

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

KENAI DRILLING LIMITED
2701 PATTON WAY
Bakersfield, CA 93308

Employer

DOCKETS 12-R4D3-1230
and 1231

DECISION

STATEMENT OF THE CASE

Kenai Drilling Limited, (Employer) is a drilling contractor with rigs available to conduct oil, gas and geothermal drilling on land and off shore. On September 26, 2011, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Terry Hammer (Hammer) conducted a fatal accident inspection at a place of employment maintained by Employer at Rig 17, Aera Energy Lease at School Canyon Road, Ventura, California (the site). On March 23, 2012, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in California Code of Regulations, title 8¹: Citation 1, Item 1, for failing to implement and maintain an Injury and Illness Prevention Program; and Citation 2, Item 1, for failure to secure machinery and equipment components to minimize hazards.

Employer filed a timely appeal contesting the violation of the safety orders, classification, abatement, and the reasonableness of the proposed penalties for Citations 1 and 2. Employer alleged several affirmative defenses.

The matter came on regularly for hearing before Clara Hill-Williams, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on June 26, 2014 and June 27, 2014. Employer was represented by Thomas Feher, LeBeau-Thelen, LLP.

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

The Division was represented by Staff Counsel, Kathryn Woods. The ALJ extended the submission date to June 30, 2015.

ISSUES

1. Did Employer's Injury Illness Prevention Program (IIPP) fail to include procedures for identifying and evaluating work place hazards to identify unsafe conditions and work practices?
2. Did Employer fail to establish, implement, and maintain training for its employees in processes and procedures or equipment at the work place?
3. Did the Division correctly classify the cited violation of section 3203, subdivisions (a)(4) and (a)(7) as serious?
4. Did the Division properly calculate the penalties for a violation of Section 3203, subdivisions (a)(4) and (a)(7)?
5. Did Employer fail to secure machinery and component parts to minimize hazards caused by breakage, release of mechanical energy (e.g., broken springs), or loosening and/or falling?
6. Did the Division make a reasonable attempt to review and consider Employer's response to the Division's Notice of Intent to issue serious citations before the serious citations were issued?

FINDINGS OF FACT

1. In the process of raising an oil rig mast², employee Nicholas Angelica (Angelica) mistakenly knocked out the upper rig pin that caused the A-leg³ (Photo Exhibit 2A) of the rig to fall, fatally crushing employee Oscar Zamudio (Zamudio).
2. The proper procedure requires the bottom pin of the oil rig mast to be removed before the top pin.
3. Employer submitted a "Job Safety Plan" (JSP) for September 25, 2011, but failed to submit a JSP for September 26, 2011, the day the accident occurred.

² Mast – 1: a long pole or spar rising from the keel or deck of a ship and supporting the yards, booms, and rigging 2: a slender vertical or nearly vertical structure (as an upright post in various cranes) *Merriam-Webster Online Dictionary*

³ Associate Safety Engineer, Terry Hammer testified that she observed the "A-Leg" which looks like the letter "A" with a cross-beam (Exhibit 2A).

4. Employer's rigging up procedure was not applicable to section 3328(e) which requires that machinery and equipment components shall be designed and secured or covered (or both) to minimize hazards caused by breakage, release of mechanical energy (e.g., broken springs), or loosening and/or falling.
5. Employer's response to the Division's 1BY Notice was received by the Division on March 23, 2012.
6. The Division did not review Employer's response before issuing the serious citations on March 23, 2012.

ANALYSIS

1. Did Employer's Injury Illness Prevention Program (IIPP) fail to include procedures for identifying and evaluating work place hazards to identify unsafe conditions and work practices?

Section 6507, Injury and Illness Prevention Program provides:

Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

Section 3203, subdivision (a), Injury and Illness Prevention provides:

Every employer shall establish, implement and maintain an effective injury and Illness Prevention Program. The Program shall be in writing and, shall, at a minimum:

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.

The Division alleged the following in Instance 1:

On the day of the accident, September 26, 2011, the employer, Kenai Drilling Limited, had not identified the workplace hazard of having an employee climb up the lower "A" leg of Rig #17 to hand up tools while a pin

was being removed on the upper "A" leg in order to raise the mast. Due to the location of the employee on the "A" legs and the removal of the wrong pin, the upper beam of the "A" legs fell and the employee standing under the beam was pinned between the falling "A" leg beam and the mast section resulting in a fatality.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Clap. 4th 472, 483, review denied.)

