

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

IRWIN INDUSTRIES
5901 Edison Drive
Oxnard, CA 93033

Employer

Dockets. 12-R4D3-3276 and 3277

**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 Irwin Industries (Employer).

JURISDICTION

Commencing on May 24, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On November 2, 2012, the Division issued two citations to Employer alleging a total of three violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹ The Division alleged a general violation of section 4999(a) in Citation 1, Item 1 [the injured employee had not been trained to perform rigging operations]; a general violation of section 5006(a) in Citation 1, Item 2 [untrained person operated the crane]; and a serious violation of section 4999(c)(1) in Citation 2, Item 1 [object being moved not been attached to the crane by suitable means].

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, a duly-noticed contested evidentiary hearing.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

On March 21, 2014, the ALJ issued a Decision (Decision) which sustained Citation 1, Item 1, granted Employer's appeal of Citation 1, Item 2, and sustained Citation 2, Item 1. The Decision also imposed civil penalties commensurate with the violations sustained.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

ISSUE

Was the Decision correct in sustaining Citation 1, Item 1 and Citation 2, Item 1?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (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.

The petition asserts that the ALJ acted in excess of powers, the evidence does not justify the findings of fact, and/or the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances. The Board has taken no new evidence in reviewing and deciding on Employer's petition.

The evidence is well summarized in the Decision. We briefly review it as necessary for purposes of this Denial.

Employer's employee was seriously injured when a 22-foot long I-beam weighing between 1,200 and 1,600 pounds fell from an overhead crane and crushed his foot.² The injured employer and a foreman were using the crane to move I-beams from the floor of Employer's workshop onto a pair of supports ("horses") about 8 or 10 feet away, where the beam was to have additional work done on it.

The foreman directed the injured worker to attach the I-beam to the hook of the crane using a clamp variously called a "plate clamp" or an "e-clamp;" the latter designation is a reference to the shape of the clamp, which resembles a lower case letter *e*. They had moved two beams without incident before the accident; the third beam fell out of the clamp and struck the injured employee while it was being moved by the crane.

Citation 1, Item 1.

Section 4999(a) states, in pertinent part, "The qualified person (rigger) shall be trained and capable of performing the rigging operation." The Decision found that the injured employee had not been trained by Employer (or anyone else) in rigging. The preponderance of the evidence supports that finding. Employer argues that the injured employee was a qualified rigger by virtue of his previous experience doing rigging "on and off" for another employer for four or five years. The injured employee then worked for FedEx before going to work for Employer, which had hired him about six months before the accident.

The Board has held that experience is not necessarily a substitute for training. (*Hypower Inc., dba Hypower Electric Services, Inc.*, Cal/OSHA App. 12-1498, Denial of Petition for Reconsideration (Sep. 11, 2013).) And the plain wording of the safety order requires the rigger to "be trained *and* capable of performing the rigging operation." (Emphasis added.) The language is conjunctive; both "train[ing]" and "capab[ility]" are required. Since there was no evidence that the injured worker who rigged the load was trained by Employer in rigging loads, the requirements of the safety order were not met. And, while a worker may become "capable" of performing a particular rigging operation through past experience, he also may not, and it does not necessarily follow that one "learns" the correct method of doing so by self-teaching or trial and error. In short, experience alone is not sufficient to satisfy the terms of the safety order.

Citation 2, Item 1.

Section 4999(c)(1) states: "The load shall be attached to the [crane's] hook by means of slings or other suitable and effective means which shall be rigged to insure the safe handling of the load."

² "Serious injury" is defined in Labor Code § 6302(h), in pertinent part, as one "which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers any serious degree of permanent disfigurement[.]"

