BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
MAXIM CRANE WORKS, LP	**1597182**
Employer	**DECISION**

Statement of the Case

Maxim Crane Works LP (Employer) operates a business that provides crane rental and operation services. Beginning May 16, 2022, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Nancy Mirza, conducted an investigation of an accident that occurred at a jobsite located at 528 Third Street in West Sacramento, California, where Employer was dismantling a tower crane.

On October 4, 2022, the Division issued two citations, consisting of four violations, to Employer alleging that Employer failed to: follow the manufacturer's procedures for dismantling a tower crane's outer jib; ensure employees understood the hazardous positions and locations they needed to avoid during the removal of connection pins from the outer jib; address the proper location of blocking to prevent dangerous movement of the outer jib; and ensure the outer jib was rigged or supported to maintain stability upon removal of pins.

Employer filed timely appeals of the citations on the grounds that the safety orders were not violated, and the proposed penalties are unreasonable. For Citation 2, Employer also appealed on the ground that the classification is incorrect. Employer asserted a series of affirmative defenses.[1]

Leticia Tanner, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board), held two days of hearing on April 2 and 3, 2025, in Sacramento, California, via the Zoom video platform. ALJ Tanner became unavailable to complete the hearing. As a result, the parties had the option to have another ALJ conduct a de novo hearing or have the ALJ continue with the hearing as if that ALJ presided from the start.

[1] 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).)

(Cal. Code Regs., § 375.1, subd. (c).) The parties elected to have another ALJ continue with the hearing that was already in progress. This matter was then assigned to ALJ Jennie Culjat who held the remainder of the hearing on November 4, 5, and 18, 2025, in Sacramento, California, via the Zoom video platform. Attorney Megan S. Shaked of Conn, Maciel, Carey LLP represented Employer. Javier Castro, Staff Counsel, represented the Division. Each party submitted a closing brief on March 27, 2026. The matter was submitted for decision on August 14, 2026.

Issues

1. Did Employer fail to comply with the manufacturer's procedures when disassembling a tower crane's outer jib?

2. Did Employer fail to ensure that crew members understood the hazardous positions/locations to avoid during the disassembly of an outer jib?

3. Did Employer fail to address the hazard associated with the proper location of blocking to prevent dangerous movement of an outer jib during disassembly?

4. Did Employer fail to ensure that the outer jib was rigged or supported to maintain stability upon pin removal?

5. Did Employer establish that an affirmative defense relieved it of liability for the violations?

6. Did the Division establish that Citation 2 was properly classified as Serious?

7. Did Employer rebut the presumption that the violation in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

8. Are the proposed penalties for Citation 1, Item 3, and Citation 2 reasonable?

Findings of Fact

1. On April 11, 2022, Employer had a crew of employees dismantling a Potain MD 569 tower crane (tower crane) at a construction site located in West Sacramento, California.

2. Employer was following the manufacturer's procedures to dismantle the tower crane.

3. Prior to beginning dismantling of the tower crane, a morning safety meeting was conducted with Employer's crew. Struck by, caught between, pinch point, and crushing injury hazards were reviewed.

4. The outer jib of the tower crane was removed from the mast and lowered to the ground and placed on two supports, one located at each end of the outer jib. The outer jib was stable when resting on the two supports.

5. A crew of four employees was then tasked with disassembling the outer jib into smaller sections that could fit onto the flatbed of a semitruck for removal from the construction site.

6. Employer had a process in place for the disassembly of the outer jib on the ground. The process called for a specific sequence to be followed that addressed the proper location of blocking and rigging to ensure stability of the outer jib during disassembly, including during pin removal.

7. The assembly/disassembly director (A/D director) oversaw the disassembly procedure and gave instructions to the crew as they went along disassembling the outer jib.

8. Ironworker Ashton Oesterreich (Oesterreich) had his foot crushed between the outer jib and an outrigger pad of an assist crane when the outer jib dropped and slid because a connection pin was removed prior to the outer jib being properly supported for pin removal.

9. Oesterreich was a certified rigger and received training on how to assemble and disassemble tower cranes.

10. After the accident on April 11, 2022, Employer retrained employees not to perform any task in the disassembly process until instructed to do so and added this language to its job safety analysis forms for tower cranes.

