

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

W. A. RASIC CONSTRUCTION COMPANY, INC.
4150 Long Beach Blvd.
Long Beach, CA 90807

Employer

DOCKET 13-R4D4-1422

DECISION

Statement of the Case

W. A. Rasic Construction Company, Inc. (Employer) performs underground construction. Beginning November 6, 2012, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Kevin Chu conducted an accident inspection at a place of employment maintained by Employer at the Los Angeles Airport, Center Way Los Angeles, California (the site). On April 17, 2013, the Division cited Employer for failure to keep an employee clear of a suspended load.¹

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, and the reasonableness of the proposed penalty. Employer amended its appeal to add multiple affirmative defenses².

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Board), at West Covina, California on August 25, 2015, January 13, 2016, and March 30, 2016³. Ronald E. Medeiros, Attorney, of Counsel to the Robert D. Peterson Corporation, represented Employer.

¹ Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

² Affirmative defenses for which Employer did not present evidence are deemed waived. (See section 361.3 "Issues on Appeal" and *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) They are not discussed.

³ No evidence was taken on March 30, 2016. The parties stipulated to Joint Exhibit J-1, submitted the matter on the record, and were granted leave to file briefs.

William Cregar, Staff Counsel, represented the Division. The matter was submitted on May 30, 2016.⁴

Issues

1. Does the Board have jurisdiction to hear a matter where the cited safety order was not yet in effect but referred to a safety order that was in effect?
2. Would Employer suffer prejudice if the ALJ deleted language regarding 1593, subdivision (n), thereby causing the citation to allege a violation of 5042, subdivision (a)(9)?
3. Did Employer fail to keep an employee clear of a suspended load?
4. Did the Division establish a rebuttable presumption that the violation was properly classified as serious?
5. Was the violation correctly characterized as accident-related?
6. Was the proposed penalty reasonable?

Findings of Fact

1. Citation 1, Item 1, alleged that a violation of section 1593, subdivision (n) occurred on October 29, 2012, and referred to section 5042, subdivision (a)(9). The entire text of section 5042, subdivision (a)(9) was printed in the alleged violation description. The California Occupational Safety and Health Standards Board Section adopted section 1593, subdivision (n), on October 23, 2012. Section 1593, subdivision (n) became operative on November 22, 2012. Section 5042, subdivision (a)(9) became operative in March, 1976. The accident occurred before section 1593, subdivision (n) became operative, but after section 5042, subdivision (a)(9) became operative.
2. On October 29, 2012, Employer was performing excavations at the site.
3. Employer had placed a temporary steel bridge⁵ over an excavation. The bridge weighed about 7,000 pounds.
4. Employer intended to lift the bridge then move it horizontally with an excavator. The excavator had a boom⁶ to which a sling was attached.
5. Employer's foreman, Carlos Serrato, attached slings⁷ to the excavator's boom with a hook.

⁴ On May 4, 2016, the ALJ issued a Notice of Proposed Amendment to the parties, notifying them that the ALJ proposed amending (1) the spelling of "Catapiler" to "Caterpillar" in the alleged violation description for instance 1, and (2) the safety order number for Citation 1 from 1593, subdivision (n) to 5042, subdivision (a)(9). Employer filed a response to the notice of proposed amendment. The Division did not file a response.

⁵ The parties also referred to the bridge as a plate. The bridge consisted of steel plates joined together with steel beams underneath it. Employer stipulated that the bridge weighed between 7,000 and 8,000 pounds.

⁶ The excavator was a Caterpillar 325 CL. The end of the boom to which the sling was attached is photographed in Exhibits 5 and C.

⁷ The parties also referred to the slings as straps.

6. Employer's employees, Laborers Ricardo Rodriguez and Jose Sanchez (Sanchez)⁸, were assigned to steer the bridge while it was lifted. Sanchez used his hands to guide the bridge.
7. When the excavator lifted the bridge, it began to swing and bounce. One of the safety swivel hook clasps holding the sling opened. This caused the sling to slip out of the hook, and, as a result, the bridge fell.
8. When the bridge fell, it struck Sanchez's hand and crushed it.

