The Division has the burden of proving that 1) the beams being lifted were a "load" within the meaning of section 4999(c); 2) the hook was not attached by means of slings or other suitable means, and 3) that the load was not rigged to insure the safe handling of the load. (*Irwin Industries*, Cal/OSHA App. 12-3276, Denial of Petition for Reconsideration (June 10, 2014).)

"Load" as referred to in Section 4999(c)(1) is defined in Section 4885 of the General Industry Safety Orders as:

Load (Working). The external load in pounds applied on the hoisting line, including the weight of load attaching equipment such as load blocks, shackles, slings, buckets, and magnets.

Although the term “load” is not defined in Section 4999(c)(1), it is defined in the Section 4885 of the General Industry Safety Orders. Its’ application here is clear and unambiguous. The beams being lifted were a “load”.

During the April 16, 2013 incident at issue here, the load consisted of two steel beams. The beams were tied together with wire. (Exhibits 8 and 9.) Each beam was 21 inches by 20 inches and 36 feet and 8 inches long, and weighed 1800 pounds. (Exhibit 11.)

The Division must next show the hook was not attached by means of slings or other suitable means. Here no sling or other rigging was used to ensure the load would not slip off the hook. The only “means” used was the hook being placed directly under the lip of the I-Beam, such that metal on metal connection, without securing method, was employed to move the leans. Villafan, the injured employee, testified that on April 16, 2013, he unloaded a truckload of steel U-beams and stacked them using a crane. (Exhibit 12.)

Last, the Division must establish that the load was not rigged to insure the safe handling of the load. Here, there was no rigging, and the slippage and failure of the load to remain secured to the crane establish this element. Specifically, Villafan testified that he noticed a U-shaped broken wire extending out from the side of one of the beams. Villafan attempted to remove the wire. He decided to move the heavy beams apart in order to remove the wire. He used the crane to move the beams. He put a bare crane hook at the end of two of the beams to lift the beams in order to remove the wire. Then, using the controller in one hand, Villafan operated the crane hook to lift one side of the beams 12-18 inches. As he reached for the wire with his left hand, the beams fell off the crane hook. Villafan’s left thumb was caught between two beams and was crushed. (Exhibit 12.) This resulted in a partial amputation of his left thumb. (Exhibit 15.)

During this lift, no sling or other rigging was used to ensure the load would not slip off the hook. The beams were lifted using a bare hook. In addition, Pam Sekhon, the Division’s Associate Safety Engineer testified that during the investigation she observed that the safety latch on the hook used by Villifan on the day of his injury was missing. The latch is designed to hold the load on the hook.

Employer argued that the Division misleads the court by emphasizing that the weight of the entire load was over 1800 pounds, when in fact, Villafan only lifted the very end of the beam, and the load was only lifted 12 to 18 inches. The relative weight of a load is not part of the safety order, nor does an exception exist to the requirement to secure a load that allows for a lack of securing for loads of a particular weight. For this reason, Employer’s argument is insufficient to overcome the Division’s proof here.

There is ample evidence in this record to conclude no suitable means of securing the load to a crane was used here. Where there is no dispute, objection, nor evidence to the contrary presented by the adverse party regarding specific evidence presented by the party who bears the burden of proving all elements of a violation, the Board must give full consideration to the negative and affirmative inferences drawn from the evidence presented by the sole party offering the evidence. (*Lone Pine Nurseries*, Cal-OSHA App. 00-2817, DAR (Oct. 30, 2001).) If the evidence establishes that the manner in which the hook was used failed to hold load lifting it, namely the beam, it is reasonable to infer that the means used to lift the beam was not "suitable and effective . . . to insure safe handling of the load." (*Irwin Industries*, *supra*.) An inference may be drawn that the load was not secure, based on the photographs of the hook with missing safety latches, the uncontroverted testimony that no sling or other rigging was used and that the beams fell off the hook. Division established a violation of Section 4999(c)(1).

C. Citation 2, Item 1 was properly classified as "serious".

To establish a violation as "serious", Labor Code Section 6432(a) provides in relevant part:

(a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the diversion demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. 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, means, methods, operations, or processes that have been adopted or are in use.

