BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1135350**
HILL CRANE SERVICE INC. **3333 CHERRY AVENUE** **LONG BEACH, CA 90807**	**DECISION**
Employer	

Statement of the Case

Hill Crane Services, Inc. (Employer) is in the business of crane operations. Commencing on March 22, 2016, the Division of Occupational Safety and Health (the Division), through District Manager (and the Inspector in this investigation), Victor Copelan (Copelan), in response to a report of a fatality (the incident or accident) conducted an accident inspection at 1227 North La Cienega Blvd., Los Angeles, California (the site).

On September 21, 2017, the Division issued three citations to Employer alleging violations of California Code of Regulations, title 8.[1] Citation 1, Item 1, alleges that Employer failed to establish and maintain an effective Heat Illness Prevention Plan. Citation 2, Item 1, alleges that Employer did not maintain an effective Injury and Illness Prevention Program by failing to train employees to use two or more chocks pursuant to Employer's boom dolly operating instructions. Citation 3, Item 1, alleges that Employer did not chock the wheels of the crane doom dolly pursuant to the manufacturer's recommendations.

Employer filed timely appeals of the citations, contesting that the safety orders were not violated. As to Citation 2, Item 1, and Citation 3, Item 1, Employer appealed the correctness of the classifications and the reasonableness of the proposed penalties. Employer also raised twenty one additional defenses.[2]

This matter was heard by Leslie E. Murad, II, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in West Covina, California, on November 19 and 20, 2019. Perry P. Poff, of Donnell, Melgoza & Scates, LLP, represented Employer. Clara Hill-Williams, staff attorney, represented the Division. The matter was submitted for decision on April 29, 2020.

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

[2] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration, (May 26, 2017).

Issues

1. Did the Division prove that Employer failed to establish, implement, and maintain an effective heat illness prevention plan including high heat procedures, emergency response procedures and acclimatization?

2. Did the Division prove that Employer failed to establish, implement, and maintain an effective injury and illness prevention program including training all employees to use two or more chocks pursuant to its boom dolly operating instructions?

3. Did the Division establish that Employer violated section 3328, subdivision (a) (2), by failing to ensure the wheels of the Robb Technologies crane dolly were chocked in accordance with the manufacturer's recommendations?

Findings of Fact

1. On March 22, 2016, Michael Troyer (Troyer), was employed by Employer as a Crane Operator.
2. Troyer was a certified crane operator as of February 25, 2016, at the time he was hired by Employer.
3. Troyer was the "Third Man" on the crane crew on the site on March 22, 2016. The crane crew consisted of the crane Operator, the Oiler and the Third Man. As the Third Man on the site, Troyer was trained to only do what he was directed to do by the crane Operator and the Oiler.
4. Employer's Heat Illness Prevention Plan contained the elements required by the applicable safety order including provisions for high heat procedures, emergency response procedures and acclimatization procedures.
5. The crane Operator and the Oiler did not direct Troyer to connect the air brake release line from the boom dolly to the crane. Troyer connected the air brake line releasing the brakes on the boom dolly without being directed to do so.
6. Employer's employees had been trained on chocking the wheels on the boom dolly.
7. The Employer established, implemented and maintained its Injury and Illness Prevention Program as required by the applicable safety order, and the operative chocking procedures in effect at the time of the accident were followed by its employees.
8. The manufacturer's recommendations on chocking the boom dolly wheels were followed by Employer.

Analysis

1. **Did the Division prove that Employer failed to establish, implement, and maintain an effective Heat Illness Prevention Plan including high heat procedures, emergency response procedures and acclimatization procedures?**

Section 3395, subdivision (i), provides in pertinent part that:

> (i) Heat Illness Prevention Plan. The employer shall establish, implement, and maintain, an effective heat illness prevention plan. The plan shall be in writing in both English and the language understood by the majority of the employees and shall be made available at the worksite to employees and to representatives of the Division upon request. The Heat Illness Prevention Plan may be included as part of the employer's Illness and Injury Prevention Program required by section 3203, and shall, at a minimum, contain:
>
> (1) Procedures for the provision of water and access to shade.
>
> (2) The high heat procedures referred to in subsection (e).
>
> (3) Emergency Response Procedures in accordance with subsection (f).
>
> (4) Acclimatization methods and procedures in accordance with subsection (g)

The relevant subdivisions of section 3395 that are referenced in section 3395, subdivision (i), are as follows:

> (e) High-heat procedures. The employer shall implement high-heat procedures when the temperature equals or exceeds 95 degrees Fahrenheit. These procedures shall include the following to the extent practicable:
>
> (3) Designating one or more employees on each worksite as authorized to call for emergency medical services, and allowing other employees to call for emergency services when no designated employee is available.
>
> (5) Pre-shift meetings before the commencement of work to review the high heat procedures, encourage employees to drink plenty of water, and remind employees of their right to take a cool-down rest when necessary.