Analysis

1. Does the Appeals Board have jurisdiction to hear a matter where the cited safety order was not yet in effect but referred to a safety order that was in effect?

Labor Code section 6600 permits an employer to appeal citations issued pursuant to Labor Code section 6317.

Labor Code section 6602 reads as follows:

If an employer notifies the appeals board that he or she intends to contest a citation issued under Section 6317, or notice of proposed penalty issued under Section 6319, or order issued under Section 6308, or if, within 15 working days of the issuance of a citation or order any employee or representative of an employee files a notice with the division or appeals board alleging that the period of time fixed in the citation or order for the abatement of the violation is unreasonable, the appeals board shall afford an opportunity for a hearing. The appeals board shall thereafter issue a decision, based on findings of fact, affirming, modifying or vacating the division's citation, order, or proposed penalty, or directing other appropriate relief.

Labor Code section 6602 confers jurisdiction on the Board to hear appeals of citations issued pursuant to Labor Code section 6317. Labor Code section 6317 authorized the Division to issue citations where it finds that an employer has violated any standard, rule, order or regulation established pursuant to Chapter 6. The Labor Code assumes that the Division may err when it determines that an employer has violated a standard, rule, order or regulation, and allows an employer to contest the Division's findings. Where an employer intends to contest a citation, Labor Code section 6602 requires the employer to notify the Appeals Board of that intention.

⁸ The parties stipulated that Sanchez's testimony at hearing would be treated as if it were given under oath.

Labor Code section 6602 confers jurisdiction on the Board to hear the matter and issue a decision “affirming, modifying or vacating the division’s citation, order, or proposed penalty, or directing other appropriate relief.” The remedy when inappropriate safety orders are cited is for the Board to hear the matter and issue a decision. The Division may determine that an employer violated a safety order not yet in effect and issue a citation. If the Board did not have jurisdiction to hear a matter where an employer alleged that a cited safety order was not in effect, Employer would not have a remedy.

Therefore, the Board has jurisdiction over the instant matter.

2. Would Employer suffer prejudice from violation of its due process rights if the ALJ deleted language regarding section 1593, subdivision (n), thereby causing the citation to allege a violation of 5042, subdivision (a)(9)?

Citation 1, in relevant part⁹, reads as follows:

Citation 1 Item 1 Type of Violation: Serious Accident-Related

Subchapter 4. Construction Safety Orders
Article 10. Haulage and Earth Moving

T8CCR 1593(n). Haulage Vehicle Operation

(n) The use, care and maintenance of slings used in lifting suspended loads with excavators, loaders and similar equipment shall comply with the requirements of Article 101 of the General Industry Safety Orders.

Instance 1 Reference:

Subchapter 7. General Industry Safety Orders
Group 13. Cranes and Other Hoisting Equipment
Article 101. Slings

T8CCR 5042(a)(9). Safe Operating Practices

(9) All employees shall be kept clear of loads about to be lifted and of suspended loads.

Violation¹⁰

⁹ Instance 2 and all references to instance 2 have been deleted as the Division withdrew instance 2.

On or about 10/29/12 WA Rasic used a Catapiler¹¹ 325 CL excavator equipment # 4009 to move a steel plate bridge weighing approximately 8,000 pounds. They rigged the steel plate bridge with a Yoke hook model #8-027-26 and the Carpenter Group sling serial #6003001-2-00631. The WA Rasic employees were not kept clear of loads about to be lifted and suspended loads. There was an employee located at the back and front of the steel bridge as it was lifted. The employee at the back of the bridge used his hands to direct it while suspended by the excavator. This employee had his hand crushed as the sling slipped out from the hook causing a serious injury. The employee's hand was not kept clear of the lifted and suspended load.

Pursuant to California Code of Regulations, title 8, section 386, the ALJ proposed amending the safety order violation number to 5042(a), subdivision (9), which would be accomplished by striking the language in Citation 1, Item 1 beginning with "Subchapter 4" above and ending with "Article 101 of the General Industry Safety Orders," all of which referred to section 1593, subdivision (n).