"Realistic possibility" is not defined in the safety orders. However, the Appeals Board has interpreted the phrase "realistic possibility" to mean a prediction "clearly within the bounds of human reason, not pure speculation." (*B & B Roof Preparation, Inc.*, Cal/OSHA App. 12-2946, Decision After Reconsideration (October 6, 2014) citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sept. 27, 2001).) In *Janco, supra*, the Board found that there was a realistic possibility of eye injury from the hazard in question, (splash in the eyes), although such an injury was unlikely and the possibility was remote. (*Id.*)

"Serious physical harm", although not defined in the Labor Code or Title 8 of the California Code of Regulations, has been held to have the same meaning as "serious injury or illness" as defined in Labor Code Section 6302(h). (*Abatti Farms/Produce*, Cal/OSHA App. 81-0256, Decision After Reconsideration (Oct. 4, 1985); *Chooljian Brothers Packing Co. Inc.*, CAL/OSHA 95-2549, DAR (June 15, 2000).)

"Serious injury or illness" is defined as "any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement." (Labor Code Section 6302(h).)

The Division must show that serious physical harm is a "realistic possibility" from the hazard created by the safety violation in question. The evidence showed that the partial amputation of his left thumb was the type of injury that would more likely than not result from a failure to ensure the load would not slip off the hook. The fact that a partial amputation occurred is proof that a serious injury is a realistic possibility, not pure speculation.

An inspector's opinions that are sufficiently supported by education, training, or experience support a finding. (See *Home Depot USA, Inc. # 6617, Home Depot*, Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec, 24, 2012); *Davis Brothers Framing Inc.*, Cal/OSHA App. 05-634, Decision After Reconsideration (Apr. 8, 2010).) Sekhon testified that she is up-to-date on the Division's mandated training and she has conducted over 330 investigations in the eight years she has worked for the Division. She testified that serious injury or death is a realistic possibility with respect to this citation, based on her training and experience.⁵

Serious injury or death is a realistic possibility when a steel beam approximately 1800 lbs. slips off a hook and smashes a worker's hand or other body part. The evidence about the actual events and circumstances, combined with Sekhon's testimony established a realistic possibility that a serious injury could result from the hazard. The parties did not dispute that injuries to Villafan involved "serious physical harm". The Division has established that the amputation, which resulted in permanent disfigurement, meets the Board's "realistic possibility" standard. The violation was properly classified as serious.

D. The violation caused the occurrence of the injury.

⁵ The testimony of an inspector who is current on the Division's mandated training and has investigated similar injuries and accidents is expert opinion which may be relied on to establish the realistic possibility that a violation of the safety order caused a serious injury. (See, *Brunton Enterprises*, Cal/OSHA App. 09-2239 Decision After Reconsideration (March 26, 2014); *Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271 Decision After Reconsideration (May 13, 2014). This is particularly true here, where her testimony was un rebutted.

Since the violation is alleged to be accident-related, the Division must show by a preponderance of the evidence, a causal nexus between the violation and the serious injury. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002), citing *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).)

Sekhon testified that the injury occurred as a direct result of the fact that the two beams slipped off the hook and smashed the worker's left hand. Her testimony that the serious injury was caused by failure to secure the load resulting in the steel beam slipping off the hook is credited. Villafan testified that he did in fact suffer a serious injury, as a result of the beams crushing his thumb, and resulting in a partial amputation of his thumb. (Exhibit 15) When the beams slipped off the hook and crushed Villafan's thumb, it was the weight of the unsecured load which caused the serious injury. Employer presented no contrary evidence to the testimony that two 1800 pound beams smashed Villafan's thumb. The violation of Section 4999(c)(1) was properly characterized as accident-related.

E. The proposed penalty of \$18,000 in Citation 2, Item 1, is reasonable.

The Division properly calculated the penalty associated with Citation 2, Item 1 which was classified as accident-related serious as \$18,000. The gravity base penalty for a serious violation is set by regulation at \$18,000. (Section 336(c)(1).) Labor Code Section 6319(d) provides that "if serious injury . . . is caused by any serious . . . violation, the penalty shall not be reduced for any reason other than the size of the business of the employer being charged." Employer had over 100 employees so no size credit was given. The penalty in cases classified as "accident-related serious" may not be reduced, except for size. (Section 336(c)(3).) The Division having established that a serious violation caused a serious injury, the penalty setting limitations of Labor Code Section 6319(d) applies to the proposed civil penalty proposed. The \$18,000 proposed penalty for Citation 2 is properly calculated according to Section 336 and is affirmed.