To establish an Injury Illness Prevention Program (IIPP) violation, the Division must prove that flaws in the Employer's written IIPP amounted to a failure to "implement" or "maintain" an "effective" program. Section 3203, subdivision (a)(4) requires: (1) a procedure for identifying and evaluating work place hazards; and (2) scheduled periodic inspections to identify unsafe conditions, work practices and inspection hazards.

Hammer testified that she gave Employer a "Document Request" form on September 27, 2011, (Exhibit 3) during her accident inspection at the worksite, which requested a copy of Employer's "Job Safety Plan" (JSP). The JSP was requested to identify work place hazards. The JSP included the basic job description, the equipment required to do the job, the steps for completing the job safely, a list of potential hazards, a list of solutions to reduce hazards, and names of employees performing an assigned task. Hammer requested the JSP for September 25, 2011, and for September 26, 2011, but only received a JSP for September 25th (Exhibit 5B).

According to Hammer, Employer failed to provide a JSP for September 26th, which was the day the fatal accident occurred⁴, in response to Hammer's Document Request. Employer's JSP for September 25th appeared to have a sufficient "procedure" for identifying and evaluating work place hazards, with inspections to identify unsafe conditions, work practices and inspection hazards. Hammer testified that a JSP with a procedure for identifying and evaluating work place hazards with inspections to identify unsafe conditions

⁴ Hammer testified that the Division received a call from Employer reporting the accident on September 26, 2011 at 6:25 p.m.

should have likewise taken place on September 26th. Employer's failure to submit a JSP for September 26th raises doubt as to whether these safety procedures as shown in the September 25th JSP were implemented on September 26th, the day the accident occurred. Pursuant to Evidence Code section 413, an inference may be drawn that the JSP safety procedures were not implemented, on September 26th.

Employer's witnesses maintained Employer lacked knowledge that the removal of the top pin was an identifiable workplace hazard. Robert Richie (Richie), a motor man at the time of the accident, Peter McMillan (McMillan), Employer's Regulatory Affairs and Safety Manager and Dr. Walter Lee Guice (Dr. Guice) a mechanical engineering and rig expert⁵, all testified that they had never observed or heard of anyone knocking out the top pin, before removing the bottom pin. Dr. Guice, a licensed professional engineer with a doctorate in mechanical engineering and over 50 years of experience working with rigs, testified that he had never seen anyone knock out the wrong pin on a rig. He stated that knocking out the bottom pin first is the standard procedure when rigging up or down. Thus, Employer maintained that it could not anticipate such a hazard of someone knocking out the wrong pin.

In *Sully-Miller Contracting Co. v. California Occupational Safety & Health Appeals Bd.*, 138 Cal. App. 4th 684, a primary employer leased one of its employees who was fatally injured while working at a secondary employer's worksite. The California Court of Appeals, in applying section 3203, subdivision (a)(4) held that "Absent unusual mitigating factors, the only way to comply with the statutory mandate is not to permit any employee to go to or be in a place of employment which is not safe, and to make sure the place has been inspected before a construction worker begins his job at the construction site."

Here, as a result of Angelica's error in knocking out the wrong pin, employees' safety was compromised because Employer did not follow or maintain a procedure for identifying and evaluating work place hazards that included scheduled periodic inspections to identify unsafe conditions, work practices and ensure inspection hazards were followed on a daily basis. Employer submitted a JSP on September 25th, the day before the fatal accident but did not submit a JSP for September 26th, the date of the accident to document and show Employer followed a daily procedure for identifying and evaluating work place hazards.

⁵ ALJ Hill-Williams qualified Dr. Walter Lee Guice, Ph.D. as an expert witness. His education background includes an Associate Science Degree (1968); a Bachelor of Science, Mechanical Engineering (1972); a Master of Science Degree in Mechanics, University of Houston (1973); and Ph.D. in Mechanical Engineering, University of Houston, 1983. Dr. Guice has held a Professional Engineering license since 4/29/78; he is active in the practice of engineering; he has worked in mechanical engineering as a facilities engineer and in an aluminum plant; Dr. Guice taught at the University of Houston (1977-1983) and taught as an adjunct visiting professor at the University of North Carolina.