11. The proposed penalties were calculated in accordance with the Division's policies and procedures.[2]

[2] This Finding of Fact is a stipulation by the parties.

Analysis

1. Did Employer fail to comply with the manufacturer's procedures when disassembling a tower crane's outer jib?

At the time of the accident, California Code of Regulations, title 8, section 1611.1, subdivision (a),[3] required the following: [4]

> When assembling or disassembling equipment (or attachments), the employer shall comply with all applicable manufacturer prohibitions and shall comply with either:
>
> (a) Manufacturer procedures applicable to assembly and disassembly, or […]

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to on 4/11/22, Employer failed to follow the manufacturer's applicable procedures for disassembling a Potain MD 569 tower crane outer jib.

On the day of the accident, Employer was dismantling a tower crane at a construction site. As part of the process, the crew was tasked with removing the jib, which is the horizontal arm of the tower crane that extends from the mast of the tower crane to lift and move materials.

The operator's manual for the tower crane provides three different alternatives for removing the jib from the mast of the tower crane. (Ex. 28.) Employer was following alternative two of three, which calls for the jib to be removed in two sections. (Ex. 28, pp. 5-236.) The first section of the jib to be removed is called the outer jib and it was 165 feet in length. After the outer jib is disconnected from the tower crane, the instructions in the second alternative require the following step: "Place the first jib section [] on the ground on supports []."[5] (Ex. 28, p. 5-

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

[4] The crane standards for which Employer was cited were located in the Construction Safety Orders of California Code of Regulations, title 8. These standards were repealed and renumbered on July 26, 2022, in order to consolidate all crane standards into the General Industry Safety Orders.

[5] The reference numerals that directed the reader to the part of the diagram that corresponds with the written instruction are omitted.

240.) Accompanying this written instruction is a diagram reflecting the outer jib resting on three supports, with one support located at each end of the outer jib section and one in the middle. (Ex. 28, p. 5-240.)

Employer's crew rigged the outer jib to an assist crane, disconnected the outer jib and landed it on the city street below onto two supports. The supports were made of stacked lumber, which is referred to as blocking. One set of blocking was located at each end of the outer jib. The outer jib itself consists of several sections. The plan was to disassemble the outer jib into smaller sections by lifting those sections using another assist crane and placing the smaller sections onto the flatbed of a semitruck for removal from the construction site.

The Division argues that Employer did not follow the manufacturer's procedures because Employer used only two sets of blocking to support the outer jib, which is contrary to the diagram in the operator's manual depicting the outer jib resting on three supports. Employer counters that the operator's manual does not mandate the number of supports required to support the outer jib when it is landed on the ground or during disassembly.

Each party engaged an expert witness to testify at the hearing regarding tower cranes. Both experts gave similar testimony regarding the manufacturer's procedures and the disassembly of an outer jib once it is removed from the mast of a tower crane and landed on the ground.

Employer's expert, Jim Wiethorn (Wiethorn), testified that the tower crane's operator's manual does not dictate the number of supports that are required to support the outer jib while it is on the ground. Wiethorn further testified that the diagram is a demonstration of how the outer jib may be supported while it is on the ground. Wiethorn explained that, once the outer jib is on the ground, the operator's manual no longer applies because it does not have procedures for disassembling the outer jib into smaller sections for removal from a jobsite.

The Division's expert, Marvin Moran (Moran), testified that crane manuals often do not have instructions for the disassembly process of crane components once the component is on the ground. Moran further testified that a crane manufacturer is not typically concerned with the disassembly of a crane component once it is on the ground, except to the extent that a crane component can be damaged if it is placed directly on the ground. Moran explained that the operator's manual does not dictate how the outer jib is supported on the ground, only that it must be supported during disassembly. Moran further explained that:

> [T]he [operator's] manual doesn't take into account every configuration that you're going to possibly run into in disassembling the crane and landing the [jib] sections on the ground. So that's left up to the assembly/disassembly director. The

A/D director has to ensure that it is cribbed, blocked properly for the disassembly of individual sections procedure."

