

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

OLDCASTLE PRECAST, INC.
10650 Hemlock Avenue
Fontana, CA 92337

Employer

Docket No. 13-R3D3-0583

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Oldcastle Precast, Inc. (Employer).

JURISDICTION

The Division of Occupational Safety and Health (Division) conducted an inspection on August 8, 2014, at a place of employment in Fontana, California maintained by Employer. On December 17, 2014, the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1 alleges a serious accident related violation of section 4999(h).

A hearing was held before an Administrative Law Judge (ALJ) of the Board on March 19, 2015. The ALJ issued a Decision on the matter on May 14, 2015, upholding the Division's citation. Employer subsequently filed a Petition for Reconsideration with the Board on June 20, 2015, and a properly verified Amended Petition on June 24, 2015. The Division did not answer either petition.

ISSUE

Was the ALJ's Decision in error?

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

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Employer was cited for a serious accident related violation of section 4999(h), which states: Loads shall not be released or detached from a crane or other hoisting apparatus until the qualified person (rigger) detaching the load has verified that the load has been secured or supported to prevent inadvertent movement.

The citation having been upheld by the ALJ, Employer petitions for reconsideration by the Board. A petition for reconsideration may be based upon five grounds under section 6617 of the Labor Code:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer argues on the basis of (c), and (e). More specifically, Employer makes several contentions, summarized as follows: that section 4999(h) does not apply to the facts presented, and/or the ALJ's interpretation of section 4999(h) is inconsistent with the plain language of the section; the classification of the citation was improperly upheld as serious; and, Employer was able to show the Independent Employee Action Defense (IEAD). We will address these arguments in turn.

Employer first argues that the ALJ's finding of a violation of section 4999(h) is unreasonable. The main facts are largely uncontested. Injured employee Augustine Granado (Granado) was employed as a Hook Man, and his job was to work with a crane operator to unload heavy concrete piles. Granado was the qualified person who "verified that the load was secured or supported against inadvertent movement." (Section 4999(h).) In the usual course of work, the load was fully detached and was supported through placement of pieces of wood, known as dunnage, between the concrete piles. The placement of dunnage separated the piles so that the straps connected to the crane could then be extracted from the piles; it did not help to secure the pile from inadvertent movement.

In this particular instance, although Granado was tasked with verifying that the load was secured or supported against inadvertent movement, his inspection failed to note and correct a strap that was not fully detached from the pile. Therefore, when he signaled for the crane operator to lift the rigging, the crane's movement inadvertently caused the piling to move, and to fall onto Granado's leg. Employer argues that because the accident was the result of

the “deliberate” action of the crane operator moving the crane straps away from the pile, it cannot be properly classified as a violation of section 4999(h), or a violation caused by “inadvertent movement.”

Employer’s argument was addressed by the ALJ and properly dismissed. In her Decision, the ALJ found that “existence of inadvertent movement is not an element of the violation. Failure to secure or support a load to prevent inadvertent movement is a violation whether or not inadvertent movement occurs.” (Decision, p. 5.) The ALJ’s analysis is sound. The safety order states: “Loads *shall not be released or detached* from a crane or other hoisting apparatus until the qualified person (rigger) detaching the load has verified that the load has been secured or supported to prevent inadvertent movement.” (Emphasis added.) Stated another way, the violation is releasing or detaching the load before ensuring that the load is secure—the safety order’s purpose is to prevent inadvertent movement of the load. The movement of the pile here is evidence that it was not properly secured.

It is obvious that the crane operator did not deliberately create movement in order to dislodge the pile, but that the strap was accidentally caught on the pile and the pile was inadvertently, rather than purposefully, moved. Because the load was not secured or supported to ensure that the pile would be stable in such an event, Granado and other workers in the area were exposed to the danger that the safety order is designed to protect against; namely, the hazard of a falling load.

The Employer contends that the safety order applies “before detaching a load from a crane,” and because the load was no longer in the crane straps, the safety order was no longer applicable. (Petition, p. 8.) The Board does not find this argument persuasive, as the straps had not yet been removed from the load, the crane operator had not yet pulled away, and the pile was not yet fully secured. The safety order was therefore still applicable at the time the pile fell. We read the regulation bearing in mind that safety orders are to be construed liberally so as to effectuate the purpose of “assuring safe and healthful working conditions for all California working men and women [...]” (Labor Code section 6300.)

Petitioner argues that the classification was wrongly classified as serious. A violation is properly classified as serious where there is a realistic probability of death or serious physical harm that could result from the actual hazard created by the violation.² The realistic possibility here was the possibility of body parts being crushed, or a worker being killed, due to the load falling. In fact, employee Granado suffered a partial leg amputation due to a concrete pile weighing over 41,000 pounds falling on his leg. The Division demonstrated a

² Labor Code section 6432: (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 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.

realistic possibility of serious possible harm, which Employer failed to rebut pursuant to section 6432(c) of the Labor Code.³

Finally, Employer disputes the ALJ's finding that the Employer did not meet its burden of proof in demonstrating the Independent Employee Action defense (or IEAD). The elements of that defense are as follows:

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 of sanctions against employees who violate the safety program.
5. The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.
(*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

An employer must show all five elements to prove the defense. The parties agreed that employee Granado was experienced in his job, having stipulated to his position as "qualified person". Granado testified that the employer generally enforced its safety rules and at one point in his career he had received a safety sanction. However, he also testified that the only training he had had in his job as a Hook Man was observing his co-worker, the Crane Operator. The bulk of his training had been relevant to his prior position, as a Laborer.

Granado had not been given training or instructions about how far away from the fall area to move during unloading. He had acted according to his own common sense, and, as the ALJ found, did not know that he was acting against an established work rule when he failed to ensure that the load was secure before the crane was detached. (Decision, p. 7.) Indeed, Employer had no program or plan in place for securing the load for employees to follow. Employer's failure to provide training or procedures for these safety matters establishes, as the ALJ found, that the Employer's safety program was not well-devised. Not meeting the five elements of the defense, Employer's IEA defense fails.

³ Employer disputes the accident related classification in its petition, but provides no argument or evidence for the Board to consider. The record supports the ALJ's finding on this point, and we decline to disturb it.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JUL 27, 2015