Accordingly, on the day of the accident, Employer failed to identify the workplace hazard of having top and bottom identical pins on the A-legs that could be removed. I conclude that the position of the pins and not the identical color as asserted by the Division, was the actual hazard that caused the violation. In this case the hazard was caused by Angelica's confusion in understanding the procedure. In conclusion, Employer failed to maintain its procedures for identifying and evaluating work place hazards, in failing to identify and correct an unusual, but yet potential hazard, when the wrong pin was removed in error.

2. Did Employer fail to establish, implement and maintain training for its employees in processes and procedures or equipment at the work place?

Section 3203, subdivision (a)(7) provides:

Provide training and instruction:

- (C) To all employees given new assignments for which training has not previously been received;
- (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
- (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

The allegations alleged in Instance 1, as stated above, also address subdivision (a)(7)(C), regarding employees given new assignments for which training has not previously been received. According to statements made by Roman Uribe (Uribe), Angelica's supervisor during Hammer's investigation, Angelica had been trained in performing the "rigging down" operation of the A-leg, but had not been trained in the "rigging up" of the A-leg. Robert Richie (Richie) a former motorman employed by Employer, credibly testified that he recalled attending a safety meeting with Angelica on September 26th. Richie's testimony corroborated Uribe's statement that Angelica was trained regarding which pins to remove for the rigging down process but Angelica was not shown the reverse process for "rigging up" before the accident occurred.⁶ McMillan, Employer's safety manager, testified that when he interviewed Angelica the day after the September 26th accident, Angelica said he became frustrated and

⁶ Robert Richie (Richie), a motor man at the time of the accident testified that there were safety meetings every five to ten days that involved rigging up and rigging down.

knocked out the wrong pin, Angelica stated he “knew which pin to knock out, but wasn’t thinking”.

Subdivision (F) requires supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed. As discussed above, Employer’s managers and expert witness testified that identical pins were an industry standard, with universal knowledge that the top pin is never removed before removing the bottom pin. Nevertheless, subdivision (F) requires that supervisors familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed. Here, Uribe should have anticipated the potential hazard of an accidental removal of a pin from the A-leg while another employee is positioned under the beam, could result in serious injuries or a fatality.

The Division alleged the following in Instance 2:

On the day of the accident, September 26, 2011, the employer Kenai Drilling Limited, had not identified the workplace hazard of having two identical pins on the “A” legs that can be removed, one on top of the other. The top pin is never to be removed during normal operations or during rig up and rig down. By not identifying and correcting this potential hazard, when the wrong pin was accidentally removed, the upper leg fell fatally pinning one of their employees.

Subdivision (a)(7)(F) is also applicable to Instance 2 regarding the hazard of having two identical pins on the A-legs that can be removed. As discussed above, Employer’s managers and expert witness testified that identical pins were an industry standard, with universal knowledge that the top pin is never removed before removing the bottom pin. Nevertheless, subdivision (F) requires that supervisors familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

The Division alleged the following in Instance 3:

On the day of the accident, September 26, 2011, the employer, Kenai Drilling Limited, had not trained the Motor Man assigned to remove the A-leg pin on Rig #17 which pins to remove. The “A” legs had two identical pins that could be removed, one on top of the other. The Motor Man assigned this task had never removed the “A” leg pin before. The Motor Man removed the wrong pin causing the upper “A” leg to fall pinning the Driller standing on the lower leg between the “A” leg and the mast section resulting in a fatality.

In the third instance subdivision (C) is clearly applicable to the Division's allegations that Employer had not trained Angelica, assigned as a "motor man" to remove the correct A-leg pin on Rig #17. Hammer testified that she cited Employer because employee Angelica told her that he was trained by other hands⁷ but on the day of the accident he could not recall which pin to knock out. In Hammer's interview Uribe stated he assigned Angelica to remove pins from the rig. Uribe stated Angelica knew which pin to knock out, but "got rattled" and knocked out the wrong pin.