(Hearing Transcript (Hrg. Tr.), Nov. 4, 2025, p. 60, ln. 11-17.) Finally, Moran opined that the A/D director determines how to properly support the outer jib based on factors that are present at the jobsite.

The alleged violation description (AVD) in Citation 1, Item 1, broadly asserts that "Employer failed to follow the manufacturer's applicable procedures for disassembling a Potain MD 569 tower crane outer jib." To the extent that the AVD can be read to include the disassembly of the outer jib on the ground, based on both experts' testimony, the operator's manual does not include procedures for this stage of disassembly. Additionally, no such procedures could be found in the excerpts of the operator's manual submitted as Exhibit 28. Accordingly, it cannot be said that Employer failed to follow the manufacturer's procedures during disassembly of the outer jib once it was on the ground because there are no such procedures to be followed.

In its post-hearing brief, the Division narrowly focuses on the outer jib being lowered and placed on the ground on two sets of blocking. As described above, the diagram in the operator's manual depicts the outer jib resting on three supports. (Ex. 28, p. 5-240.) The word "procedures" is defined in the Cranes and Derricks in Construction safety orders as "[i]nstructions, diagrams, recommendations, warnings, specifications, protocols and limitations." (§ 1610.3.)

Despite diagrams being included in the definition of the word "procedures," in this case, it is reasonable to conclude that the diagram does not strictly require that the outer jib be landed on three supports. As Moran testified, there are a variety of conditions that can be encountered at different jobsites that the operator's manual cannot take into account. Given this, it is logical that an A/D director should have the ability to consider these conditions and determine the appropriate amount of supports needed to ensure that the outer jib is stable while it is resting on the ground. Additionally, once the outer jib is on the ground, it is transitioning into a disassembly stage for which there are no procedures in the operator's manual. It is reasonable to conclude that the A/D director be able to determine the appropriate amount of supports needed during this transition to ensure the outer jib is stable as it is being made ready for disassembly on the ground.

The only written instruction in the operator's manual regarding supporting the outer jib on the ground in the second alternative is as follows: "Place the first jib section [] on the ground on supports []." (Ex. 28, p. 5-240.) If it was always necessary for the outer jib to be supported by three supports, it stands to reason that the written instructions would expressly state this requirement as opposed to relying only on a diagram to depict a vital instruction.

There is no evidence that the outer jib was not supported when it was resting on the two sets of blocking. Joseph Basham (Basham), a Tower Crane Technician who was the designated A/D director for the disassembly of the outer jib on the ground, testified that the outer jib was stable when it was resting on the two sets of blocking. Ironworker Foreman, Geddy Dye (Dye), testified that the outer jib was stable when it was resting on the two sets of blocking. In addition, according to the interview notes taken by Associate Safety Engineer Nancy Mirza (Mirza), Oesterreich informed her that "[t]he jib sat on the ground for at least an hour and it was stable. We could have walked away from it and it wouldn't have moved." (Ex. 15.)

Based on the expert testimony, the written instructions requiring only that the outer jib be placed on supports, and that the outer jib was stable when it was resting on the ground on the two sets of blocking, there is insufficient evidence to find that Employer failed to follow the manufacturer's procedures when disassembling the outer jib.

Accordingly, the Division did not establish that Employer failed to follow the manufacturer's procedures during disassembly. Employer's appeal of Citation 1, Item 1, is granted.

2. Did Employer fail to ensure that crew members understood the hazardous positions/locations to avoid during the disassembly of an outer jib?

Section 1611.2, which is entitled "Assembly/Disassembly-General Requirements (Applies to All Assembly and Disassembly Operations)," contains various subdivisions setting forth the requirements that must be followed during the assembly and disassembly of a crane. Section 1611.2, subdivision (d)(1)(C), provides the following:

> (d) Crew instructions.
>
> > (1) Before commencing assembly/disassembly operations, the A/D director shall ensure that the crew members understand all of the following:
> >
> > […]
> >
> > (C) The hazardous positions/locations that they need to avoid.

In Citation 1, Item 2, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to on 4/11/22, Employer failed to provide clear instructions and ensure crew member

understanding of the hazardous positions/locations to be avoided before initiating the disassembly of a tower crane outer jib by knocking out the connecting pins.

