

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

In the Matter of the Appeal of:

WEST VALLEY CONSTRUCTION CO., INC.  
580 McGlincey Lane  
Campbell, California 95008

Employer

Docket Nos. 01-R1D2-3017  
and 3018

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), having taken the petition for reconsideration of West Valley Construction Co., Inc. (Employer) under submission, issues this Decision After Reconsideration pursuant to the authority vested in it by the California Labor Code.

**Jurisdiction**

Commencing on May 21, 2001, the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at Three Forks Lane/Middle Fork Lane, Los Altos Hills, California. On July 31, 2001, the Division cited Employer for violating sections 4999(a) [crane boom loaded beyond the rated capacity], 2946(a) [operation of crane in proximity to high voltage power lines prohibited until danger from accidental contact effectively guarded against] and 2946(b)(3) [operation of crane within 10 feet of high voltage power lines prohibited] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.<sup>1</sup> The first violation was classified “general” and the latter two violations were classified “serious.” Total penalties of \$36,420 were proposed.

Employer filed a timely appeal in which it raised a number of affirmative defenses, including the independent employee act defense. An Administrative Law Judge for the Board convened a hearing held April 12 through 14, 2005. At the hearing, the Division withdrew the general citation for the violation of section 4999(a) and Employer withdrew the independent employee act defense. The ALJ issued a decision on June 15, 2005, which upheld the remaining two citations and the serious classifications, but eliminated one of the two \$18,000 proposed penalties because she found the violations involved the same

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

abatement measures. Accordingly, Employer received an \$18,000 penalty.

Employer filed a petition for reconsideration in which it alleged that: it should not be held responsible for an employee's "willful and criminal" misconduct; and the record failed to support the violations' serious classification. The Board took Employer's petition for reconsideration took the matter under submission on September 2, 2005. The Division filed an answer to the petition on September 19, 2005.

### **FACTUAL BACKGROUND**

Employer was installing a water main along a street. A truck crane was used to lift pipe sections off the truck and place them in the trench in which the main was being constructed. A high power line ran alongside the trench and crossed it.

An owner/operator of a dump truck used on the project, Joe Kruljac, assisted Employer's crew with other tasks as requested. At one point, Employer's project foreman, Craig Woolworth, asked Kruljac to operate the crane while Woolworth backfilled a separate section of the trench. Woolworth was working some distance from the crane.

While operating the crane, Kruljac moved the crane up the street from its original location in order to continue to lay pipe. He placed the crane very near to where the power line crossed the trench. While Kruljac was moving one section of pipe from the truck to the trench, two of Employer's workers allegedly saw that the crane's boom was too close to the power line and they claim to have yelled at Kruljac to move the boom. When Kruljac did not respond, one walked away and one acted to protect himself, but they did not persist with their warning. A third employee, the decedent, failed to note the problem, pushed down on the pipe, and signaled Kruljac to lower the pipe into the trench. In so doing, the boom either came so close to the power line that it created an electrical arc, or actually made contact with the power line, and decedent was fatally electrocuted.

When the accident occurred, Woolworth was walking toward the crane. He was inspecting the pipes in the trench as he approached the crane, so he was looking down. Woolworth then either heard, or looked up in time to see and hear, the electrical arc that resulted in the electrocution.

Conflicting testimony was offered regarding Kruljac's experience operating truck cranes. It is undisputed that, on a separate occasion before the accident, Woolworth had Kruljac demonstrate his ability to operate the crane's controls and that Woolworth was satisfied with his performance. Woolworth further contends that he informed Kruljac of the requirement to maintain a 10-foot clearance from power lines then and on at least one other occasion. Kruljac maintains that he was unaware, and not informed, of the 10-foot rule. The ALJ concluded that Kruljac's assessment of his experience and

knowledge was the more reliable account.

As a result of this incident, Kruljac pled no contest to a charge of involuntary manslaughter.

### **ISSUES FOR RECONSIDERATION**

1. Does Kruljac's conduct eliminate Employer's liability?
2. Were the violations properly classified as serious?

### **DISCUSSION AND ANALYSIS**

Although we concur with the ALJ's decision below, we will address some of the points made in Employer's petition for reconsideration and emphasize some of the issues raised in the decision.

#### **1. Kruljac's conduct does not obviate Employer's liability.**

Employer contends that it should not be held liable for Kruljac's willful and/or criminal behavior. We disagree. Rather, we agree with the ALJ's finding that Kruljac's behavior does not rise to the level of willful or deliberate misconduct. And, we see no reason why Kruljac's no contest plea to involuntary manslaughter should absolve Employer of responsibility here.