Employer's IIPP (Exhibit 4 - p. 208 – 212) addresses "Employees Working in Other Classifications" other than rig manager or driller, which included Angelica's position as a motor man. The IIPP among other safety concerns listed "On the Job Training", which required training, at the time of initial employment and at other periodic intervals, through Employer's safety handbook, other written communications, verbally and by various other methods. Employer's IIPP subdivision (H), P.214, states training is also provided "...when new substances, processes, procedures or equipment are introduced that represent a new hazard..." Thus, Employer's IIPP required that Angelica be trained on "rigging up" the A-leg since he had not been previously trained to perform this assignment. Angelica's action in knocking out the wrong pin indicates Employer failed to adequately train Angelica to ensure that he comprehended the assignment and the tasks necessary to complete the removal of the correct pin.

In weighing the evidence, Angelica received training as a motor man⁸, in removing pins from rigs but on September 26, 2011, Angelica became confused and knocked out the top pin first. Employer's supervisor, Uribe, assumed Angelica, having received previous training, knew and was familiar with the steps of removing the pins. The lack of training given to Angelica regarding the process of "rigging up" the A-leg may have contributed to his confusion in removing the wrong pin. Angelica would have greatly benefited from his supervisor going over the process for "rigging up" before beginning the September 26th assignment.

The evidence supports finding Employer violated section 3203, subdivisions (a)(7) (C), and (F), which was established in Employer's IIPP (Exhibit 4). Employer's IIPP requires training when a program is first established for all employees given new assignments for which training has not previously been received. By failing to ensure that Angelica understood the

⁷ "Hand" a person skilled in a particular action or pursuit; a specialist or veteran in a usually designated activity or region. *i-word.com/Merriam-Webster Inc.*

⁸ A "motor man" is described as follows: Monitor and report the general condition of rig equipment. Perform maintenance and repairs to rig equipment as directed by the rig manager. Assist with drilling operations as directed by the driller.

<http://www.rigzone.com/jobs/postings/148145/Motorman.asp#sthash.GP0G5or7.dpuf>

procedure of removing the bottom pin first in rigging down as well as rigging up, Employer exposed its employees to a hazard by not training Angelica in the new job assignment of rigging up, which he had not previously received.

3. Did the Division correctly classify the cited violation of section 3203, subsections (a)(4) and (a)(7)(C), and (F) as serious?

The legal standard for a serious violation is expressed in Labor Code section 6432, subdivision (a) which 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 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. The actual hazard may consist of, among other things:
 - (1) A serious exposure exceeding an established permissible exposure limit.
 - (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

The elements of a serious violation are: (1) a violation exists in a place of employment, (2) a demonstration of realistic possibility of death or serious injury (3) employee exposure to an actual hazard and (4) if elements 1, 2, and 3 are established, there exists a rebuttable presumption that the violation is serious.

The first element requires that “a violation exists in a place of employment”. The first element is established by the evidence showing Hammer’s September 26, 2011 inspection. Hammer’s investigation revealed Employer violated its IIPP by failure to maintain its procedures for identifying and evaluating work place hazards, in failing to identify and correct an actual hazard; failure to train Angelica in the rigging up procedures, when the wrong pin was removed in error, that created an unsafe condition and work practice; and Employer’s supervisors failing to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

The second element requires a demonstration of a “realistic possibility” of death or serious physical harm. A “realistic possibility” is not defined in the Labor Code or safety orders, but has previously been addressed by the Appeals Board. In *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), the Appeals Board determined that it was unnecessary for the Division to prove actual splashing of caustic chemicals but only a realistic possibility that splashing of chemicals occurred. The Appeals Board explained: “[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation)... if such a prediction is clearly within the bounds of human reason, not pure speculation.” Hammer testified that a realistic possibility of death or serious injury could occur if Employer failed to identify the hazard, failed to properly train Angelica in rigging up, which was a new procedure for Angelica, and if Employer’s supervisors failed to familiarize themselves with the safety and health hazards of an employee removing the wrong pin while another employee was in the path of an A-leg weighing approximately 3500 pounds⁹.

The third element, serious physical harm as used in section 6432, subdivision (e) is defined as serious physical harm that could result from the actual hazard created by the violation. The actual hazard may consist of among other things: (1) A serious exposure exceeding an established permissible exposure limit or (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use. Here, Employer allowed the unsafe practice of failing to adhere to maintaining its job safety procedures on September 26, 2011, in identifying possible hazards of an employee not confident in a different procedure of rigging up and for failing to ensure the employee was trained in the procedure.

