

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

In the Matter of the Appeal of:

**BIGGE CRANE & RIGGING CO.
10700 Bigge Street
San Leandro, CA 94577**

Employer

DOCKET 14-R1D2-1798

DECISION

Statement of the Case

BIGGE CRANE & RIGGING CO, (Employer) is an equipment and project services company which provides rigging in the construction industry. Beginning January 25, 2014, the Division of Occupational Safety and Health (Division) through Associate Safety Engineer Kelly Tatum (Tatum) conducted an inspection at a place of employment maintained by Employer at 1 South Market Street, San Jose, California (the site). On May 20, 2014, the Division issued one citation for an alleged violation of the California Code of Regulations, title 8: failure to ensure load does not come into contact with obstructions which could cause falling material or damage to the boom.¹

Employer filed a timely appeal contesting whether the safety order was violated, classification of serious was correct, and penalty was unreasonable.²

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Oakland, California on June 18 and 19, 2015. Robert D. Peterson, Esq., Robert D. Peterson Law Corporation represented the Employer. Denise M. Cardoso, Esq., Staff Counsel, represented the Division. Leave to file briefs was granted and the matter was submitted on August 14, 2015. The ALJ extended the submission date to January 5, 2015 on her own motion.

¹ Unless otherwise specified, all section references are to the California Code of Regulations, title 8. The Division alleged a serious violation of section 1616.1, subdivision (o).

² The parties stipulated that the proposed penalty should be set at \$2,000 if the serious classification is upheld, pursuant to section 336, subdivision (c)(5) which provides that “[a]ny employer who violates any tower crane standard, order or special order and such violation is determined to be serious violation . . . shall be assessed a penalty of \$2,000.”

Issues

- A. Was Employer denied due process when Division's expert witnesses were allowed to attend the hearing?
- B. Did Employer violate section 1616.1, subdivision (o) by failing to ensure during a lifting operation that the load does not come into contact with any obstructions which could cause falling material or damage to the boom?
- C. Did the Division establish a rebuttable presumption that the violation is properly classified as a serious violation?
- D. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?

Findings of Fact

1. On November 24, 2013, Adam Mitchell (Mitchell), the mobile crane operator, was lifting the inner jib up to install it on the tower turntable, when the inner jib swung towards the tower crane.
2. Ironworkers Brandon Richardson (Richardson) and Mike Leprinzi (Leprinzi) stood on the slew ring of the tower crane at the time of the incident and saw the jib (which weighed approximately 16,000 pounds) strike and shatter the cab window (windshield) of the tower crane.
3. Calvin Jackson (Jackson), the tower crane operator, who was in the cab, pushed his chair back as the jib was coming towards him, to get out of the way; he was not injured.
4. The broken glass of the wind shield and the wiper blade motor was later found on the ground below the tower crane cab. ³
5. A realistic possibility of serious injury exists when a 16,000 pound inner jib comes into contact with the windshield of a cab.
6. Employer's supervisor had a reasonable opportunity to detect the hazard of the inner jib contacting the tower crane cab.

³ The parties stipulated that that there was broken glass on the ground from the windshield of the cab of the crane.

Analysis

A. Was Employer denied due process when Division's expert witnesses were allowed to attend the hearing?

Section 379 provides:

Exclusion of Witnesses. Upon motion of a party, the Appeals Board may exclude from the hearing room any witnesses not at the time under examination; but a party to the proceeding, the party's representative, and the inspector or investigator for the Division and the Division's representative shall not be excluded.

In *Gal Concrete Construction Co.*, Cal/OSHA App. 91-271, Decision After Reconsideration (Feb. 28, 1992), the Appeals Board held that section 379 does not give a party a right to have witnesses excluded. It merely provides that a party may move to exclude witnesses. The Appeals Board retains the discretion to grant, partially grant, or deny the motion. Under Section 379 the Division may designate one or more inspectors or investigators to remain in the hearing room while other Division witnesses testify, even though the designee is also going to be called as an expert witness. (*Gal Concrete Construction Co.*, *supra.*)

At the hearing, Employer's attorney moved to have all witnesses not under examination excluded from the hearing room, including the two Division safety engineers who had participated in the inspection giving rise to the citation. Counsel for the Division indicated that the safety engineers would be called as the Division's expert witnesses and she wanted both safety engineers to remain in the hearing room throughout the hearing.