(f) Emergency Response Procedures. The Employer shall implement effective emergency response procedures including:

(4) Ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders.

(g) Acclimatization.

(1) All employees shall be closely observed by a supervisor or designee during a heat wave. For purposes of this section only, "heat wave" means any day in which the predicted high temperature for the day will be at least 80 degrees Fahrenheit and at least ten degrees Fahrenheit higher than the average high daily temperature in the preceding five days.

(2) An employee who has been newly assigned to a high heat area shall be closely observed by a supervisor or designee for the first 14 days of the employee's employment.

In Citation 1, Item 1, the Division alleges:

Prior to and during the course of this investigation including but not limited to, on March 22, 2016, the employer's written Heat Illness Prevention Plan did not include all the required elements including but not limited to:

(2) The high heat procedures referred to in subsection (e). (See (e) (3) and (e) (5))

(3) Emergency Response Procedures in accordance with subsection (f). (See (f) (4))

(4) Acclimatization methods and procedures in accordance with subsection (g).

The Division has the burden of proving a violation 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. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

The Employer failed to produce or provide a complete copy of its Heat Illness Prevention Plan (HIPP) to the Division. As a result, the Division cited Employer for an incomplete HIPP as set forth in Citation 1, Item 1.

Copelan testified that Employer's HIPP must have at a minimum all the elements and sub-elements but not the exact wording from the standard. Employer later produced a complete copy of its HIPP to the Division before the hearing commenced. The complete copy was produced at the hearing and marked and admitted without objection into evidence as Exhibit A. A review of Employer's HIPP reveals that it contains all four minimum requirements, including the three alleged to be missing by the Division: high heat procedures, emergency response procedures and acclimatization methods, as set forth in section 3395, subdivision (i). Despite failing to provide a complete copy of the HIPP to the Division upon request, Employer demonstrated that it did have an effective HIPP at the time of the inspection. Accordingly, Employer's appeal of Citation 1, Item 1, is granted.

2. Did the Division prove that Employer failed to establish, implement, and maintain an effective Injury and Illness Prevention Program including training all employees to use two or more chocks pursuant to its boom dolly operating instructions?

In Citation 2, Item 1, the Division cited the Employer for a violation of section 3203, subdivision (a) (7), which provides in pertinent part:

> (a) Effective July 1, 1991, 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:
>
> (7) Provide training and instruction:
>
> (A) When the program was first established;
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> …
>
> (B) To all new employees;
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> (C) To all employees given new job assignments for which training has not previously been received;
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> (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
>
> (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
>
> (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 Alleged Violation Description states:

> Prior to and during the course of the investigation, employees were not trained to use two or more chocks per the boom dolly operating instructions. As a result, on March 22, 2016 an employee sustained fatal injuries when the crane dolly rolled downhill and pinned the employee between the boom dolly and the crane.

Merely having a written Injury and Illness Prevention Program (IIPP) is insufficient to demonstrate implementation. (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).) Although an employer may have a comprehensive IIPP, the Division may still demonstrate a violation by showing that the employer failed to implement one or more elements. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015); *BHC Fremont Hospital, Inc*., Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) Whether an employer has implemented its IIPP is a question of fact. (*National Distribution Center, LP, et al.*, Cal/OSHA App. 12-0391, Decision After Reconsideration, (Oct. 5, 2016), citing *Ironworks Unlimited*, Cal/OSHA App. 93-024, Decision After Reconsideration (Dec. 20, 1996).) As is stated above, (see, *Nolte Sheet Metal, Inc., supra*, Cal/OSHA, App. 14-2777) the Division has the burden of proof as to whether the Employer's IIPP was not in compliance with the regulation.

Copelan testified that Employer's IIPP was complete. The evidence presented showed that the written provisions of Employer's IIPP were in compliance with section 3203, subdivision (a) (7). Copelan testified that the alleged violation of the IIPP was the failure of the Employer to implement its IIPP by not training its employees in the use of two or more chocks on the boom dolly in violation of the operating instructions in effect on the day of the incident.

In order to establish a violation by the Employer of section 3203, subdivision (a) (7), the Division must first establish by a preponderance of the evidence, what were the operating instructions in effect on the day of the incident that required the use of two or more chocks, and second, establish that those operating instructions were not followed or implemented.