In *Susanville Construction Co.*, Cal/OSHA App. 79-1401 Decision After Reconsideration (Nov. 24, 1981) the Board held that although the lack of training per se may not always be appropriately classified as a serious violation, the facts established a specific hazard in operating a particular piece of equipment, for which the lack of training or experience would likely result in serious injury or death should an accident occur. The Board found the employee's lack of training left the employee unqualified to recognize and deal with the specific hazards unique to the employee's job assignment. As in *Susanville supra*, where the employee was “not adequately trained” in driving over windrows¹⁰ before they had been graded. Here, Angelica was not sufficiently trained in the removal of pins on an A-leg.

⁹ The weight of the A-leg was confirmed by Peter McMillan, Employer’s safety manager.

¹⁰ Windrow is defined as 1. a row of hay raked up to dry before being baled or stored
b: a similar row of cut vegetation (as grain) for drying 2. a row heaped up by or as if by the wind . 3. a long low ridge of road-making material scraped to the side of a road
b: bank, ridge, heap. *Merriam -Webster Online Dictionary*

The Division has established that Employer failed to ensure that Angelica was properly trained and advised of the hazard of removing the wrong pin during the rigging up process. The Division further established a realistic possibility of a serious injury or a fatality (which actually occurred on September 26, 2013), if the wrong pin was removed, exposing Employer's employees to serious injuries or death. Since these elements are established, there is a rebuttable presumption that the violation is serious.

Labor Code section 6432, subdivision (c) establishes the requirements for rebutting the presumption that a violation is classified as serious:

If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

- (1) The employer took all of the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).¹¹
- (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Here, as discussed earlier in the first issue above, Uribe, Angelica's supervisor, was aware that Angelica had not removed pins during a rigging up process, which was a hazard Employer is deemed to be aware of since Uribe as a supervisor is considered Employer's management¹². Employer is deemed to

¹¹ See section 6432, subdivision (b) *infra* p. 16-17

¹² Admission -Statement of Supervisor Uribe is a party admission. Pursuant to Evidence Code section 1220, evidence of a statement is not made inadmissible by the hearsay rule when

have knowledge of the violation in failing to identify the employee exposure and evaluate the hazard. Thus, Employer failed to present sufficient evidence to rebut the presumption that the violation was serious. Therefore, the Division has established that a serious violation occurred because all of the elements are present: (1) a violation existed at Employer's work site; (2) Hammer demonstrated a realistic possibility of death or serious injury; and (3) the employees were exposed to an actual hazard, establishing (4) a rebuttable presumption that Employer failed to rebut. Thus, the serious classification of the citation is established.

4. Did the Division properly calculate the penalties for a violation of Section 3203, subdivisions (a)(4) and (a)(7)?

Hammer calculated the penalties pursuant to the Division's policies and procedures and the California Code of Regulations as indicated on the Penalty Worksheet (Exhibit 7). Severity of a serious violation is considered to be high. Since the violation was classified as serious, Hammer evaluated severity as high. Extent, when an injury occurs, is based upon the degree to which a safety order is violated. Hammer rated extent as medium because Employer did not recognize the hazard of the employee knocking out the wrong pin. "Likelihood" is the probability that injury, illness or disease will occur as a result of the violation and is based on the number of employees exposed to the hazard created by the violation and the extent to which the violation has in the past resulted in injury, illness or disease to employees. Hammer classified likelihood as medium because 13 employees were exposed, but this type of accident had not occurred before the September 26, 2011, fatal accident.

The base penalty is then afforded adjustments for size of the business, the good faith of the employer, which is based upon the quality and extent of the safety program the employer has in effect and operating, awareness of the regulations and willingness to comply with regulations, and the history of previous violations. Here, Hammer gave 15 percent good faith credit because Employer was helpful with Hammer's investigation. Employer was given 10 percent credit for history because Employer did not have a previous violation. Employer was not given credit for size because Employer had over 100 employees at the time the citation was issued. Employer was given a 50 percent abatement credit with the assumption that the abatement would be made, resulting in a penalty of \$6,750.

The Division has clearly established that a serious violation occurred because all of the elements of a serious violation are present: (1) a hazard existed at Employer's work site as a result of the wrong pin being knocked out

offered against the declarant in an action to which he is a party in either his individual or representative capacity.

of the A-leg during the rigging up process, a procedure that should have been reviewed with the employee before removing the pin; (2) Hammer demonstrated a realistic possibility of death or serious harm; (3) the employees' exposure to an actual hazard has been established; and (4) the presumption was not rebutted by Employer, resulting in a proposed penalty of \$6,750.