The Administrative Law Judge granted Employer's motion to exclude witnesses, but denied the motion insofar as its purpose was to exclude David Thrash (Thrash) and James McCarthy (McCarthy), the safety engineers from the hearing room, who were called as Division's expert witnesses. Employer contends that the Administrative Law Judge exceeded her authority in doing so and that the presence of the expert witnesses had a chilling effect upon the testimony of all of the witnesses. Employer concedes that "[t]here can be no serious contention that the presence of Mr. Thrash and Mr. McCarthy throughout the hearing did not prejudice Appellant [quoted exactly as stated]." (Employer's Post-Hearing Brief, p. 4, footnote 3.) Thus, Employer failed to identify any evidence that it was prejudiced by the presence of the expert witnesses at the hearing. They were professional and non-intimidating throughout the hearing.

Allowing the Division's expert witnesses to remain in the hearing room did not deprive Employer of the opportunity to present evidence, cross-examine witnesses, or otherwise deprive Employer of the due process rights. Therefore,

allowing the expert witnesses was appropriate and within the discretion of the Administrative Law Judge conducting the hearing.

B. Did Employer violate section 1616.1, subdivision (o) by failing to ensure during a lifting operation that the load does not come into contact with any obstructions which could cause falling material or damage to the boom?

The Division cited Employer for a violation of section 1616.1, subdivision (o) of the Construction Safety Orders, which requires:

- (o) During lifting operations, the load, boom or other parts of the equipment shall not contact any obstruction in a way which could cause falling material or damage to the boom.

Citation 1, Item 1 alleges as follows:

On or before November 24, 2013, the employer failed to ensure during a lifting operation that the load does not come into contact with any obstructions which could cause falling material or damage to the boom. An accident occurred when a mobile crane lifting a tower crane jib came into contact with the tower crane cab causing the window to break and the wiper blade motor and equipment to fall to the ground.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) Words within an administrative regulation are to be given their plain and commonsense meaning, and when the plain language of the regulation is clear, there is a presumption that the regulation means what it says. (*AC Transit*, Cal/OSHA App. 08-135, Decision After Reconsideration (June 12, 2013).)

To establish a violation of section 1616.1, subdivision (o), the Division must establish 1) the employer was engaged in “lifting operations” at the time of the incident, 2) the employer’s load contacted an “obstruction”, and 3) at least one employee was exposed to the actual hazard that the safety order was designed to address.

Was Employer engaged in “lifting operations” at the time of the incident?

“Lifting operation” is not defined in the safety order. “Hoisting: is defined in section 1610.3 as “raising, lowering or otherwise moving a load in the air

with equipment covered by this standard.” Section 1610.1 states that mobile cranes are covered by the standard. Section 1610.3 defines mobile crane as “a lifting device incorporating a cable suspended latticed boom or hydraulic telescopic boom designed to be moved between operating locations by transport over the road and “load refers to the object(s) being hoisted and/or the weight of the objects(s); both uses refer to the object(s) and the load-attaching equipment, such as, the load block, ropes, slings, shackles, and any other ancillary attachment.”

On November 24, 2013, the Employer was constructing a tower crane at 1 S. Market Street, San Jose. The inner jib was being raised to be connected to the existing boom on the turntable of the tower crane. Richardson, one of the Ironworkers who stood on the slew ring⁴ of the tower crane at the time of the incident, testified that the jib weighed approximately 16,000 pounds.

It is undisputed that at the time of the incident, the inner jib was being lifted; it hit the cab of the tower crane and shattered the windshield. Adam Mitchell (Mitchell), the mobile crane operator, testified that his job duties involved raising the inner jib up to the erection crew on top of the tower crane. In Employer’s closing argument, it admitted that “a load being lifted – an “inner jib” – did strike a part of the partially erected tower crane during a lifting operation.” (Employer’s Post-Hearing Brief, p. 4.)