In order to establish a violation of section 1611.2, subdivision (d)(1)(C), the Division must prove that, prior to the assembly or disassembly of a crane, the A/D director failed to ensure that crew members understood the hazardous positions/locations that they needed to avoid.

Employer conducted a morning safety meeting with all employees prior to beginning the dismantling of the tower crane. Basham testified that the Job Safety Analysis (JSA) for the disassembly of the tower crane was reviewed at the morning safety meeting. The JSA contains various common hazards, including "Struck By/Caught Between/Pinch Point Hazards" and "Crushing Injury Hazard," and provides the safe practices to avoid these hazards. (Ex. E.) Basham, Dye, and Oesterreich all gave similar testimony that these hazards were reviewed during the morning meeting.[6] Dye specifically testified that hand placement, foot placement, body placement, and pinch points were discussed.

The Division is not asserting that the hazards reviewed in the morning safety meeting were insufficient. Rather, the Division argues that Basham gave vague instructions to Oesterreich and Hennessey during the disassembly of the outer jib, which caused them to not understand their work assignments. Before turning to this argument, a description of the sequence of the disassembly process of the outer jib and the accident is useful to provide context.

As described above, the outer jib was resting on the ground on blocking located at each end of the outer jib. The shape of the outer jib is a triangular prism. The outer jib consists of several sections that are held together by three connection pins, one at each vertex. Based on Basham's and Dye's testimony, the plan for disassembly of the outer jib was as follows: The crew began at one end of the outer jib and rigged that section to an assist crane that was located next to the outer jib. Once rigged, the assist crane was engaged to lift the outer jib slightly off the blocking that was supporting the outer jib at that end. This blocking was then moved and placed under the end of the outer jib that was to remain on the ground. Once the blocking was in place, and with the outer jib section that was rigged supported by the assist crane, the three connecting

[6] Basham testified that, in addition to the JSA, a Tower Crane Activity permit was completed and reviewed with employees in a leadership role to review the task to be completed that day. The Tower Crane Activity Permit is an Employer-created document that contains a check list of items that must be reviewed to identify and correct hazards prior to starting any work. (Ex. D.)

pins that were holding the jib sections together were removed. The connection pins are large metal pins that were removed by using a sledgehammer to beat the connection pins out after the cotter pins were removed. The cotter pins are smaller fastener pins that lock the connection pins into place. Once disconnected, the outer jib section that was rigged was lifted and placed on a flatbed of a semitruck for removal. The portion of the outer jib remaining on the ground was left supported by the two sets of blocking located at each end. The crew was to follow this sequence to remove all sections of the outer jib from the jobsite.

The crew disassembling the outer jib on the ground included Basham, Dye, Oesterreich, and Ironworker Ryan Hennessey (Hennessey). There was also an employee operating the assist crane. The crew removed the first section of the outer jib without issue. The next section of the outer jib to be removed was then rigged, but before the outer jib section was fully supported by the assist crane and the blocking was moved into place, Hennessey began to knock out one of the lower connection pins using a sledgehammer. Oesterreich testified that he positioned himself next to the outer jib. Once the connection pin came out, because the rigging was still slack and the blocking was not yet under the end of the outer jib that was to remain on the ground, the outer jib dropped and slid toward Oesterreich. Oesterreich testified that he tried to get out of the way and moved several feet, but his foot was crushed between the outer jib and the outrigger pad of the nearby assist crane.

As discussed in detail below, there is conflicting testimony about what instruction was provided prior to the accident. However, as to the location that Oesterreich was standing in at the time of the accident, Basham testified that Oesterreich's location was not hazardous when the outer jib was resting on the two sets of blocking. What made the location hazardous, at the time of the accident, was that a connection pin was removed prior to the outer jib being properly supported and rigged for removal of the connection pins. There was no testimony elicited from Oesterreich about what he understood about the position he was standing in at the time of the accident. During the hearing, Oesterreich acknowledged that Employer trained him not to place his body near or under the jib pieces. Accordingly, the fact that Oesterreich was in a location that resulted in a crushing injury does not, alone, support that the A/D director failed to ensure the crew understood the dangerous positions the crew needed to avoid.