5. Did Employer fail to secure machinery and component parts to minimize hazards caused by breakage, release of mechanical energy (e.g., broken springs), or loosening and/or falling?

Section 3328. Machinery and Equipment, subdivision (e) provides:

Machinery and equipment components shall be designed and secured or covered (or both) to minimize hazards caused by breakage, release of mechanical energy (e.g., broken springs), or loosening and/or falling unless the employer can demonstrate that to do so would be inconsistent with the manufacturer's recommendations or would otherwise impair employee safety.

The Division alleged:

On the day of the accident, September 26, 2011, the employer, Kenai Drilling Limited, had not secured the A-leg pin that holds the upper leg to the strong back to prevent accidental removal of the pin. Due to the pin not being secured, an employee from Kenai Drilling removed this pin causing the upper A-leg to fall pinning the Driller standing on the lower leg between the A-leg and the mast section resulting in a fatality.

To establish a violation of section 3328, subdivision (e), the Division must determine whether the A-leg is a machine or an equipment component. Secondly, the Division must establish that (1) the machinery and equipment component(s) were designed and secured or covered (or both) to minimize hazards caused by breakage, release of mechanical energy (e.g., broken springs), or loosening and/or falling, unless (2) the employer can demonstrate that to do so would be inconsistent with the manufacturer's recommendations or (3) would otherwise impair employee safety.

In *E.L. Yeager Construction Company*, Cal/OSHA App 01-3261, Decision After Reconsideration (Nov 2, 2007), an employer was cited for failure "to secure the weigh hopper to minimize the hazard of falling as a result of the failure weigh hopper scale/support system." (*sic*) The Board held that the ALJ

erred in the application of section 3328. The Board's holding in *Yeager, supra*, determined whether the employer violated section 3328, subdivision (e). The Board considered the terms of section 3328, subdivision (e) as (1) machinery and equipment components; (2) designed or secured; (3) minimize HAZARDS; and (4) breakage or loosening and falling.

Machinery and Equipment Components

The Board reasoned that the terms of section 3328, subdivision (e) apply to "machinery and equipment" in use at places of employment in California. In *Yeager* it was not disputed that the weigh hopper was an item of machinery or equipment subject to section 3328, subdivision (e). Similarly in the instant case neither party disputed that the A-leg was equipment attached to the rig (Photo Exhibit 2A) in use in Ventura, California.

Designed or Secured

The Board in *Yeager, supra*, then considered the term "designed or secured." The Board noted that the words are used in the disjunctive, and interpreted the standard to mean that the machinery or equipment in question must be designed to minimize hazards or secured to minimize hazards, due to breakage or loosening and falling. The Board held that the standard does not require machinery or equipment to both be designed *and* secured to minimize the listed hazards. Here, the evidence indicated the pins were secure until motor man, Hernandez, removed the safety as part of the usual process of rigging up before the second motor man, Angelica, knocked out the pin, which would satisfy the requirement of "secured". However, the Division insisted that Employer also show the equipment was designed to minimize the listed hazards and subsequently issued the citation because Employer did not produce the manufacturer's design specifications in response to the Division's Request for Production of Documents (Exhibit 3).

The Board has held the Division must show which option the employer selected and that it did not comply with it or any of the alternatives in the safety order. Here, the holding in *Yeager, supra*, can be applied to the instant facts. Employer has established that the pins in the A-leg were secured by a safety that had to be removed by one motor man before the second assigned motor man could knock out the pin. Since Employer established that the pins were secured, applying the holding in *Yeager*, Employer was not required to also show the pins were designed to minimize the hazard.

Minimized Hazards of Breakage or Loosening and Falling.