Thus, it was established that Employer was engaged in lifting operations when the tower cab was struck by the load.

Did Employer’s load contact an obstruction?

“Obstruction” is not defined in the safety order. The ordinary meaning of the word "obstruction" is “the state of having something that blocks or hinders, or something that gets in the way.” (See, <http://www.merriam-webster.com/dictionary/obstruction>, accessed January 15, 2016.)

Adam Mitchell (Mitchell), the mobile crane operator, was lifting the inner jib up, to “basket”⁵ it to the turntable when the inner jib swung towards the tower crane. The windshield of the tower crane cab was struck by the inner jib.

Jackson, the tower crane operator, was in the cab at the time of the incident. He pushed his chair back as the jib was coming towards him, to get out of the way. He testified that the jib struck and shattered the cab window

⁴ A “slew[ing] ring” is a rotational rolling-element bearing that typically supports a heavy but slow-turning or slow-oscillating load, often a horizontal platform such as a conventional crane. (See, https://en.wikipedia.org/wiki/Slewing_bearing, accessed Feb. 1, 2016.)

⁵ Mitchell testified that “basket” is a maneuver in which they horse-shoe the jib with the rigging gear to install it.

(windshield). Fortunately, it tapped the window, shattered it, but did not come into the cab or injure Jackson.

Exhibit 6 is a photograph of the tower crane being struck by the inner jib. A few feet from the cab of the tower crane, two Iron Workers, Leprinzi and Richardson stood on the platform. They observed the jib hit the windshield of the cab. After the windshield shattered, they were able to gain control of the jib and install the inner jib to the turntable.

The broken glass of the wind shield and the wiper blade motor was later found on the ground below the tower crane cab on the following day. Division's Elevator Experts Thrash and McCarthy noticed it during an inspection of the worksite regarding an unrelated permit issue.

Employer argues that since the contact with the cab was minimal, there was no "obstruction".⁶ The evidence establishes that the 16,000 pound load, namely the inner jib, shattered the tower crane windshield during the process of being connected to the tower crane. The cab was an obstruction because it was in the way of the inner jib. The inner jib struck and shattered the windshield. The crane cab is found to be an "obstruction". Therefore, the safety order applies here and the safety order was violated.

Was there employee exposure?

Division must show that employees of the cited employer were exposed to the hazard addressed by the safety order in order to sustain the violation (*Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981), or, that employees had access to the "zone of danger" (*Golden State Utility Co.*, Cal/OSHA App. 85-1435, Decision After Reconsideration (Jan. 22, 1987).) To find employee exposure, there must be reliable proof that employees are endangered by an existing hazardous condition. (*Huber, Hunt & Nichols, Inc.*, Cal/OSHA App. 75-1182 (Decision After Reconsideration (July 26, 1977).)

Jackson was in the cab at the time of the incident.⁷ He pushed his chair

⁶ Employer also contends that section 1616.1, subdivision (o) does not apply because Mitchell, the mobile crane operator, rather than Jackson, the tower crane operator, was involved in the lifting of the inner jib. (Employer's Post Hearing Brief, p.5-6.) Nothing in the safety order supports this distinction.

⁷ Much is made of the discrepancies between Jackson, Leprinzi and Richardson about whether Jackson was given hand signals to swing the tower crane out of the way of the inner jib. Jackson credibly testified that he could not see the hand signals, because he was focused on the inner jib coming straight at him; the two Ironworkers on the turntable of the tower were outside of his vision and they could not be heard over the noise. Jackson testified that all signals were given to him via radio. General Foreman Leyba testified that crane operators do not move the crane, unless instructed. Mitchell, Leprinzi and Jackson testified that no radio instruction to turn the crane was given to Jackson during this incident.

back as the jib was coming towards him, to get out of the way and the jib struck and shattered the cab window, but did not hit him. If the cab was struck and had fallen, Jackson's injuries could have been serious or fatal. Richardson and Leprinzi were standing on the slew ring at the time of the incident. Richardson testified that if the jib hit the tower crane itself in its pre-erection state, when it is not in its most stable position, it could have damaged it. Jackson testified that Richardson and Leprinzi could have fallen off the turntable, if the impact of the jib with the crane was more forceful. The evidence establishes employee exposure.