We further decline Employer's invitation to create a defense that would allow it to escape liability because of Kruljac's conduct despite Employer's decision to waive the independent employee act (IEA) defense. Given the facts of this case, it is understandable that Employer opted not to assert the IEA defense, but the cases cited by Employer to support its argument that it should not be liable are wholly distinguishable<sup>2</sup> from the situation at hand.

With respect to Kruljac's alleged "intentional" behavior, our independent review of the record demonstrates that Kruljac was completely unaware of the need to preserve 10 feet of clearance between the high voltage lines and the crane's boom. After the accident, Kruljac repeatedly and consistently asserted that he believed the boom was two to three feet from the power line, which he thought was sufficient clearance.<sup>3</sup> He believed it was safe as long as the crane

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<sup>2</sup> *Andersen Tile Co.*, Cal/OSHA App. 94-3076, Decision After Reconsideration (Feb. 16, 2000)(serious classification reduced to general where violation unforeseeable because employee specifically ignored employer's instruction to limit scope of work); *Mercury Service Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980)(application of IEA defense); *Ag Labor, Inc.*, Cal/OSHA App. 96-168, Decision After Reconsideration (May 24, 2000)(*specific application of Title 8, section 3314*); *Sequel Contractors*, Cal/OSHA App. 99-1055, Decision After Reconsideration (Aug. 29, 2001) (*compliance with manufacturer's recommendations*).

<sup>3</sup> See, e.g., Division ex. 9 (Letter from Kruljac: ". . . I was watching the power lines to make sure I did not touch them with the crane."); Division ex. 4B (Division Field Documentation Worksheet/notes from interview with Kruljac: not near power line, 2-3 ft. from power line); Division ex. 4 (Division investigation summary: ". . . operator [Kruljac] stated that the crane appeared to be approximately 2 feet away from the power line."; Division ex. 6 (Statement signed by Kruljac, dated 5/23, 1001: I did not feel I was too close to the power line); Division Inspector Tieu testimony, Transcript p.211-212; Kruljac's testimony,

was not touching the power line. As a result, we cannot agree that his behavior was intentional. The evidence to support Kruljac's ignorance of the safety order, taken collectively, is vast and there is no evidence to demonstrate he knew the rule.

While we do not dispute that the crane itself contained several warnings regarding the necessary clearance, their presence does nothing to ensure that a worker is informed of the rule stated in them, or to ensure compliance with that rule. The prevalence of the placards does, however, serve to highlight the severity of the hazard involved. Moreover, placement of a warning sign on the equipment regarding the 10-foot clearance requirement is a separate requirement stated in Title 8, section 2947. Compliance with section 2947 does not substitute for compliance with sections 2946(a) and 2946(b)(3).

Similarly, it may be that Woolworth made casual comments to Kruljac regarding the clearance requirement, but, contrary to Employer's assertions, he did nothing to "ensure" that Kruljac actually knew the rule. Woolworth's testimony on this issue included his conclusion that Kruljac knew the 10-foot rule because Kruljac smiled at him like he already knew the rule after Woolworth mentioned it to him. Kruljac was operating the crane at the time.

Relying on a smile to reach such a significant conclusion is woefully insufficient. Given Kruljac's testimony that he was not informed of the rule, there is, in fact, no assurance that Kruljac even heard Woolworth when Woolworth made his comment. And, although Woolworth claims to have discussed the rule with Kruljac on other occasions, his testimony on this issue is too vague for us to give it meaning.<sup>4</sup> Because we are well satisfied that Kruljac did not know the 10-foot clearance requirement, we cannot find his conduct to be willful.

Moreover, neither the placards nor Woolworth's passing comments to Kruljac serve in any fashion to ensure that "accidental contact with . . . high-voltage lines has been effectively guarded against." Title 8, section 2946(a). We have held that a violation of section 2946(a) is established if an employee is required to work in proximity to a power line regardless of any warnings to the employee about the hazard. See, *Kenko, Inc.*, Cal/OSHA App. 90-1101, Decision After Reconsideration (Jan. 6, 1992). Employer's measures here were neither effective nor sufficient.

Similarly, we are unpersuaded by Employer's argument that Kruljac acted willfully because he ignored the warnings issued by his colleagues. One of Kruljac's co-workers, Conor Matlock, credibility testified to the warnings he gave when he realized that the crane boom was too close to the power line. We note that Matlock also testified that he made his comments following a similar

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Transcript, pp.41-420.