Section 386 reads as follows:

- (a) The Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision.
- (b) Each party shall be given notice of the intended amendment and the opportunity to show that the party will be prejudiced thereby unless the case is continued to permit the introduction of additional evidence on the party's behalf. If such prejudice is shown, the proceeding shall be continued to permit introduction of additional evidence.

In order to satisfy due process, the "Board requires only a general notice pleading for hearings, to give the employer a fair notice and opportunity to prepare its defense." (*Crop Production Services*, Cal/OSHA App. 09-4036, Decision After Reconsideration and Order of Remand (May 25, 2014) p. 7, citing *Sacramento Bag Mfg. Co.*, Cal/OSHA App. 91-320, Decision After Reconsideration (Dec. 11, 1992), citing *Certified Grocers of California, Ltd.*, Cal/OSHA App. 78-607, Decision After Reconsideration (Oct. 27, 1982),

¹⁰ This is the alleged violation description. This language is an exact duplication of the language in Citation 1.

¹¹ The ALJ issued a notice of amendment to both parties under section 386 to amend the spelling to "Caterpillar." Neither party objected to the amendment or cited prejudice.

affirmed *Crop Production Services*, Cal/OSHA App. 09-4036, Decision After Reconsideration and Order of Remand (Mar. 28, 2015).)

The Board has rejected the argument that an ALJ loses neutrality and becomes an advocate by amending a safety order alleged. (See *Crop Production Services*, Cal/OSHA App. 09-4036, Decision After Reconsideration and Order of Remand (Mar. 28, 2015).) The Board has held that “prejudice may be cured by reopening the record to permit the introduction of additional evidence.” (*Crop Production Services*, Cal/OSHA App. 09-4036, Decision After Reconsideration and Order of Remand (Mar. 28, 2015) p. 4, citing *Hood Corporation*, Cal/OSHA App. 85-672, Decision After Reconsideration (Dec. 2, 1987); Gov. Code § 11516, Cal. Code of Regs. title 8, § 386.)

The Board favors allowance of amendments. “Resolving an issue on the merits, rather than disposing of a case due to technical defect is the favored means of resolving matters in California courts, and the Board will follow that sound policy. (*Crop Production Services*, Cal/OSHA App. 09-4036, Decision After Reconsideration and Order of Remand (Mar. 28, 2015) p. 4, citing *Rapleyea v. Campbell* (1994) 8 Cal.4th 975, 980.)

In this case, the safety order referred to section 5042, subdivision (a)(9), and the Division printed the text out in its entirety on the citation. Under notice pleading, this was sufficient to give Employer fair notice and opportunity to defend itself. The parties tried the issue of whether employer failed to keep an employee clear of a suspended load. The violation is the same and the facts are the same. Employer did not allege that it would have acted differently or that it needed to present additional evidence if the safety order alleged was 5042, subdivision (a)(9). To the contrary, Employer represented that a continuance would be prejudicial due to “the costs and uncertainties of a future trial.”

Under these circumstances, it cannot be found that Employer’s due process rights will be violated by the proposed amendment or that Employer will suffer prejudice from the proposed amendment.

3. Did Employer fail to keep an employee clear of a suspended load?

The Division issued Employer a citation for a violation of section 1593, subdivision (n). As discussed, the safety order was amended by the undersigned, through deletion, to section 5042, subdivision (a)(9), which reads as follows:

Subchapter 7. General Industry Safety Orders
Group 13. Cranes and Other Hoisting Equipment
Article 101. Slings

5042. Safe Operating Practices

(a) Whenever any sling is used, the following practices shall be enforced: ...

(9) All employees shall be kept clear of loads about to be lifted and suspended loads.

Section 5042 is part of Group 13. Section 4884, subdivision (a), provides that the orders in Group 13 apply to boom-type excavators.

Section 4885 contains the following definitions:

“Boom-Type Excavator” is “A power-operated excavating crane-type machine used for digging or moving materials.”

“Crane” is “A machine for lifting or lowering a load and moving it horizontally, in which the hoisting mechanism is an integral part of the machine.”