Division established a violation of section 1616.1, subdivision (o).

C. Did the Division establish a rebuttable presumption that the violation is properly classified as a serious violation?

Labor Code § 6432, subdivision (a) states:

(a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm⁸ could result from the actual hazard created by the violation. 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 that have been adopted or are in use.

The Appeals Board has defined "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).)

⁸ Labor Code section 6432, subdivision (e) provides as follows:

"Serious physical harm" as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

Associate Safety Engineer Tatum testified that beginning on the date of the opening conference on January 28, 2014, she interviewed managers and employees, including Iron Worker General Foreman Bobby Leyba (Leyba), Mitchell, Leprinzi, Scott Ehsapfort, and Jackson. (Exhibit 10.) She also obtained a copy of the Employer's Job Hazard Analysis Form for November 23 – 24, 2013 and Balfour Beatty's Incident Report. (Exhibits 9 and 14.) The types of injuries which result from when the inner jib comes into contact with the front window of the tower crane cab include crushing or pinching injuries, other serious injuries, or even death. Tatum's unrebutted opinion that serious injury or death from the jib contacting the cab is a realistic possibility is found credible and is accepted.⁹

The realistic possibility of serious physical harm combined with existence of the actual hazard caused by an inner jib, coming into contact with the front window of the tower crane cab is well within the definition of "serious" set forth in section 6432.¹⁰ The Division established a rebuttable presumption that the violation was properly classified as a serious.

D. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to Employer to rebut the presumption. Section 6432, subdivision (c), provides as follows:

If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the

⁹ Tatum's opinion was based upon her five and a half years of experience working for the Division. Tatum testified that she was current in her Division-mandated training, and has experience conducting accident inspections. She conducted over 300 inspections, including 20 which included crushing accidents. She described three of the investigations involving crushing and pinching injuries, all of which resulted in serious injuries, including one which resulted in a fatality. Her opinion was based upon a reasonable evidentiary foundation consisting of her experience and training. Thus, Tatum is competent to give her opinion per Labor Code section 6432, subdivision (g). (*Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

¹⁰ Tatum's opinion was corroborated by the Division's two crane experts. Thrash testified that it was his opinion there was a realistic possibility of death or serious physical harm because contact of the inner jib, estimated to weigh over 16,000 pounds, with the cab, could have crushed or killed Jackson or knocked the cab to the ground 300 feet below. McCarthy testified that if Jackson swung his cab to the right, as he was allegedly instructed, the jib would have kept moving until it hit something; if it made contact with a person, it would likely have resulted in internal injuries, broken bones, crushed cranium, broken neck or crushed muscles.

presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.

To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April. 1, 2003).) Reasonable diligence includes the obligation of foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. (*A. A. Portonova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986).)

Employer did not present evidence that it was unaware of the violation. Chris Evans, the Operations Manager for Bigge Crane testified that he drafted the Job Hazard Analysis for the job at 1 S. Market Street, in San Jose, scheduled for November 23 - 24, 2013. (Exhibit 9.) The employer had knowledge of the hazards as they were identified prior to the accident and included:

2. Make sure everybody knows the communication plan, and their task for each step in the erection.

Employer argued that because Leprinzi and Richardson gave Mitchell numerous verbal and hand signals to swing the tower crane out of the way of the inner jib, Mitchell should have swung the crane to one direction or the other. However, Mitchell testified that he did not see or hear the verbal and hand signals because he was looking at the jib and the Ironworkers were not in his field of vision. Crane operators are required to wait until instructed before moving the crane. It is undisputed that Mitchell was not given a radio instruction to move the tower crane in any direction. The use of verbal or hand signals were not covered in the meeting prior to the shift that day. At any rate, moving the tower crane could have resulted in serious injury to the two Ironworkers on the slew ring, Leprinzi and Richardson.

Employer failed to present evidence which rebuts the presumption of a serious classification.