Therefore, the Division presented insufficient evidence that Employer violated section 1611.2, subdivision (d)(1)(C). Employer's appeal of Citation 1, Item 2, is granted.

3. Did Employer fail to address the hazard associated with the proper location of blocking to prevent dangerous movement of an outer jib during disassembly?

Section 1611.2, subdivision (h)(3)(B), requires the following:

> (h) Addressing specific hazards. The A/D director supervising the assembly/disassembly operation shall address the hazards associated with the operation, which include but are not limited to:
>
> […]
>
> (3) Proper location of blocking. When used to support lattice booms or components, blocking shall be appropriately placed to:
>
> […]
>
> (B) Prevent dangerous movement and collapse.

In Citation 1, Item 3, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to on 4/11/22, Employer failed to address the specific hazards associated with disassembling a complete tower crane outer jib, while not fully supported by the required number of blocks and locate them as recommended by the manufacturer, to prevent and avoid dangerous movements.

Before turning to whether there is a violation of the cited regulation, Employer argues that the citation should be dismissed because the cited regulation does not apply. Employer asserts that the outer jib is not a lattice boom or a component. However, other than making this assertion, Employer does not provide any definitions or analysis. Section 1610.3, which provides definitions for Cranes and Derricks in Construction, under which the cited regulation is located, provides that, "[o]n tower cranes, if the 'boom' (i.e., principal horizontal structure) is fixed, it is referred to as a jib; if it is moveable up and down, it is referred to as a boom." Based on this definition, a jib and a boom are the same part of a tower crane, with the only difference being whether that part can move up or down. As such, it makes little sense that a lattice boom would require blocking to prevent dangerous movement and collapse during disassembly, but not a lattice jib, when they are the same component of the crane under the safety order. There was no assertion from employer that the outer jib at issue in this case was not a lattice jib.

The AVD asserts that Employer did not use the required amount of blocking and did not place the blocking as recommended by the manufacturer. As established above, there are no manufacturer's procedures for the disassembly of the outer jib once it is on the ground.

Accordingly, the premise that Employer failed to follow the manufacturer's procedures in determining the proper amount and location of blocking is incorrect. Nonetheless, it is undisputed that one set of blocking was not yet in the proper location when Oesterreich and Hennessey removed a connection pin. As such, it must be determined whether this results in a violation of the cited regulation.

The Division argues that Basham should have verified that the blocking was in place before allowing Oesterreich and Hennessey to proceed with disassembly. Employer argues that its procedure for disassembling the outer jib on the ground addressed the proper location of blocking to prevent dangerous movement or collapse. Employer asserts that it was Oesterreich's and Hennessey's failure to follow instructions that resulted in the premature removal of one of the connection pins before the blocking was in the proper location.

As described above, Employer's plan called for the outer jib to be supported by two sets of blocking and the assist crane during disassembly on the ground. Wiethorn testified that Employer's process of supporting the outer jib with this combination of blocking and the assist crane during the disassembly process was appropriate. Moran testified that there are different methods that can be used to provide support and it is not uncommon for an assist crane (or even a forklift) to support the outer jib section that is being removed. There is no evidence that, if Employer's plan was carried out correctly, the location of the blocking was insufficient to prevent dangerous movement and collapse of the outer jib. Employer's plan demonstrates that the A/D director took steps to address the proper location of blocking during disassembly of the outer jib. However, there was an error in the execution of this plan, which Employer asserts was the result of the failure of Oesterreich and Hennessey to follow instructions.

There is conflicting evidence about the instructions that were provided regarding the disassembly of the outer jib. Basham testified that he was giving step-by-step instructions to the crew as they went along with their work. Basham further testified that, prior to the accident, he, Dye, Oesterreich, and Hennessey were discussing the next step to be performed. Basham testified that he instructed Oesterreich and Hennessey to remove only the cotter pins while he and Dye went to put the rigging in place and retrieve the blocking to move it into place under the end of the outer jib that would remain on the ground. It is noted that Basham gave a short three sentence written statement to DPR Construction,[7] that broadly stated that at the time of the accident the crew was taking the pins out. (Ex. 38.) Basham explained that this statement was given immediately after the accident when he was emotional, and the statement did not include a detailed account of the instructions that were provided before the accident. Given this explanation, Basham's straightforward testimony at the hearing is credited.