<sup>4</sup> For example, Employer's counsel asked Woolworth whether he had conversations with Kruljac about the 10-foot rule during times that Kruljac was spotting for him, to which Woolworth replied: "Yeah." (Tr. p. 490) No follow-up testimony was elicited.

warning issued by Augustin Rodriguez.<sup>5</sup> We also find that Kruljac credibly testified that he heard neither warning. We find no conflict in this testimony; rather, we conclude that Kruljac did not hear the warnings Rodriguez and Matlock gave.

Matlock was standing closest to Rodriguez when Rodriguez allegedly made his comment, and, according to Matlock's unrefuted testimony, Rodriguez was standing behind Kruljac when he spoke. Kruljac, for his part, was standing next to the crane's motor when the warnings were given.

Although Matlock testified that Kruljac looked toward both gentlemen when they made their respective comments, that does not mean that he heard what they said. Indeed, Matlock testified that Kruljac did not respond to either of them. Moreover, Matlock's uncontested testimony was that neither he nor Rodriguez persisted in their warnings because they did not believe Kruljac was listening to them. Because we conclude that Kruljac likely did not hear the warnings given, we, again, cannot find his behavior to be willful or intentional.

Indeed, we believe a reasonable inference could be made that the decedent also failed to hear the warnings, because it defies credulity to suggest that he would have heard them and ignored them so completely when his life hung in the balance. Alternatively, it is possible that the decedent was also sufficiently unfamiliar with the 10-foot clearance rule that he failed to appreciate the danger present.

In addition, we note that Kruljac did not act in isolation. Rather, the record reflects that the decedent used a hand signal to instruct Kruljac to lower the pipe into the trench. Woolworth testified that the laborer or the plumber (i.e., the decedent in this instance) conveys information to the crane operator regarding where to place the pipe in this fashion. Accordingly, we question whether Kruljac did anything more than follow Employer's standard practice here.

Next, Employer makes much of Kruljac's no contest plea to involuntary manslaughter, and asserts that it should not be responsible for Kruljac's criminal behavior. We note that the record is devoid of any documentation regarding the charge against Kruljac or his plea. Involuntary manslaughter, as it applies here, is defined to be,

the unlawful killing of a human being without malice . . . in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection . . . .  
Cal. Penal Code section 192.

Given that the definition is written in the disjunctive, and because we

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<sup>5</sup> We find no mention of Rodriguez, or the warnings he allegedly made in any of the witness statements or inspection reports. We further note that Employer chose not to call Rodriguez as a witness.

know nothing about why Kruljac was charged with involuntary manslaughter, we must acknowledge the possibility that he was charged with this crime because he was found to be operating a crane in an unlawful manner as opposed to acting without due caution and circumspection. Nonetheless, even if he were charged with failing to exercise due caution and circumspection, we find such a charge to be more akin to a negligent<sup>6</sup> act rather than willful misconduct. Irrespective of which element of involuntary manslaughter served as the basis for Kruljac's criminal charge, his plea provides no basis on which to shield Employer from liability.

Employer also relies on Kruljac's no contest plea to attack the ALJ's credibility findings. Employer argues that the ALJ's decision to credit the testimony of a "convicted felon" over that of its foreman, Craig Woolworth, is baseless. Again, we disagree. We note that Kruljac's "crime" is hardly one that renders him an inherently untrustworthy person. Much as we concluded in *Jerlane, Inc. dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344, Decision After Reconsideration (Aug. 8, 2006),<sup>7</sup> we decline to find a person generally untrustworthy based on evidence that he committed a single wrong, especially one for which he has accepted full responsibility.

In addition, although Employer portrays the evidence as being Kruljac's word against the rest of the evidence, we do not find this to be the case. For example, Kruljac testified that he operated the truck crane five times, Matlock testified that Kruljac operated it several times, and the Division's investigation summary states that Kruljac operated the crane several times.<sup>8</sup> We find this evidence to be relatively consistent.

In contrast, we have Woolworth's testimony in which he contends that Kruljac's experience was far greater, and a single notation from the Division inspector's notes regarding a conversation with Kruljac that says "operated this crane 100 x's." Kruljac did not recall making the latter statement, although he conceded he may have, and the Division inspector's recollection of the statement was weak, at best. More importantly, in the Division's investigation summary, which was prepared subsequent to the referenced conversation, the inspector represented that Kruljac operated the crane several times.

Similarly, we have already addressed the significant evidence to support a finding that Kruljac did not know the 10-foot clearance rule, which is consistent with Kruljac's testimony, and the paucity of evidence to indicate that

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<sup>6</sup> Negligence is defined to be "the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do. . . .the failure to use such care as a reasonably prudent and careful person would use under similar circumstances . . . ." *Black's Law Dictionary (5<sup>th</sup> Ed. 1979)*

<sup>7</sup> There, the employer attempted to discredit the injured employee's testimony by focusing on alleged misrepresentations made regarding his immigration status on employment documents.

