BEFORE THE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

In the Matter of the Appeal of: OWL CRANE AND RIGGING 500 S. Alameda Street Compton, California 90224 Employer	DOCKET NO. 83-R5D4-619 DECISION

Jurisdiction

I

This matter came on regularly for hearing before Ronald F. Peters, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Oxnard, California, on February 3, 1984, at 9:00 a.m. The Employer was represented by Dave Lindquist, Chief Safety Engineer. The Division of Occupational Safety and Health (the Division) was represented by Jean P. Dickey, District Manager. Oral and documentary evidence was introduced by the parties, briefs were permitted to be filed, and the matter was submitted on February 14, 1984.

II

On May 16, 1983, Charles L. Boone, Associate Safety Engineer, conducted an accident investigation of a place of employment maintained by the Employer at 393 North Harbor Boulevard, Oxnard, California (the site). On June 1, 1983, the Division issued to the Employer Citation No. 1 alleging a serious violation of Title 8, California Administrative Code, Section 1587.10(m). On June 1, 1983, the Division issued to the Employer a notice of civil penalty assessing a proposed civil penalty of $325.

III

The Employer has filed a timely appeal from the Citation contesting the existence of the alleged violation, and from the Notice of Civil Penalty contesting the amount of the proposed civil penalty.

Citation No. 1
Serious
8 Cal. Adm. Code 1587.10(m)

Summary of Evidence

Charles Boone testified that he observed a P & H 60 ton carrier mounted crane with a 100 to 110 foot boom at the site. The crane was equipped with a clamshell to accomplish its task of dredging a canal. Mr. Boone observed the body of the deceased oiler before it was moved. There were major lacerations to the right hand and forearm, a broken neck and crushed skull which, together with the smudge of red paint from the hard hat on the crane mechanism, indicated that the victim had been caught by the hook rollers as the crane rotated. The body was near an open toolbox but there were no tools or rags indicating any work in progress. Mr. Boone's investigation revealed that there was no other pedestrian traffic in the area and there were no barricades to prevent entry into the area. The oiler was the only person exposed to the swing area in this remote location.

The Employer had a good safety program. The penalties were calculated in accordance with Division policies and procedures.

Bill McDaniel testified that he is the manager of the Fontana Division of this Employer. He owned his own crane business for 19 years and has 25 years' experience in the field. The decedent was his son and was experienced in the job, with two years as an oiler and membership in the appropriate unions. The decedent knew the crane barricade requirements from the training he personally had given him. The Employer has regular safety meetings and has a policy of sanctioning employees, up to and including dismissal, for safety violations. On any given day, up to fifty cranes are in operation and assigning full-time supervisors is not practical. The oiler must be inside the barricade area to perform his duties.

In his opinion, his son was either putting something into or taking something out of the toolbox at the time of the accident. A loose keeper was discovered on a roller after the accident, and the decedent may have reached up to see if that keeper was loose, resulting in being caught as the crane rotated. Mr. McDaniel stated that another oiler found himself reaching into the same area the very next day and reported the loose keeper to him. In his opinion, it would be reasonable to stop the crane to check the keeper rather than attempting to check while the machinery is in motion.

The operator of the crane is an employee, not a management official.

On cross-examination, Mr. McDaniel admitted that, in order to ensure the stability of the crane by observing the cribbing

blocks, it is not necessary for the oiler to be within the barricaded area.

Gordon Keyes testified that he was the operator of the crane in question on the date of the accident with 22 years' experience, 19 of them with this Employer.

The decedent had been with him for two years and he trained him in the various operations of the crane. The barrier tape was on the crane just prior to this time and it is the Employer's requirement at all times. It is the oiler's duty to place the barriers around the crane. Since the crane had proceeded down the canal from a parking lot where there was exposure to other workers, to a remote area, the barriers were inadvertently left down. The decedent tripped over the barrier tape and broke it, and since there was no hazard to anyone else, he did not replace it.

The oiler's duties include driving the truck crane to the site, and greasing it at the start of the shift. A signaling system is used to enable the crane operator to know when to manipulate the machinery in order to bring grease fittings into an appropriate position for lubrication. The oiler would hit the crane twice with an iron bar and the operator would then move the mechanism slowly until the oiler struck the crane once with a bar, at which time he would stop the machinery. This signaling system was used throughout the greasing operation. The crane was not greased while operating. The attached tape barrier did not need to be replaced as the crane moved.

