

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

SHEEDY DRAYAGE
1215 Michigan Street
San Francisco, CA 94107-0004

Employer

Docket No(s). 06-R1D4-3054 and 3055

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, having taken the petition for reconsideration filed by Sheedy Drayage (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Commencing on June 22, 2006, the Division of Occupational Safety and Health (Division) conducted an accident investigation at a place of employment in Livermore, California where Employer was conducting operations. On August 1, 2006, the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹ Employer timely appealed the citations.

Administrative proceedings were held, including an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After considering the evidence and arguments of counsel, the ALJ issued a Decision on February 23, 2010, holding that Employer had committed 4 of the 5 cited violations, and imposing civil penalties totaling \$18,560.

Employer timely filed a petition for reconsideration challenging the Decision insofar as it sustained the violations alleged in Citations 2 and 3, which the Board took under submission. The Division filed an Answer (opposition) to the petition.

ISSUES

Did the Decision correctly sustain Citations 2 and 3?

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

EVIDENCE

The Board incorporates by reference the summary of evidence set forth in the Decision. For clarity and ease of reference, we briefly restate the evidence.

Employer provides crane, rigging and heavy hauling services to its customers. Here, Employer was working for a company installing underground cables for Pacific Gas and Electric in the Livermore, California area. Employer's work involved using a crane to unload reels of electrical cable weighing about 44,000 to 45,000 pounds from trucks into a short term storage yard near the installation site, then loading them back onto a flatbed truck for movement to the points of installation and unloading the reels into previously prepared vaults for unreeling.

The loading and unloading of each reel of cable involved two of Employer's employees. One employee would operate a crane to lift and move the reel, and another acted as a "rigger," the person who sets up a crane before it makes a lift. The rigger would set counterweights as needed and select the proper shackles to attach the reel to the crane's hook and to so attach it. As the Decision summarized the respective roles of the rigger and crane operator, the rigger is responsible for lift "from the hook down," and the crane operator "from the hook up." The hook is the hardware component (literally, a hook) hanging from the end of the crane's boom load line. (Decision, pp. 9-10.)

On June 22, 2006, the crane operator was attempting to unload a reel of cable off a flatbed truck at one of the vault locations. The operator tried to lift the reel twice in rapid succession. The first attempt caused the rear of the crane to lift about three feet off the ground, and when the second attempt was made less than a minute later, the crane toppled over onto its side against the flatbed truck, crushing the crane's cab and fatally injuring the operator.

The testimony regarding the accident was that the crane operator had "over boomed" the reel he was attempting to lift, and the rigger's attempts to signal the operator to stop were unsuccessful. Over-booming means that the end of the crane's boom was not directly over the reel, but extended beyond it. A lift should be made with the end of the boom directly over the center of the object to be lifted, so as to prevent swinging of the load. Swinging is what occurred in this instance, causing the crane to topple. Additionally, the crane was equipped with "outriggers" – supports which can be extended to provide extra stability for the crane – which, however, were not properly deployed. (Decision, pp. 15-17.)

DISCUSSION

In making this decision, the Board relies upon its independent review of the entire record in the proceeding. The Board has taken no new evidence. The Board

has reviewed and considered the briefs and arguments of the parties made during the hearing and in their respective petition for reconsideration and opposition.

Citation 2 alleged a serious violation of section 4999(a), which at the time of the accident provided:

- (a) Size of load. A crane, derrick or hoist shall not be loaded beyond the rated capacity or safe working load, whichever is smaller, except for test purposes.

As the Decision noted, the load charts did not clearly show that the crane was being operated “beyond [its] rated capacity,” because they did not pertain to the outrigger configuration which existed at the time of the accident. (*Id.* at pp. 15-17.) On the other hand, that the crane lifted off its base on the first attempt and toppled moments later during the second indicates it was being operated “beyond . . . [its] safe working load[.]” (*Ibid.*) We agree with the ALJ’s finding that the crane was loaded beyond its safe working load when it reacted as it did during the attempted lifts. We conclude, therefore, that Employer violated section 4999(a) when its employee, the crane operator, attempted a lift beyond the crane’s safe working load.²

Citation 3 alleged a violation of section 4999(d)(3), which stated at relevant times:

- Moving the load. The hook shall be positioned over the load in such a manner as to prevent swinging of the load when lifted.

The evidence in the record established that the hook was not positioned over the load so as to prevent swinging. The testimony was that the load did swing, causing the crane to lift and fall back, and then topple when the operator attempted a second lift. The rigger testified that he observed that the hook was over boomed – i.e. or not directly over the load – and tried unsuccessfully to signal the operator to correct the hook’s position. Therefore, we hold the record supports the ALJ’s Decision that a violation of section 4999(d)(3) was established.

Employer contends in its petition for reconsideration that it established the “independent employee action defense” (IEAD). The IEAD is an affirmative defense. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) To prevail, an employer asserting the IEAD must establish by a preponderance of the evidence all five of the following:

² The Decision used the phrase “not operating safely” rather than the wording of section 4999(a), “beyond safe working load.” Although Employer argues the distinction is critical, we hold the ALJ reached the correct result, despite the arguable mistake in wording.

1. The employee was experienced in the job being performed.
2. The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments.
3. The employer effectively enforces the safety program.
4. The employer has a policy which it enforces of sanctions against employees who violate the safety program.
5. The employee caused a safety infraction which he or she knew was contrary to the employer's safety requirements.

Failure to prove any one or more of the foregoing elements defeats the defense.

The Decision found that Employer failed to prove the first and fifth elements. We agree that the evidence does not establish either of them. Further, the testimony was that Employer's manager assigned to this work was absent from the site for the two weeks prior to the accident, and further that Employer was understaffed in terms of management and supervisory personnel. We find that those facts also show that Employer did not satisfy the IEAD's third element.

Employer also argues that the crane operator engaged in an extreme departure from his assigned work. We disagree. The crane operator made a mistake in over booming the load, but there is no convincing evidence that his doing so was other than an inadvertence or an error in judgment while attempting to perform the lift.

DECISION AFTER RECONSIDERATION

For the reasons stated above, we affirm the Decision of the ALJ.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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