F. The Employer failed to establish the Independent Employee Action Defense.

Employer asserted the independent employee action defense (IEAD). To avoid liability through that affirmative defense, employers must establish all five of the following elements: (1) the employee was experienced in the job being performed; (2) employer has a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments; (3) employer effectively enforces the safety program; (4) employer has a policy which it enforces of sanctions against employees who violate the safety program, and; (5) the employee caused a safety infraction which s/he knew was against employer's safety requirement. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

If the employee causing the violation is a supervisor or foreman, the IEAD is not available to the cited employer. (*Brunton Enterprises, Inc.* Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013); *CA Forestry & Fire*

Protection, Cal/OSHA App. 10-0728, Decision After Reconsideration (Aug. 10, 2012).) Employers "must ensure that their agents in the workplace 'are knowledgeable of the safety orders and are diligent in enforcing and following them'." (*Contra Costa Electric, Inc.*, Cal/OSHA App. 90-470, Decision after Reconsideration (May 8, 1991).)⁶

The primary test to determine whether or not an employee is a supervisor or foreman is the employee's responsibility for the safety of others. *MV Transportation, Inc.*, Cal/OSHA App. 02-2930, Decision After Reconsideration (December 10, 2004); citing *City of Sacramento, Department of Public Works*, Cal/OSHA App. 93-1947, Decision After Reconsideration (February 5, 1998).) A finding that an employee is a supervisor is based on his duties, such as the ability to direct the work of the crew, as well as statements of other employees identifying him as supervisor. (*Martin J. Solis dba Solis Farm Labor Contractor*, Cal/OSHA App., 08-3414, Decision After Reconsideration (Dec. 30, 2013), citing *Duinick Bros., Inc.*, Cal/OSHA App., 06-2870, Decision After Reconsideration and Order of Remand (Apr. 13, 2012).) "Delegated authority over safety matters is enough to render an employee a supervisor for purposes of the Act." (*Chevron USA, Inc.*, Cal/OSHA App. 89-283, Decision After Reconsideration (February 8, 1991).)

The IEAD is barred if the employee has been delegated sufficient authority to ensure that other employees follow the employer's and the government's safety rules. (*Jerry W. Winfrey, dba Jerry's Electrical Service*, Cal/OSHA App., 91-1287, Decision After Reconsideration (July 29, 1993).) In *Jerry's Electrical Service*, the Board held that the employee who is "in charge" of the work crew and empowered to determine the means used to complete a project is a foreman or supervisor. The injured employee ordered the other employees to work outside the building shortly before the accident, and he was empowered by Employer to determine the means to be used to reach overhead conduits and fixtures. The Board held in that case that a job title is not the determining factor. The injured employee, whose job title was "operating engineer" was determined to be a foreman or supervisor because he was "in charge" of the work of the crew at the site and was empowered to determine the means to be used to complete the tasks.

Here, Villafan, whose job title was "foreman", was employed at PDM Steel for 17 years, and was responsible for training the other employees. Villafan trained six to eight employees in the warehouse in 2012 (Exhibit 4; Exhibit 14) He explained that he was given training responsibilities because he was the most

⁶ "[Forepersons] and supervisors are responsible for more than just their personal safety; they are responsible for the safety of the workers under their supervision. They are their employer's representatives at the work site and directly ensure their employer's compliance with statutory and regulatory safety requirements." (*Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.*, (1985) 167 Cal. App. 3d 1232, 1241, 213 Cal. Rptr. 806, 810-811, citing *In re Cutter Laboratories*, Cal/OSHA App. 81-440, Decision After Reconsideration, (February 24, 1982) p. 2.) When a supervisor is in violation of a safety order, his knowledge of the violation is imputed to the Employer. (*Id.*) The supervisor or foreman is expected to serve as a role model and safety advocate.

experienced employee and was bilingual. Villafan signed the annual training forms as “supervisor”, was responsible for conducting safety training for other employees, and was responsible for safety on the job. (Division Exhibit 4, five training forms, two for Truck Loading Crew Evaluation, two for Crane Operator Certification, and one for Receiving Crew – Truck.) Villafan and other employees told Sekhon that Villafan was a supervisor.⁷

Andrew Sanchez, the Operations Manager for PDM Steel initially denied that Villafan was a supervisor but eventually admitted that he filled in Villafan’s title as “supervisor” on the Employer’s Report of Occupational Injury or Illness form when reporting this incident. (Division Exhibit 16).⁸ Sanchez admitted that Villafan was the person with the most experience and reported some, but not all, of the safety violations, was “the lead on that shift” and “the person who passes out instructions”. Sanchez also testified that Villafan’s shift was from 8:30 a.m. to 5:00 p.m. whereas his shift was from 6:00 a.m. to 4:00 p.m. During the last hour of each day, Villafan had responsibility for safety of the employees.