Under cross-examination, the crane operator admitted that the outriggers can be observed from outside of the barrier area and the only reason for an oiler to go inside the barrier area would be to get a tool or oil can from the attached toolbox.

David Lindquist testified that he has been a full-time safety employee of the Employer for nine years. There are three full-time safety persons inspecting the cranes and crew. Each time he has observed any of the Employer's cranes in operation, the barriers were in place.

After a previous citation concerning barrier guards, he was instructed to discuss the situation with all oilers. Over 20 employees of the Employer had been terminated for safety related violations.

Under cross-examination, Mr. Lindquist testified that the oilers were not told to refrain from entering within the barricaded area. The safety program of the Employer (Exhibit C) makes no mention of barricades.

Mr. Keyes was not disciplined for this incident since the Employer felt he was not responsible for the accident.

Findings and Reasons for Decision

AN EMPLOYEE OF THE EMPLOYER WAS NOT PREVENTED FROM ENTERING INTO AN AREA WHERE HE MIGHT BE CAUGHT BETWEEN PARTS OF A ROTATING MACHINE DECK AND NON-ROTATING PARTS OF THE CRANE, SAID AREA NOT BEING PROTECTED BY A BARRICADE OR OTHER POSITIVE MEANS AS REQUIRED BY 8 CAL. ADM. CODE 1587.10(m).

THE VIOLATION WAS PROPERLY CHARACTERIZED AS SERIOUS.

The weight of the evidence presented clearly established that this Employer required barrier guards to be placed in the appropriate places to prevent persons from coming in contact with the hazardous rotating parts of the crane. The evidence also clearly establishes that the Employer maintains that its oilers are exempt from the operations of the regulation in question.[1] The Employer's position is bolstered by federal case authority interpreting a similar federal regulation.[2] The federal regulation was construed to contain an implied exemption for essential members of the crane crew, including the oiler operator to enter the barricaded area.[3]

No credible evidence was adduced at the hearing to establish that there is any necessity for an oiler to enter into the zone described within the regulation while the crane is performing its assigned tasks. The burden of going forward with the evidence to establish an exemption from an Order, clear on its face rests, with the party claiming the exemption, here, the Employer. The Order is not overly burdensome, only applying when the crane is operating, meaning it is performing its assigned task. This

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[1] 1587.10(m) provides: Where a rotating crane is positioned to operate in areas where persons may be caught between rotating parts of the crane and outside obstructions or parts of rotating machine deck and nonrotating parts of crane, those danger areas shall be barricaded to prevent traffic or other positive means shall be taken to prevent workmen entering such areas while the crane is operating.

[2] Title 29 Code of Federal Regulations, Section 1926.55(a)(9) which states . . . "Accessible areas within the swing radius of the rear of the rotating superstructure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane."

[3] Shurtliff and Andrews Construction Company, 10 OSHC 2106 (OSHRC Docket No. 80-4796, October 21, 1982).

depends upon the attachment being manipulated by the boom. The regulation does not prevent the oiler from lubricating the crane as described in the Summary of Evidence. The outriggers and cribbing blocks could be observed from outside of the prohibited area. No other duties were described that would necessitate the oiler entering into the proscribed area while the crane was in the process of performing its assigned task.

The dangers associated with positioning oneself within the prohibited area are obvious and the crane operator's description of the signaling method used by the oiler to communicate over the din of the equipment establishes the necessity for understandable communications between the oiler and operator and the necessity for regulating movement within the barricaded area.

While "custom and practice" may be an aid in interpreting an Order that is not clear on its face[4], we are not permitted to establish exemptions to clearly worded orders based upon an industry practice.[5] The Standards Board presumably was aware that mobile cranes used oilers at the time the regulation was enacted and chose not to establish a specific exemption for that class of employee.