Conclusion

Employer was engaged in “lifting operations” at the time of the incident. While the inner jib of crane was being lifted to the top of the tower crane. It hit an “obstruction”, namely the tower crane cab windshield, and the glass

shattered. At least one employee was exposed to the actual hazard that the safety order was designed to address. Division established a serious violation of section 1616.1, subdivision (o). Therefore, Employer's appeal is denied.

Order

Citation 1, Item 1 and the proposed \$2,000 penalty are affirmed.

It is further ordered that the penalty indicated above and set forth in the attached Summary Table be assessed.

DATED: February __4__, 2016

MD:sp

MARY DRYOVAGE
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration.

Your petition for reconsideration must fully comply with the requirements of Labor Code Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

For further information, call: (916) 274-5751.

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD BIGGE CRANE & RIGGING CO. Docket 14-R1D2-1798

Dates of Hearing: June 18 and 19, 2015

Division's Exhibits—Admitted

Exhibit Number	Exhibit Description	
1	Jurisdictional Documents	X
2	I-B-Y letter dated April 15, 2015	X
3	Proposed Penalty Worksheet, dated May 19, 2014	X
4	Balfour Beatty Safety Training Attendance sign-in sheet, dated Nov. 24, 2013	X
5	Architectural Drawing of One South Market, Tower Crane Installation, sheet 8 of 9	X
6	Photo of Tower Crane at job site	X
7	Bigge Crane Incident Investigation Report prepared by Chris Evans, dated Nov. 25, 2013 (1 page)	X
8	Email from Calvin Jackson to David Thrash, dated January 23, 2014	X
9	Bigge Crane Job Hazard Analysis Form, Nov. 23-24, 2013 (2 pages)	X
10	Employee Witness Statement – Bobby Leyba, dated Jan. 28, 2014 (2 pages)	X
11	Document Request Sheet, January 28, 2014	X
12	Document Request Sheet, April 11, 2014	X
13	Cal/OSHA 1-A Form – Insp. No. 317351781 (2 pages)	X
14	Balfour Beatty Incident Report prepared by Bryan Bishop,	X

	Nov 24, 2013 (4 pages)	
15	Resume of David Thrash	X
16	Bobby Leyba – Signal Person and Rigging training completed Dec. 11, 2010	X
17	Ken Hill - Qualified Rigger & Signal Person card issued March 8, 2013	X
18	ETS Signal Person Training Course, Student Guide	X
19	Photo of similar crane not involved in accident.	X
20	Photo of jib of crane	X

Employer’s Exhibits—Admitted

Exhibit Letter	Exhibit Description	
A	Employee Witness Statement – Calvin Jackson, blank (1 page)	X
B	Investigator notes of interview with Bobby Leyba, dated Jan. 28, 2014 (1 page)	X
C	Employee Witness Statement – Mike Leprinzi, dated Jan. 30, 2014 (2 pages)	X

Witnesses Testifying at Hearing

1. Calvin Jackson
2. Chris Evans
3. Bobby Leyba
4. Kelly Tatum
5. David Thrash
6. James McCarthy
7. Adam Mitchell

8. Brandon Richardson

9. Mike Leprinzi

CERTIFICATION OF RECORDING

I, Mary Dryovage, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above 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.

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**BIGGE CRANE & RIGGING CO.
DOCKET 14-R1D2-1798**

Abbreviation Key:	
G=General	Reg=Regulatory
S=Serious	W=Willful
Er=Employer	R=Repeat
Ee=Employee	DOSH=Division

Inspection No. 317351781

Site: 1 South Market St., San Jose, CA 95113
Date of Inspection: 01/25/14 - 05/19/14

Date of Citation: 05/20/14

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFV FIR MTE DED	VAC RAT TED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING or STATUS CONF.	FINAL PENALTY ASSESSED BY BOARD
14-R1D2-1798	1	1	1616.1(o)	S	ALJ affirmed violation.	X		\$4,500	\$2,000	\$2,000
Sub-Total								\$4,500	\$2,000	\$2,000

Total Amount Due*

\$2,000

Please do not send payments to the Appeals Board.
All Penalty payments must be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. 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: 02/4/16**