Based on Villafan’s authority to instruct other employees on his shift, his title, his training responsibilities, statements by other employees and documents evidencing his role as supervisor for PDM Steel, it is established that he was a supervisor.

Villafan meets the standard for a supervisor for purposes of the Occupational Safety and Health Act and his actions are imputed to his employer. (*MV Transportation, Inc.*, Cal/OSHA App. 02-2930 Decision After Reconsideration (December 10, 2004).) The IEAD is not available as a defense to this citation.⁹

The allegations of Citation 2, Item 1 are sustained as to an accident-related serious violation, the Citation was properly classified as accident-related serious, the penalty of \$18,000 was reasonable. The appeal is denied, based on the above.

⁷ The statements of two PDM warehousemen made to Sekhon are indeed “hearsay. Evidence Code Section 1222 provides in pertinent part: “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.” (*Sherwood Mechanical, Inc.* Cal/OSHA App. 08-4692 Decision After Reconsideration (June 28, 2012).) (Section 376.2 [hearsay may be used to supplement or explain other evidence]; *Sherwood Mechanical, Inc.* Cal/OSHA App. 08-4692 Decision After Reconsideration (June 28, 2012), note 10.) The identification of Villafan as supervisor by other employees corroborates evidence that Villafan’s job title was “foreman”, and his role was that of “supervisor”.

⁸ Sanchez was not credible regarding the scope of Villafan’s safety duties, his title and his role in directing the work. He appeared to equivocate when asked who was in charge of safety during the day and tried to minimize Villafan’s supervisory role, in spite of documentation to the contrary.

⁹ The IEAD is not available because Villafan is a foreman and supervisor, but even if he were not, the employer was required to establish that it effectively enforces the safety program and that it has a policy which it enforces of sanctions against employees who violate the safety program. There was no documentation of regular safety meetings or other indicia of a well-run safety program. Villafan was not disciplined for this incident. The third and fourth elements of the IEAD were not established. Employer met the first element that he was experienced in the warehouse foreman position and fifth element, that Villafan knew he violated a safety order.

G. The load was not well secured and properly balanced before it was lifted.

The Division cited employer for a violation of Section 4999(d)(2):

(d) Moving the load. The individual directing the lift shall see that:

(2) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches;

Citation 3, Item 1 alleges:

On or about April 16, 2013, at the above location, the Employer failed to ensure that a load was well secured and properly balanced in a lifting device before it was lifted more than a few inches. As a result, an employee suffered a serious injury to his left thumb when he lifted two steel beams that were not well secured and properly balanced on a bare hook and both beams fell on his thumb when the hook slipped off.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Travenol Laboratories, Hyland Division*, Cal/OSHA App. 76-1073, Decision After Reconsideration (Oct. 16, 1980) at pp. 2-3; *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

It is the Division's burden to prove in this case that the individual directing the lift failed to ensure that the load was 1) well secured, 2) properly balanced, 3) in a sling or lifting device, 4) before it was lifted more than a few inches. The Division established all four of these elements through Villafan's testimony. Villafan was unloading a truckload of steel beams, when he noticed a piece of wire between two beams. He lifted the beams up by using a hook which was not well secured. When he tried to pull the wire out with one hand, the beams came off the hook. He testified to taking no steps to balance the load and admitted that no sling or lifting device was used. No steps were taken to secure or balance the load before lifting the load.

Employer's letter to Sekhon dated June 27, 2013 states: "Villafan admitted that he failed to follow PDM's established procedures by not using the proper lifting device. (Specifically Mr. Villafan decided to take a shortcut and use the Crane's hook instead of the proper lifting device as is our established procedure.)" thereby acknowledging that the improper lift, movement of the load, caused the accident. (Exhibit 14) A violation of Section 4999(d)(2) was established.

Citation 3, Item 1 was initially classified as “serious”. There was a realistic possibility of serious injury or death when the load was lifted 12 to 18 inches without steps taken to insure it was “well secured and properly balanced in the sling or lifting device”. Serious injury was shown to be a “realistic possibility” when a load is not balanced before it is lifted more than a few inches.

Employer’s reliance on the IEAD was not well founded, as discussed above.