<sup>8</sup> "Several" was not further defined by Matlock or in the narrative summary. However, the word is commonly defined to mean "a number more than two or three, but not many; of an indefinitely small number." *The American Heritage Dictionary (1978)*

he possessed that knowledge as Woolworth contends.

We have repeatedly held that we will not disturb the factual and credibility findings of an ALJ absent substantial evidence to the contrary. See, e.g., *Jerlane, supra*; *Tutor-Saliba-Perini*, Cal/OSHA App. 97-3209, Decision After Reconsideration (Jan. 23, 2003). Our position is consistent with that expressed by the California courts. *Garza v. Workmen's Comp. Appeals Board (1970) 3 Cal. 3d 312, 318-19*. While we might agree that the ALJ made too much of the inconsistencies she referenced in Woolworth's testimony, we concur with her overall assessment of the evidence.

## **2. The violations were properly classified as serious.**

We now turn to the citations' serious classification. Employer contests the ALJ's determination that it knew or could have known with reasonable diligence of the violations.<sup>9</sup> We again concur with the ALJ's findings that the citations were properly classified and that there was sufficient duplication in the abatement measures to justify elimination of one of the two \$18,000 penalties.

The ALJ found, and we agree, that Employer lacked direct knowledge of the violation. We conclude, however, that Employer could have known of the hazard had it exercised reasonable diligence.

Woolworth instructed Kruljac and the crew to continue laying pipe while he backfilled the trench in another location on the job site. As the ALJ observed, the power line was plainly visible, and it was clear that the crew would move toward the location where the power line crossed the trench in short order as their work progressed. Woolworth testified that he did not observe the location of the crane because he was "concentrating on the back fill." (Tr. p. 506).

Woolworth, however, could have easily anticipated the hazard and undertaken steps to plan for it, including: discussing with Kruljac where to position the crane as the crew moved forward; telling the crew to come get him before it moved the crane; ensuring that the crew knew who was to spot for Kruljac while they were positioned near the crossing;<sup>10</sup> ensuring that the crew knew how to communicate a problem if one were to occur;<sup>11</sup> and holding a tailgate meeting to review power line safety before turning the crane over to

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<sup>9</sup> Employer stipulated at the hearing that an injury resulting from a violation of the applicable safety orders would constitute a "serious injury" as defined in Labor Code section 6302(h).

<sup>10</sup> Kruljac testified that he believed Matlock would tell him if he was too close to the power line, yet ultimately followed a command given by the decedent, and Matlock testified that he believed it was Kruljac's responsibility to monitor the power line's proximity.

<sup>11</sup> Despite significant evidence in the record that hand signals were commonly used to communicate with the crane operator, Matlock and Rodriguez opted to yell to him. And, despite their awareness of a life threatening hazard, they opted to give up when their efforts to warn Kruljac were not immediately successful. We note that Kruljac may have heeded the decedent's hand signal to lower the pipe over Matlock and Rodriguez's verbal warnings because he could detect the former but not the latter.

Kruljac.

We are unmoved by the actions Employer contends it took to exercise due diligence, most of which have already been discussed and discounted. Specifically, we have concluded that Kruljac was a relatively inexperienced crane operator who was unaware of the 10-foot clearance from power line requirement. As a result, while he may have been competent to operate the crane in some respects, and may have successfully avoided an accident until the fatal one at issue, we cannot agree that he was competent to operate the crane near high-voltage lines. We further conclude that Employer's reliance on the warning placards regarding the 10-foot rule placed on the crane, and Woolworth's casual comments to Kruljac regarding the rule, were insufficient to ensure compliance with the rule, or to effectively guard against accidental contact with high-voltage lines. Title 8, Section 2946(a). Furthermore, the fact that the power line was in plain view does not support Employer's argument. Rather, the apparent nature of the hazard supports the conclusion that Employer could have known of the violation through the exercise of reasonable diligence.

Accordingly, we do not believe Employer undertook the steps it claims constitute "due diligence." Moreover, even had Employer effectively implemented these steps, they likely would have been insufficient to reduce the violation's classification to general.

The facts presented here resemble those found in prior Board cases in which the Board upheld the serious classification of the citations. *Western States Construction Co., Inc.*, Cal/OSHA App. 86-0096, Decision After Reconsideration (March 18, 1988); *Kenko, Inc, supra*. In those cases, the Board determined that the supervision provided was inadequate and concluded that more careful supervision would have enabled the employers to know of the violation. We see no reason to deviate from that precedent here.