Employer argues there is no evidence in the record indicating that the clamp was not appropriate for the task being performed. To the contrary, the manufacturer's "owner's manual" for the clamp, which was admitted into evidence, provides several statements supporting the Decision. The manual at page 4 states that "Model E" clamps are to be used for "vertical lifting and transfer of steel plates" in contrast to several other types of clamp sold for other applications by the manufacturer and discussed in the manual. The manual refers to two other types of clamp for lifting, turning and mounting of "wide flange beams and shape steel." An I-beam is a wide-flange beam. On page 5 of the manual it states: "2. **Know the application.** Before using any Campbell clamp, refer to the application section of this manual to be sure the lift to be made is appropriate for this type of clamp." (Original emphasis.) Page 6 of the manual issues a "warning" to "[u]se at least two clamps and a spreader bar when lifting long plates or shapes." This warning was not heeded, as only one clamp was used. Also on page 6, it states: "9. **Lift slowly and smoothly.** Do not jerk load. Shock loading can damage the clamp." (Original emphasis.) The foreman testified that he jerked each beam after it was clamped to the crane in order to test the security of the clamp. The foreman's testimony indicated that jerking a load was his usual practice. That practice was contrary to the owner's manual's direction. Finally, page 13 of the manual, which speaks to e-clamps, refers only to lifting plates. Although the manual does not explicitly say one is not to use an e-clamp to lift other materials, it does refer only to plates (i.e. flat sheets of steel) when addressing use of e-clamps.

Also, the testimony was that injured employee suggested to the foreman that they use a sling to rig the beams to the crane, and the foreman rejected that suggestion in favor of using the e-clamp for reasons of expediency.

In view of the evidence regarding proper use of the clamp, the manner it was actually used, and its failure to hold the third I-beam, it is reasonable to infer that the e-clamp was not "suitable and effective . . . to insure safe handling of the load." (§ 4999(c)(1).) The ALJ so found, and when an ALJ makes findings supported by sound and credible evidence, we will not reject them in the absence of substantial evidence of considerable substantiality. (*Lamb v. Workmen's Compensation Appeals Bd.* (1974) 11 Cal.3d 274, 281.) We note that section 4999(c)(1) specifically first calls for the use of "slings" to attach a load to a crane, and allows "other suitable and effective means" as a general alternative. Such alternatives must be "suitable and effective[.]" That one time in three the e-clamp failed to hold the I-beam strongly suggests the e-clamp was not, at the least, "effective" in this use.

Employer also argues the Decision speculated as to the cause of the accident. We disagree. The Decision, based in part on the injured employee's testimony that the beam slipped out of the clamp when it fell, held that the Division had introduced sufficient evidence to make a prima facie case. Accordingly, it was Employer's opportunity and burden to go forward and produce

evidence sufficient to balance or outweigh the Division's evidence. Employer failed to do so.

The Division has the burden of proof. (*Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013).) When the Division has made a prima facie case, the cited employer has the opportunity to present rebuttal evidence and/or establish proof of an affirmative defense. (*Barnhart, Inc.*, Cal/OSHA App. 09-2778, Denial of Petition for Reconsideration (Jun. 9, 2010).) That procedure was followed here and was not improper. Employer did not carry its burden of persuasion in light of the Division's prima facie showing.

Lastly, Employer argues in its petition that the record does not contain any indication that the Division issued a 1BY form, and contends that as a result the violation must be reclassified to "general" and the penalty adjusted accordingly. (See Labor Code § 6432(b)(2).) Employer did not raise that issue in its appeal of the citation or before the ALJ, and thus waived it. The issue may not be raised for the first time in a petition for reconsideration. Any objection to the insufficiency of the evidence on that question should be raised at hearing or in the pre-hearing procedures. Moreover, Labor Code section 6432 does not require that the Division give a particular form of notice to a cited employer or else be barred from issuing a "serious" citation. Rather, Labor Code section 6432(b)(2) provides that the Division shall be presumed to have satisfied the investigative requirements of section 6432(b)(1) if it "delivers to the employer a standardized form" summarizing the circumstances of the violation. While the Division may not have the benefit of the presumption it nevertheless satisfied its burden of proof. Further, in view of Employer's failure to object to the evidence or raise the issue of whether the Division issued the 1BY form, the language of Labor Code section 6432 and the totality of the evidence adduced, we hold that the evidence supports a finding that the violation was serious.

DECISION

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

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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