The Division’s motion to amend the citation to recharacterize the violation as “accident-related serious”, resulting in a proposed penalty of \$18,000 was granted. (See page 1, note 2, *supra*.) To support that designation, the Division must establish that a serious violation of Section 4999(d)(2) caused a serious injury. (*Pierce Enterprises, supra*, citing *Obayashi Corporation, supra*.)

Division established that the load slipped off the hook because it was not secured or balanced; the failure to follow the safety order was the cause of serious injury. The failure to secure the load before lifting it was one of the reasons the hook slipped off of the steel beams, and thus a causal nexus exists between the violation and the injury. (*Pierce Enterprises, supra*.) No evidence was presented to negate the nexus. The evidence here is sufficient to justify recharacterizing the violation as “accident-related serious”.

H. The hazards addressed in Citation 2, Section 4999(c)(1) and in Citation 3, Section 4999(d)(2) pertain to a single hazard.

The Appeals Board may set aside a penalty if 1) the hazards are substantially identical or duplicative of another violation, and 2) abatement of one will serve to abate the other. (*A & C Landscaping, Inc. aka A & C Construction, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010) and cases cited therein; *JSA Engineering, Inc.*, Cal-OSHA App. 00-1367, Decision After Reconsideration (December 3, 2002).)

Here, different but interrelated sections of the General Industry Safety Orders concerning handling loads were cited. Section 4999(c)(1) requires attaching the load to a hook by means of slings or other suitable and effective means to insure the safe handling of the load; Section 4999(d)(2) requires the load to be well secured and properly balanced in the sling or lifting device before the load is moved or lifted. Citation 2 and Citation 3 are based on the same facts. Failing to use a sling to secure and balance the load alleged in Section 4999(c)(1) creates the same hazard – the possibility of a load falling from a crane and injuring a worker – that is addressed by Section 4999(d)(2), failing to balance the load. The hazards addressed in both safety orders, Section 4999(c)(1) and Section 4999(d)(2) both involve ensuring the safe handling of the load. The first prong of *A & C Landscaping* has been established because the hazards involved in Citation 2 and Citation 3 are substantially identical or duplicative of the other violation.

I. Abatement of the hazard addressed in Citation 2, regarding Section 4999(c)(1) is substantially similar to abatement of the hazard in Citation 3, regarding Section 4999(d)(2); no civil penalties are assessed for Citation 3.

Where the safety orders cited pertain to a single hazard and a single form of abatement will eliminate the hazard, the Board will eliminate what constitutes a duplicative penalty.¹⁰ (*A & C Landscaping, supra. A. Teichert & Son Inc.*, Cal/OSHA App. 09-0459, Decision After Reconsideration (Nov. 9, 2012). While multiple citations involving a single hazard are appropriate and typically will be upheld, the same is not true for duplicative penalties. (*West Valley Construction Co., Inc.*, Cal/OSHA App. 01-3017, Decision After Reconsideration (May 16, 2008).) *A & C Landscaping, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010) held that where a single form of abatement will eliminate the hazards in two or more citations, the Board will eliminate what constitutes a duplicative penalty.

The fact that there was more than one way to abate one of the hazards does not vitiate the elimination of a duplicative penalty. In *A. Teichert & Son Inc.*, Cal/OSHA App. 09-0459, Decision After Reconsideration (Nov. 9, 2012), note 9, the Board acknowledged that:

[T]he hazard to employees could have been abated by having the three men in the trench come out until excavation in the proximity of the water line was finished. Had that been done, they would have been out of the zone of danger even if the pipeline was broken during the excavation. Removing the men from the trench would not abate the hazard in all situations however, since if the pipeline were one containing natural gas, say, rather than water, the operator of the excavator would be exposed to the hazard of fire and/or explosion even if no workers were in the trench. The better means of abatement, therefore, appears to us to be to locate the underground installation by safe and acceptable means which will prevent damage to it.

Citation 2 and Citation 3 would have been capable of being abated by the same actions. The use of a sling to secure and balance the load would have abated the violation alleged in Citation 2, and would have abated the violation alleged in Citation 3. Both Section 4999(c)(1) and 4999(d)(2) could have been abated by the same action.¹¹ A penalty reduction for Citation 3 is warranted.

¹⁰ If no single action will result in abatement of all hazards, penalty reduction is not warranted. (*T.L. Pavlich Construction, Inc.*, Cal/OSHA App. 11-1303, Decision After Reconsideration (June 16, 2014).)