The Employer argues that this matter was the subject of prior litigation in Docket No. 80-R3D1-541 wherein a Premptory Writ of Mandamus was issued by the Superior Court of California, County of Sacramento, No. 309534.[6] That case was distinguishable on several grounds, among them a statement by the judge of the necessity of the oiler entering into the prohibited area. No such necessity was established at this hearing. In addition, the Superior Court's Statement of Decision indicated (at Page 7) that the exemption was "necessary to prevent conflicting standards on the federal and state levels." There are many conflicts between the federal regulations and those adopted in California. The federal regulations themselves authorize the individual states to enact more stringent regulations than the federal regulations. The cited section has been construed not to exempt oilers at least since May 29, 1981.[7]

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[4] Shurtliff and Andrews Construction Company, cited supra.

[5] While we take administrative notice that it was the custom and practice of the industry to hoist and lower individuals on the load hook prior to the enactment of 8 Cal. Adm. Code 1587.10(g), the regulation clearly prohibits such activities now.

[6] Ordering the Appeals Board to grant the appeal of this Employer, which was accomplished on November 4, 1983.

[7] Novo-Rados Enterprises, a joint venture, OSHAB 75-1170, 1173 and 1175, Decision After Reconsideration (May 29, 1981).

The Employer argues that the oiler's actions in this case constituted independent action for which it should not be held responsible.[8] This argument is rejected in that the employee was not committing a violation which he knew was against the Employer's policies since the Employer's position is that the oiler was exempt from the requirements of the regulation and oilers were permitted to enter the area.

The violation was properly characterized as serious in that the Employer, by its actions in permitting entry into the proscribed area while it litigated these matters[9], could have known with the exercise of reasonable diligence of the conduct of its oilers in entering the proscribed area and that the hazard involved in such entry clearly presents the likelihood of death or serious bodily injury as a predictable result. Therefore the violation was properly characterized as serious.

THE PROPOSED PENALTIES ARE REASONABLE.

A careful and independent review of the penalties reveal that they are appropriate under the circumstances of this case.

For the above reasons, the alleged serious violation of 8 Cal. Adm. Code 1587.10(m), together with its related $325 proposed civil penalty, is affirmed.

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[8] The requirements for such a defense are:

a) The employee is experienced in the job being performed.

b) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments,

c) The employer effectively enforces the safety program,

d) The employer has a policy which it enforces of sanctions against employees who violate the safety program, and

e) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirement.

[9] This accident occurred on May 16, 1983, after the Appeals Board's Decision After Reconsideration, dated January 14, 1983, and prior to the issuance of the Writ of Mandate on September 20, 1983.

Decision

The appeal is denied.

RONALD F. PETERS
Administrative Law Judge

RFP:mmj
DATED: March 9, 1984

ATTENTION: This Summary Table is provided for reference only. Should any conflict in data arise between Summary Table entries and wording in a Decision, the decisional wording shall prevail.

TYPE
G - General
S - Serious
R - Repeat
W - Willful
REG - Regulatory

OWL CRANE AND RIGGING

SUMMARY TABLE

DOCKET NUMBER	CITATION NUMBER	ITEM NUMBER	SECTION NUMBER	ALLEGED VIOLATION TYPE	AFFIRMED	VACATED	MODIFIED	PENALTY PROPOSED BY D.I.S.	FINAL PENALTY RESULTING FROM A.B. DECISION
5-619	1		1587.10(m)	S	X			$ 325	$ 325
-								$	
-								$	
-								$	
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							SUM...	$ 325	$ 325

NOTE: Payment of Final Penalty should be made to:

DEPARTMENT OF INDUSTRIAL RELATIONS
P. O. Box 603
San Francisco, CA 94101

ATTN: Cashier, OSHA Accounting 7th Floor

DECLARATION OF SERVICE BY MAIL

I, Marilyn M. Jacobson, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 107 South Broadway, Room 7112, Los Angeles, California.

On March 9, 1984, I served the attached DECISION

by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at Los Angeles, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

Dave Lindquist, Chief Safety
Engineer
OWL CRANE AND RIGGING
500 S. Alameda Street
Compton, CA 90224

DISTRICT MANAGER
Division of Occupational Safety and Health
3704 State Street, Suite 307
Santa Barbara, CA 93105

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 9, 1984, at Los Angeles, California.

Marilyn M. Jacobson
Declarant

OSHAB 11-LA
11/75