While it was not disputed that there was "breakage" or "loosening and falling" of the weigh hopper in *Yeager, supra*, here, it is questionable that Hernandez's removal of the pin's safety and Angelica's knocking out the wrong pin could be considered a breakage, or loosening and falling of the A-leg. Evidence presented at the hearing indicated Hernandez removed the safety pin before Angelica knocked out the pin of the A-leg with a sledge hammer¹³. Hammer also testified that during her interview with Angelica and Hernandez's supervisor, Uribe, stated two motormen are always assigned to remove the pin; with one motor man removing the safety and the other motorman removing the pin. The facts here are inconsistent with the safety order, which requires that machinery and equipment components are designed and secured or covered (or both) to minimize hazards caused by breakage, release of mechanical energy, or loosening. Here, the intent of the motor men was to intentionally remove the safety to knock out the pin in order to rotate the A-leg (See testimony of McMillian, above). The hazard was not to minimize a hazard of breakage or loosening and falling, but in the removal of the wrong pin, which section 3328, subdivision (e) does not address. Thus, the Division failed to establish that Employer violated section 3328, subdivision (e) of failing to secure machinery and component parts to minimize hazards caused by breakage, or loosening and/or falling.

Since the Division failed to establish a violation of section 3328, subdivision (e), the serious and accident related classifications, in addition to the proposed penalties are moot.

6. Did the Division make a reasonable attempt to review and consider Employer's response to the Division's Notice of Intent to issue serious citations before the serious citations were issued?

Employer raised Labor Code 6432, subdivision (b)(1), as an affirmative defense on its appeal form, which states:

Before issuing a citation alleging that a violation is serious, the division shall make a reasonable attempt to determine and consider, among other things, all of the following:

¹³ Hammer's investigation did not reveal whether the safety pins of both the bottom and top pins were removed, anticipating that after the bottom pin would be knocked out before the top pin was removed.

- (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
- (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
- (C) Supervision of employees exposed or potentially exposed to the hazard.
- (D) Procedures for communicating to employees about the employer's health and safety rules and programs.
- (E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:
 - (i) The employer's explanation of the circumstances surrounding the alleged violative events.
 - (ii) Why the employer believes a serious violation does not exist.
 - (iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a). Any other information that the employer wishes to provide.
 - (iv) The division shall satisfy its requirement to determine and consider the facts specified in paragraph (1) if, not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision..." (Emphasis added by Employer.)

Employer asserts, and 6432, subdivision (b)(1) specifies, that the Division is required to make a reasonable attempt to consider the Employer's information of whether a serious violation occurred before issuing a serious citation. Employer contends that Hammer's suggestion that the parties meet informally after the citation was issued to consider Employer's response is inadequate. Employer cites the Legislature's use of the word "shall" in section 6432, subdivision (b)(1) for the proposition that the division has a mandatory duty to consider employer's response to the 1BY notice before issuing the citation. Employer references a well-established rule of statutory construction of the word 'shall', which connotes mandatory action." (*In re Marriage of Fossum* (2011) 192 Cal. App. 4th 336, 348.) Employer notes the Board has consistently interpreted 'shall' as used in the Labor Code, to be mandatory,

leaving no discretion. (See, e.g., *Central Valley Engineering & Asphalt* (Dec. 14, 2012) p.3; *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 030-2400, Decision After Reconstruction. Finally, Employer argues that because the Division did not comply with all requirements of 6432, subdivision (b)(1), it follows that the violations may not issue with serious classifications.

The Division asserts it complied with Labor Code section 6432, subdivision (b)(1) by satisfying the requirement of delivering the 1BY of not less than 15 days prior to issuing a serious citation. The Division further asserts that it is not obligated to wait “even to its prejudice, until receiving a response before issuing a citation.” Here, Employer responded to the 1BY on March 23, 2012, three days before the Statute of Limitations ran on March 26, 2012. However, the Division gave March 23rd as a permissible response date for Employer to respond to the 1BY, stating: “Information received by March 23, 2012 will be considered prior to the issuance of this citation. If no information is received, the proposed citation may be issued.” (Exhibit 6, p.2) The Division’s reply brief defended the Division’s issuance of the citation since the Employer was not prejudiced and the Division indicated there was sufficient time after the citations were issued to seek a reclassification and other relief for Employer based upon any compelling additional information received in the Employer’s March 23, 2012, response.

In *Irwin Industries*, Cal/OSHA App 12-3276, Denial of Petition for Reconsideration, (June 10, 2014) an employer argued in its petition that the record did not contain any indication that the Division issued a 1BY form, and contended that as a result the violation must be reclassified to "general" and the penalty adjusted accordingly. (See Labor Code § 6432, subd. (b)(2) *supra*.) The Board held that the employer did not raise that issue in its appeal of the citation or at the hearing before the ALJ, and thus waived it. The issue could not be raised for the first time in a petition for reconsideration. The Board further held that any objection to the insufficiency of the evidence on that question should be raised at hearing or in the pre-hearing procedures. The facts in the instant matter differ. Here, the issue of whether the Division considered Employer’s response to the 1BY before issuing citations was raised at the time of the hearing.