[7] DPR Construction was Employer's customer that rented the crane for the construction site. (See Ex. D.)

Dye gave similar testimony that Basham was giving detailed instructions as the crew worked. Dye testified that, as the Ironworker Foreman, he was also providing instructions to Oesterreich and Hennessey, and he instructed that they remove only the cotter pins while he and Basham went to retrieve the blocking.

Oesterreich testified that the only instruction Basham gave was to remove the pins and put the outer jib sections onto the trucks. Hennessey did not testify at the hearing, but Mirza interviewed Hennessey about the accident and took written notes. According to these notes, Hennessey informed Mirza that "we connected the crane to the jib and [Oesterreich] and I just started to knock the pins out. No one told us to do it . . . ." (Ex. 15.) Hennessey also informed Mirza that "[Oesterreich] and I just moved too fast and got there to start separating the pieces of jib before it was time. We don't have any specific procedures and there isn't anyone that directs the specific processes or steps." (Ex. 15.)

Oesterreich's and Hennessey's statements indicate that there were no specific instructions provided. However, this is unlikely considering the sequenced process required to disassemble the outer jib. On cross examination, Oesterreich conceded that he understood there was a sequence that needed to be followed when disassembling the outer jib, which tends to show that more than a broad instruction to take out the pins was provided. Similarly, Hennessey's statement that he started separating the jib pieces before it was time also indicates that he understood there was a sequence that must be followed.

While Basham and Dye testified that Oesterreich and Hennessey were instructed to remove only the cotter pins prior to the accident, this testimony does not necessarily result in Employer's conclusion that Oesterreich and Hennessey were acting in contradiction of instructions. Rather, the testimony of Basham, Dye, and Oesterreich, and the interview statements of Hennessey taken as a whole, lead to the conclusion that there was a miscommunication. Oesterreich testified that he did not believe that he was doing anything wrong, which supports the conclusion that he and Hennessey misunderstood and believed it was the appropriate time to start knocking out the connection pins.

The misunderstanding resulted in the blocking not being in the proper location to prevent dangerous movement and collapse when Oesterreich and Hennessey removed the connection pin. Despite Basham and Dye being in the process of retrieving the blocking, the blocking was not in the proper location when the connection pin was removed. As such, there was a failure to fully address the proper location of blocking because Employer's plan was not correctly implemented.

Based on the foregoing, the Division established a violation of section 1611.2, subdivision (h)(3)(B), because blocking was not in the proper location to prevent dangerous movement of the outer jib. Therefore, Citation 1, Item 3, is affirmed.

4. Did Employer fail to ensure that the outer jib was rigged or supported to maintain stability upon pin removal?

Section 1611.2, subdivision (h)(7), requires the following:

> (h) Addressing specific hazards. The A/D director supervising the assembly/disassembly operation shall address the hazards associated with the operation, which include but are not limited to:
>
> […]
>
> (7) Stability upon pin removal. The boom sections, boom suspension systems (such as gantry A-frames and jib struts), and components shall be rigged or supported to maintain stability upon the removal of the pins.

In Citation 2, as amended at the hearing,[8] the Division alleges:

> Prior to and during the course of the inspection, including but not limited to on 4/11/22, Employer failed to ensure proper support of a Potain MD569 tower crane outer jib to maintain stability upon removal of pins. As a result, an employee suffered serious injuries when an unsupported portion of the 3 piece outer jib, unexpectedly moved, crushing the employee's foot between it and the assist crane's outrigger pad, when a pin was removed.

Employer argued that the citation should be dismissed because the cited regulation does not apply. Employer asserts that the outer jib is not a boom section, boom suspension systems, or any of its components. However, similar to the discussion above, it is illogical to conclude that a boom would require stability upon pin removal, but not a jib, when they are essentially considered the same part of the tower crane for purposes of the safety order. As such, without any analysis from Employer to support its position, Employer's argument is unconvincing.