A. What boom dolly chocking operating instructions were in effect at the time of the accident?

Ronald Hill (Hill) was Employer's representative at the Hearing. Hill testified that Exhibit 14, was Employer's wheel chocking policy in effect at the time of the Troyer incident. Point 2 on Exhibit 14 under "Connect Procedures" provides: "chock wheels." Point 4 on Exhibit 14 under "Disconnect Procedures" provides: "Place wheel chocks under dolly wheels."

Hill further testified that Exhibit 10, page one, was Employer's wheel chocking procedure to be followed after the incident, using a minimum of two wheel chocks. Page two of Exhibit 10, was the manufacturer's wheel chocking procedures. The Employer's wheel chocking

instructions in effect on the day of the incident (Exhibit 14) were identical to the manufacturer's procedures.

Copelan was under the impression that the operative wheel chocking instruction that was in effect on the day of the incident was Exhibit 10, page one, using two or more chocks. It was not. The operative chocking instruction in effect at the time of the accident was Exhibit 14; "Place wheel chocks under dolly wheels." No specific number of chocks were required in any operative instruction that were in effect at the time of the accident.

The Division's sole allegation in support of Citation 2, Item 1, was that Employer violated its IIPP in that Employer's employees were not properly trained in how to chock the boom dolly wheels since two or more chocks were not used pursuant to the boom dolly operating instructions. The Division's allegation fails since there was no requirement in effect at the time of the incident that mandated the use of two or more chocks.

Since the manufacturer's recommendation on chocking does not specify two or more chocks, the Board will not make that assumption that two or more chocks are required. As the Board has held in *Sequel Contractors, Inc*., Cal/OSHA App 99-1055, Decision After Reconsideration (Aug. 29, 2001), the Appeals Board will not add a procedure that is not required by the manufacturer since the recommendations are silent on the issue. The Board will not read a nonexistent requirement into the manufacturer's recommendations to use two or more wheel chocks.

B. Did the Employer train its employees to follow the operative instructions in effect at the time of the accident?

Although training is not defined in the regulations, the Appeals Board has previously held that training, "when used to describe the process of providing employees with that knowledge and ability in this context, is to instruct so as to make proficient or qualified." (*Siskiyou Forest Products,* Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003). However, the occurrence of an accident, by itself, is not sufficient proof that an employer's overall training program is deficient. (*Michigan-California Lumber Company*, Cal/OSHA App. 91-759, Decision After Reconsideration (May 20, 1993).)

Copelan arrived at the accident scene on March 22, 2016, and commenced his investigation. Copelan determined the crane was operated by a three person crew; the Operator, who was in charge of the crew, the Oiler and the Third Man. Copelan interviewed at the incident scene the crane Operator, David Duncan (Duncan), and the Oiler, Travis Garrett (Garrett). The third member of the crew, the Third Man, was the deceased worker, Michael Troyer (Troyer).

The evidence presented, established that Troyer was trained as a certified crane operator with prior crane operator experience. Troyer was hired as the Third Man, the lowest position in the three man crew, and had also undergone on-the-job training as a Third Man prior to this job,

as was testified to by Employer's Operator/Oiler and Trainer, Timothy Strombo. Troyer was trained that his job was to only do what he was directed to do by the crane Operator and the Oiler, nothing else. Troyer was not authorized to place or remove chocks on the boom dolly per company policy. Troyer was also not authorized to connect the air brake line to release the brakes. In fact, Troyer was specifically instructed that morning at the job site meeting to not connect the air brake release line.

In the Employer's Accident Investigative Report, dated April 14, 2016, which was admitted into evidence as Exhibit C, and on pages 11 and 12 of Exhibit C, there is a report of the training received by Troyer, Duncan and Garrett, the crew involved in this incident. All three had been trained on the proper procedures in operating truck mounted telescoping cranes before the day of the accident.

The eye witnesses to this incident, Duncan and Garrett, both told Copelan, and as is set forth in their hand written statements, that the crane had been setup that morning as they normally would, with the chocking of wheels and with the air brake engaged. The crane and boom dolly held steady and in place all day until the job was over. The movement of the boom dolly took place during the disassembly of the crane, with the unexpected release of the air brakes by Troyer. The evidence presented at the hearing was that Duncan and Garrett did not direct Troyer to connect the air brake release line. Contrary to his training, Troyer connected the air brake line without being so directed, unexpectedly releasing the brakes on the boom dolly, which resulted in this tragic accident.