Since the enactment of amended Labor Code section 6432, subdivision (b), the Board has not yet addressed whether the Division ought to suffer consequences for failure to consider Employer’s response to a 1BY Notice before issuing a citation alleging a serious violation. In weighing arguments made by Employer and the Division under the factual circumstances presented here, the Division’s 1BY Notice specifically stated Employer’s response would be considered if received by March 23, 2012 and further stated the Division would not issue the serious citation until Employer’s response was considered. The Division’s letter allowing Employer to submit a response by March 23rd cannot be ignored. The Division’s argument that the Division is not obligated

to wait “even to its prejudice, until receiving a response before issuing a citation...” because the statute of limitations ran on March 26th is not persuasive. The Division’s actions call for some form of sanctions that must be imposed to adhere to the legislature’s language and enactment of amended Labor Code section 6432, subdivision (b)(1), *supra*. Citation 1, Item 1 is thereby reclassified as a general citation¹⁴.

Conclusion

In conclusion, On September 26, 2011, Employer failed to identify a workplace hazard that resulted when an employee climbed up the lower A-leg of Rig #17 to pass tools to another employee while a pin was removed on the upper A-leg in order to raise the mast. Employer failed to train its motor man regarding the procedures for removing the pins. The Division failed to establish the applicability of section 3328 and did not establish that Employer failed to secure the A-leg to minimize hazards caused by breakage or loosening and/or falling. The penalty proposed in Citation 1, is reclassified from a serious violation to a general, upon finding sanctions are warranted for the Division’s failure to consider Employer’s response to the Division’s 1BY before issuing the serious citations. The penalty modified for Citation 1, is assessed. The penalty proposed for Citation 2 is reclassified as a general violation and assessed.

Order

It is hereby ordered that the citations are established and modified as indicated above and as set forth in the attached Summary Table.

Dated: July 31, 2015

CLARA HILL-WILLIAMS
Administrative Law Judge

CHW: ao

¹⁴ In calculating the penalties of a general violation, the severity of the violation is based upon the degree of discomfort, temporary disability and time loss from normal activity (including work) which an employee is likely to suffer as a result of occupational illness or disease which could result from the violation. The severity remains high based upon the violation resulting in a fatal injury, with a base penalty of \$2,000. Extent and likelihood were rated as medium, with 15 percent good faith and 10 percent history, and 50 percent abatement resulting in an assessed penalty of \$750.

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**KENAI DRILLING LIMITED
Dockets 12-R4D3-1230 and 1231**

Date of Hearing: June 26 - 27, 2014

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents	X
2	Photos 2-A through 2-I	X
3	Document Request Form	X
4	Kenai Drilling IIPP received from Employer	X
5	Kenai JSP – Job Safety Plan	X
6	1BY Notice	X
7	C-10 Penalty Worksheet	X
8	Manufacturer's Rig #17 Specifications	X

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Excerpts from the Deposition of Terry Hammer	X
B	Email /Rex Northern	X
C	Fax attachment sent w/email of Rex Northern 3/23/12	X
D	Discovery Request	X
E	Diagrams of Rig E-1 through 5	X

F	Photos of Rig #17 F-1 through 3	X
G	Photos of other rigs observed by Dr. Guice G-1 and G-2	X

Witnesses Testifying at Hearing

1. Terry Hammer
2. Robert Richie
3. Peter McMillan
4. Walter Lee Guice

CERTIFICATION OF RECORDING

I, Clara Hill-Williams, 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.

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

KENAI DRILLING LIMITED
Dockets 12-R4D3-1230-1231

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

IMIS No. 314826835

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	DESCRIPTION	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
12-R4D3-1230	1	1	6507	S	ALJ reclassified from Serious to General	X		\$6,750	\$6,750	\$750
12-R4D3-1231	2	1	3328(e)	SAR	Division failed to establish a violation		X	\$18,000	\$18,000	\$0
Sub-Total								\$24,750	\$24,750	\$750

Total Amount Due*

\$750

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board. **All penalty payments must 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: CHW/ao
POS: 07/31/2015