The alleged violation description, as amended, is reproduced above.

The only type of excavator to which section 5042 applies is a boom-type excavator. To establish a violation, the Division must prove 1) the excavator was a boom-type excavator, 2) it suspended a load using slings, and 3) an employee was not kept clear of the suspended load.

Regarding the first and second elements, it was undisputed that an excavator¹² was used to lift and move the bridge, that the excavator had a boom¹³, that a hook¹⁴ was attached to the end of the boom, and that Foreman Serrato attached slings to the hook¹⁵. At hearing, Laborer Ricardo Rodriguez (Rodriguez) identified and labeled the excavator’s boom and the slings¹⁶. The excavator was a power-operated machine. It was like a crane because it was used for lifting and lowering. Therefore, it is found that the excavator was a boom-type excavator and that it suspended a load using slings.

Regarding the third element, Sanchez was Employer’s employee. Sanchez, Rodriguez and Welder Scott Waits all testified that the load

¹² Exhibits 5 and C show excavated soil below the load. Exhibit C shows a bucket that presumably was attached to the end of the boom for excavation.

¹³ “Boom” is defined in section 4885 as “A member section of a crane or derrick, the lower end of which is affixed to a mast, base, carriage, or support, and the upper end supports a hook or other attachment.” Here, the end of the member was attached to the body of the excavator and the upper end had a hook attached. Rodriguez identified and labeled the boom on Exhibit C.

¹⁴ Exhibit 4-10 is a close-up photograph of the hook with the slings attached.

¹⁵ Exhibits 5, C. Exhibit 5 shows the slings attached to the hook and the hook attached to the end of the boom. Exhibit C is a more distant view that shows the slings attached to the boom via a hook.

¹⁶ Exhibits B and C. He called the slings “straps.”

contacted Sanchez's hand. Contact could happen only if Sanchez was not clear of the load. Additionally, Foreman Serrato stated in his accident report¹⁷ that Sanchez was not kept clear of the suspended load and that he was in direct contact with the bridge.¹⁸ Serrato was responsible for safety. His report is an exception to the hearsay rule¹⁹. Statements by a foreman are attributed to Employer as authorized admissions under Evidence Code section 1221²⁰ since a foreman is a member of management and authorized to make statements on Employer's behalf. (*Macco Construction*, Cal/OSHA App. 84-1106, Decision After Reconsideration (Aug. 20, 1986).) Therefore, the evidence is convincing that Sanchez was not kept clear of the suspended load.

Accordingly, a preponderance of the evidence established a violation of section 5042, subdivision (a)(9).

4. Did the Division establish a rebuttable presumption that the violation was properly classified as serious?

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 harm²¹ could result from the actual hazard created by the violation. The actual hazard may consist of, among other things: ...

¹⁷ Exhibit 4 is Serrato's accident report.

¹⁸ He stated that tag lines or an extension tool, such as a shovel, should have been used to keep Sanchez clear of the suspended load when the safety swivel hook clasp failed.

¹⁹ Under section 376.2, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

²⁰ Evidence Code § 1221 provides that evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof has, by words or other conduct, manifested its adoption or its belief in its truth.

²¹ 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.

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

“Realistic possibility” is not defined in the safety orders. However, 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).)

Opinions about possibility must be based on a valid evidentiary foundation, such as expertise on the subject, reasonably specific scientific evidence, experience-based rationale, or generally accepted empirical evidence. (*California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009); *R. Wright & Associates, Inc. dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

Labor Code section 6432, subdivision (g), provides, “A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.”

Associate Safety Engineer Kevin Chu (Chu) testified that he classified the violation as serious because, in his opinion, serious physical harm was a realistic possibility in the event of an accident caused by failure to keep an employee clear of a suspended load that weighed approximately 7,000 pounds, as happened here. In his opinion, the most likely injuries are broken bones, vascular injuries, muscular problems, and amputations.

Chu is current in his Division-required training. He has a bachelor’s degree in Environmental Studies. He has worked for the Division for six years and has conducted approximately 200 inspections, 15 of which involved crushing injuries. His opinion was based upon his education, training, and experience. Employer did not offer any evidence in rebuttal. Therefore, Chu’s opinion is credited.