In fact, the need for proper supervision is all the more important when an employer chooses to enlist the services of an employee it has not trained and who is filling a role other than the one for which he was hired.<sup>12</sup> Under circumstances such as these, we believe the need for proper supervision is that much greater.

Moreover, we see no evidence to support a finding that the violation occurred at a time and place that deprived Employer of a reasonable opportunity to detect it. *Vance Brown*, Cal/OSHA App. 00-3318 Decision After Reconsideration (April 1, 2003).

Employer further contends that the ALJ mischaracterized the nature of the violations at issue in upholding the serious classification. Employer

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<sup>12</sup> Kruljac testified that he received no training and Employer conceded that it had no training records for him.

focuses on one sentence in the decision to support its claim. The sentence states that, had Employer exercised reasonable diligence, it would have anticipated the violations because it would have realized that the crane's boom "had the capacity" to contact the power line under specified conditions. Employer contends that it was Employer's knowledge of the violations and not the crane's capacity to violate the safety orders that was at issue.

We believe the referenced sentence speaks to Employer's ability to anticipate the violations. Employer's contention takes the referenced sentence out of context and disregards the many other paragraphs spread over several pages in the decision that provide ample basis on which to find that Employer could have known, through the exercise of reasonable diligence, of the violations. Our independent review confirms the same.

For all the foregoing reasons, we conclude that Employer could have known of the violative conditions had it exercised reasonable diligence and we uphold the serious classification of the violations.

Employer next contends that, in addition to eliminating one of the two \$18,000 penalties assessed, only one of the two citations should have been upheld because of the duplication in the hazards and abatement measures. We recognize that the Board, on occasion, has dismissed a citation along with the penalty when citations were found to be duplicative and the second citation was not needed to achieve abatement.<sup>13</sup> Dismissal of the citation, however, is a rare exception to the rule under which an employer may be subject to multiple related citations, but may not be assessed duplicative penalties.<sup>14</sup> Under the facts presented in this case, the rule, rather than the exception, applies.

To support its position, Employer makes much of the ALJ's determination that both section 2946(a) and 2946(b)(3) could have been abated by observing the 10-foot clearance requirement stated in the latter section. We agree that there is some truth to this assertion, and we will not disturb the ALJ's conclusion regarding the proper penalty here. Nonetheless, while it is true in this case that compliance with subsection (b)(3) could serve to abate (a), Employer was not free to forego compliance with subsection (a)<sup>15</sup> as long as it complied with subsection (b)(3)<sup>16</sup>. And, compliance with subsection (a) clearly did not obviate the need to comply with subsection (b)(3). Rather, compliance

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<sup>13</sup> *Adia Personnel Services*, Cal/OSHA App. 90-1015, Decision After Reconsideration (March 12, 1992; *Strong Tie Structures*, Cal/OSHA App. 75-856, Decision After Reconsideration (Sept. 16, 1976)

<sup>14</sup> See, e.g., *Western Pacific Roofing Corp.* Cal/OSHA App. 96-529, Decision After Reconsideration (Oct. 18, 2000); *San Francisco Newspaper Agency*, Cal/OSHA App. 93-0319, Decision After Reconsideration (Dec. 20, 1996); *Golden State Erectors*, Cal/OSHA App. 85-0026, Decision after Reconsideration (Feb. 25, 1987); *Pace Arrow, Inc.* Cal/OSHA App. 78-1016, Decision After Reconsideration (Nov. 19, 1984).

<sup>15</sup> Subsection (a) states, in relevant part, no employer "shall require or permit any employee to perform any function in proximity to energized high-voltage lines . . . unless and until danger from accidental contact with said high-voltage lines has been effectively guarded against."

<sup>16</sup> Subsection (b)(3) states, in relevant part, "erection, operation or dismantling of any boom-type lifting or hoisting equipment, or any part thereof, closer than the minimum clearances from energized overhead high-voltage lines set forth in Table 2 [10 feet] shall be prohibited."

with both safety orders was needed to ensure employee safety, and Employer complied with neither. See, *Bayles Ranch*, Cal/OSHA App. 86-1271, Decision After Reconsideration (Feb. 4, 1988). We affirm the ALJ's decision that Employer violated both of the referenced safety orders.

### **DECISION AFTER RECONSIDERATION**

For the reasons previously articulated, the Board affirms and reinstates the ALJ's decision dated June 15, 2005.

CANDICE A. TRAEGER, Chairwoman  
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: May 16, 2008