Garrett testified at the hearing that he used one chock to chock the dolly, which was normal. Harry Wilson (Wilson) was the Employer's crane superintendent. Wilson told Copelan that the crane and dolly wheels are chocked; chocking one axle. Based upon a preponderance of the credible evidence presented at the hearing, the evidence supports a finding that the boom dolly wheels were chocked, as the Employer's crane crew had been trained, pursuant to the operative chocking instructions in effect at the time of the accident.

C. Did the Division prove there was a violation of the regulation by the Employer?

The Division has the burden of proving a violation of the cited safety order by a preponderance of the evidence. (*Howard J. White, Inc., Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) '"Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed 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 Cal.App.4th 472, 483, rev. denied).

There was no credible evidence presented to support the Division's position that Employer was in violation of its IIPP in that its employees were required to be trained to use two or more chocks at the time of the incident pursuant to an operating instruction that was in effect on the day of the incident.

There were no operative chocking instructions that were in effect on the day of the incident that required the use of two or more chocks. The policy provided by Employer applicable at the time of the accident was only to: "Place wheel chocks under dolly wheels." The manufacturer recommendation also provided the identical recommendation: "Place wheel chocks under dolly wheels." The boom dolly chocking instructions in effect on the day of the incident from Employer and from the manufacturer did not require a specific number of chocks (two or more chocks) be used on the boom dolly wheels, as alleged by the Division.

A preponderance of the credible evidence presented at the hearing supports the finding that the boom dolly wheels were chocked on the day of the incident in compliance with Employer's IIPP and the applicable operating instructions in effect at the time of the incident. The boom dolly held steady and in place until the unexpected release of the air brakes.

The Division could not prove that the boom dolly chocking operating instructions in effect on the day of the incident from Employer or from the manufacturer required the use of two or more chocks.

The Division failed to establish a violation of the safety order. The appeal is granted as to Citation 2, Item 1.

3. Did the Division establish that Employer violated section 3328, subdivision (a) (2), by failing to ensure the wheels of the Robb Technologies crane dolly were chocked in accordance with the manufacturer's recommendation?

In Citation 3, Item 1, the Division cited Employer for a violation of section 3328 subdivision (a) (2), which provides:

> (a) All machinery and equipment:
>
> > (2) shall not be used or operated under conditions of speed, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations or, where such recommendations are not available, the engineering design

The Alleged Violation Description states:

> Prior to and during the course of the investigation, the wheels of the Robb Technologies crane dolly were not chocked in accordance with the manufacturer's recommendations in that only one wheel was chocked. As a result, on or about

March 22, 2016 an employee subsequently sustained fatal injuries when the crane dolly rolled downhill and pinned the employee between the boom dolly and the crane.

Labor Code section 6317 requires the Division to cite the applicable safety order. The Division must show that employees of the cited employer were exposed to the hazard addressed by the safety order for the violation to be sustained. (*Devcon Construction, Inc.*, Cal/OSHA App. 09-3398, Denial of Petition for Reconsideration (Feb. 16, 2012).) When the Division has cited an inapplicable safety order, the appeal must be granted. (*Bostrom-Bergen Metal Products*, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003).)

Employer argued that section 3328, subdivision (a) (2), did not exist on the day of the incident. This section was not operative until April 1, 2016, which was after the date that the incident occurred. Because Troyer's accident occurred on March 22, 2016, which was prior to the date that section 3328, subdivision (a) (2), became effective, the Division used an inapplicable code section as the basis for this citation.

The Division elected to cite Employer for a violation of a safety order that was not operative at the time of the incident. Accordingly, the appeal of Citation 3, Item 1, is granted.

Conclusions

The Division failed to establish that Employer violated section 3395, subdivision (i). Employer's HIPP contained all the required elements of the safety order.

The Division failed to establish that Employer violated section 3203, subdivision (a) (7). Employer's IIPP contained all the required elements of the safety order and was implemented in accordance with the boom dolly operating instructions that were in effect at the time of the accident.

The Division failed to establish that Employer violated section 3328, subdivision (a) (2). The cited section did not take effect until April 1, 2016. The incident that is the subject of Citation 3, Item1, took place on March 26, 2016, before the section took legal effect.

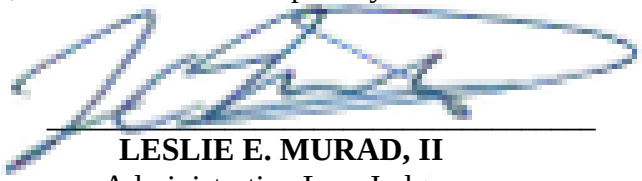
Orders

It is hereby ordered that Citation 1, Item 1, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 2, Item 1, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 3, Item 1, is dismissed and the penalty is vacated.

Dated: 05/29/2020



LESLIE E. MURAD, II
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**