¹¹ The beams also could have been safely lifted using a positioning hook attached to a lifting device, such as a “lifting dog”, the yellow steel device extruding from the beams depicted in Exhibit 13. The employer admitted that Villafan violated the employer’s procedures by using the crane

Conclusion

The penalty of \$485 for Citation 1, Item 1 is reasonable, based on the facts discussed above. Citation 2, Item 1 is sustained as to an accident-related serious violation, and the appeal is denied. The allegations of Citation 3, Item 1 are sustained as to an accident-related serious violation, and the appeal is denied. However, the hazard in Citation 3, Item 1 is substantially similar to that of Citation 2, Item 1. The two violations could have been abated by the same actions. Therefore, no penalties are assessed for Citation 3, Item 1. (Section 336(k).)

Order

Total penalties of \$18,485 are assessed for the reasons described herein, and as set forth in the attached Summary Table.

DATED: March 23, 2015

MARY DRYOVAGE
Administrative Law Judge

Pursuant to Section 364.2(d), Title 8 California Code of Regulations, Employer shall post for 15 working days a copy of this Decision.

Pursuant to Section 364.2(b), Title 8 California Code of Regulations, the Division shall serve a copy of this disposition on any authorized employee representative if known to the Division to represent affected employees.

hook rather than a proper lifting device to maneuver the beams. (Exhibit 12, June 27, 2013 letter to Pam Sekon).

**APPENDIX A
SUMMARY OF EVIDENTIARY RECORD
PDM STEEL SERVICE CENTERS, INC.
DOCKET 13-R1D3-2446/2448
DATE OF HEARING: December 10 and 11, 2013**

Division's Exhibits

Exh. No.	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Proposed Penalty Worksheet	Yes
3	I-B-Y Letter, dated July 10, 2013	Yes
4	Truck Loading Crew Evaluation, Crane Operator Certification, and Receiving Crew – Truck Evaluation forms for F. Pacheco and M. Garcia in 2012 (10 pages)	Yes
5	Photo of Warehouse	Yes
6	Photo of I-Beam with gloved hand	Yes
7	Photo of I-beam with hook	Yes
8	Photo of stack of U-Beams	Yes
9	Photo of U-beam with wire	Yes
10	Photo of remote control	Yes
11	Photo of label on U-Beams	Yes
12	L. Alfonso Villafan Accident Report (4 pages)	Yes
13	Photo of I-Beams	Yes
14	Letter to Cal/OSHA Inspector Pam Sekhon, re: accident on April 16, 2013, dated June 27, 2013 (4 pages)	Yes
15	Medical Records re: L. Alfonso Villafan (Under Seal)	Yes
16	Report of occupational injury re: L. Alfonso Villafan	Yes

Employer's Exhibits

<i>Exhibit Letter</i>	Exhibit Description	Admitted
A	PPM Steel Employee Safety Manual, August 1997 (Rev. Sept 2004) (5 pages)	Yes
B	Examples of Disciplinary Warnings given (3 pages)	Yes

Witnesses Testifying at Hearing

1. Luis Alfonso Villafan, Foreman, PDM Steel
2. Paramjeet (Pam) Sekhon, Division Associate Safety Engineer
3. David Thrash, Division Crane Expert
4. Andrew Sanchez, PDM Steel Operation Manager

CERTIFICATION OF RECORDING

I, MARY DRYOVAGE, 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.

MARY DRYOVAGE

03/23/2015
DATE

IMIS No. 315775841

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE-HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R1D3-2446	1	1	5049	G	[Failure to ensure that hooks were used in accordance with manufacturer's recommendations.] ALJ found the penalty is reasonable.	X		\$485	\$485	\$485
	2	1	4999(c)(1)	S	[Failure to attach load to a hook by means of slings or other suitable or effective means, resulting in amputation of foreman's thumb.] ALJ sustained the violation.	X		\$18,000	\$18,000	\$18,000
	3	1	4999(d)(2)	S	[Failure to ensure that load was well secured & properly balanced in a lifting device before it was lifted more than a few inches.] ALJ sustained violation. Penalty vacated as single abatement is needed for Citation 2 and 3.	X		\$5,850	\$5,850	\$0
Sub-Total								\$24,335	\$24,335	\$18,485
Total Amount Due*										\$18,485

(INCLUDES APPEALED CITATIONS ONLY)

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

Accounting Office (OSH)
 Department of Industrial Relations
 PO Box 420603
 San Francisco, CA 94142
 (415) 703-4291, (415) 703-4308 (payment plans)

*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: MD
POS: 03/23/15