The parties stipulated that Sanchez suffered serious physical harm and that a serious injury occurred. Therefore, there is a realistic possibility that serious physical harm can occur.

Accordingly, the Division established a rebuttable presumption that the violation was properly classified as serious.

5. Was the violation correctly characterized as accident-related?

A violation is accident-related where there is a causal nexus between the violation and the injury. (*MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016) p. 11.) “The violation need not be the only cause of the accident, but the Division must make a ‘showing [that] the violation more likely than not was a cause of the injury. (*Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011; *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003); *Davey Tree Surgery Company*, Cal/OSHA App. 99-2906, Decision After Reconsideration (Oct. 4, 2002).)” (*Id.* p. 11-12)

Sanchez used his hands to guide the bridge. When the excavator lifted the bridge, the bridge began to swing and bounce. One of the safety swivel hook clasps holding the sling opened, causing the sling to slip out of the hook. The bridge, no longer being supported by the sling, fell. Sanchez was close to the bridge because he was using his hands to guide the bridge. He was unable to get out of the way when it fell. If Sanchez had been clear of the suspended load, it would not have struck him when the load fell. If he had not been struck by the load, his hand would not have suffered a serious injury.

Therefore, the Division established that the violation more likely than not was a cause of the injury. The violation was properly characterized as accident-related.

6. Was the proposed penalty reasonable?

Employer stipulated that the proposed penalty was calculated in accordance with the Division’s policies and procedures²². The \$18,000 proposed penalty is found reasonable.

Conclusions

The Appeals Board has jurisdiction. Further proceedings to allow Employer to present additional evidence would not cure any alleged prejudice.

²² Where a serious violation results in a serious injury, the only penalty reduction allowable to the \$18,000 base is for size. Employer had over 100 employees, so no reduction was allowable. Labor Code section 6319, subdivision (d); *Dennis J. Amoroso Construction Co., Inc.*, Cal/OSHA App. 98-4256, Decision After Reconsideration (Dec. 20, 2001). .

Employer did not keep its employee clear of a suspended load. As a result, the employee suffered a serious injury.

Order

Citation 1 and the \$18,000 proposed penalty are affirmed.

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

DALE A. RAYMOND
Administrative Law Judge

DAR: ao

Dated: June 21, 2016

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
W. A. RASIC CONSTRUCTION COMPANY, INC.
Docket 13-R4D4-1422**

Dates of Hearing: August 25, 2015, January 13, 2016 & March 30, 2016

Division's Exhibits

Number	Description	Admitted
1	Jurisdictional Documents	Yes
2	Form C-10-Proposed Penalty Worksheet	Yes
3	Accident Report	Yes
4	Incident Investigation Report	Yes
5	Black and White Photograph of suspended load	Yes
6	Employer's Response to Notice of Intent to Issue Serious Violation	Yes

Employer's Exhibits

Letter	Description	Admitted
A	Job Hazard Analysis	Yes
B	Hand-drawn diagram	Yes
C	Color photograph of suspended load	Yes

Joint Exhibit

Letter	Description	Admitted
J-1	E-mails of March 28-29 among ALJ and parties	Yes

Witnesses Testifying at Hearing

Ricardo Rodriguez

Jose Sanchez

Kevin Chu

Scott Waits

CERTIFICATION OF RECORDING

I, Dale A. Raymond, 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.

DALE A. RAYMOND

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

W. A. RASIC CONSTRUCTION COMPANY, INC.
Docket 13-R4D1-1422

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

IMIS No. 314863978

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	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
13-R4D1-1422	1	1	1593(n)	S	ALJ amended safety order to 5042(a)(9) and affirmed violation	X		\$18,000	\$18,000	\$18,000
Sub-Total								\$18,000	\$18,000	\$18,000

Total Amount Due*

\$18,000

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: *Please do not send payments to the Appeals Board.*

All penalty payments should be made to:

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

*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: DR/ao
POS: 06/21/2016