[8] During the pendency of the hearing, on October 30, 2025, the Division filed a motion to amend Citation 2 to remove limiting language in the AVD regarding the outer jib being placed on the ground as a complete unit and failing to support the outer jib with the amount of supports as required by manufacturer's procedures. At the next hearing date on November 5, 2025, after the parties presented their respective oral arguments, the Division's motion to amend Citation 2 was verbally granted.

In addition to the blocking not yet being in the proper location to support the outer jib upon pin removal, the outer jib section to be removed was not yet fully supported by the assist crane when Oesterreich and Hennessey removed one of the connection pins. The Division argues that Basham should have verified that the outer jib was properly supported by the blocking and the assist crane before allowing Oesterreich and Hennessey to proceed, and Employer asserts that they failed to follow instructions.

As discussed, Employer's plan called for the outer jib to be supported by blocking and rigging to ensure the outer jib was stable during pin removal. This plan demonstrates that the A/D director took steps to address this hazard. However, based on the same reasoning as above, while there was a process in place to address the hazard, ultimately the process was not fully implemented due to the misunderstanding.

Accordingly, the Division established that Employer violated section 1611.2, subdivision (h)(7), because the outer jib was not rigged or supported to maintain stability upon the removal of the connection pin. Therefore, Citation 2 is affirmed.

5. Did Employer establish that an affirmative defense relieved it of liability for the violations?

Employer asserted that the logical time defense and the *Newbery* defense should relieve it of liability for any citations related to the outer jib not being properly supported.

a. The logical time defense

"The logical time defense is a Board created rule which provides that '[t]he requirements of any safety order will not begin to apply until the necessary and logical time has arrived for an employer to make provisions to correct the violation and abate the hazard. [Citations.]'" (*Bay Cities Paving & Grading, Inc.*, Cal/OSHA App. 12-1665, Denial of Petition for Reconsideration (May 16, 2014).) In order for this defense to apply, an employer must prove: "(1) compliance with the cited safety order during the cited time period will expose the employee to greater danger, or a more hazardous situation, than non-compliance; and, (2) compliance with the safety order will occur at the earliest appropriate and logical time once the greater danger has passed." (*ACCO Engineered System, Inc.*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).)

Employer's logical time defense argument focuses on testimony by the Division's expert, Moran, that one possible method for supporting the outer jib during the disassembly process could have been to place blocking under each connection point of the outer jib. However, this was not the method Employer used to disassemble the outer jib, and, therefore, it is not relevant to the logical time defense.

The logical time defense does not apply to the facts of this case because the logical time had arrived to support the outer jib with rigging and blocking for pin removal. The crew was in the process of getting the outer jib supported by the blocking and the assist crane to ensure the outer jib was properly supported for connection pin removal when the accident occurred. However, as described above, due to a misunderstanding, Oesterreich and Hennessey removed one of the connection pins prior to the outer jib being properly supported for pin removal. Therefore, Employer has failed to establish the logical time defense.

b. Newbery defense (Unforeseeability)

In *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd.* (1981) 123 Cal.App.3d 641, the Court of Appeal recognized that where an employee's violation of a safety order was unforeseeable, the employer was not held responsible for the violation. In order to successfully assert the *Newbery* defense, an employer must prove that none of the following four criteria exist:

> (1) the employer knew or should have known of the potential danger to employees;
> (2) the employer failed to exercise supervision adequate to assure safety;
> (3) the employer failed to ensure employee compliance with its safety rules; and
> (4) the violation was foreseeable.

(*Gaewhiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045.)

Employer argues that it did not know and should not have known that Oesterreich and Hennessey would fail to follow instructions and prematurely remove the connection pin. It has been determined that the premature removal of the connection pin resulted from a misunderstanding, not from Oesterreich and Hennessey simply electing to disregard an instruction. It is apparent that the step-by-step procedures used by Employer to disassemble the outer jib are in place to mitigate any potential misunderstanding of the process that could lead to the outer jib not being properly supported by blocking or rigging during the disassembly process. As such, Employer was aware of the potential danger.

Employer must establish that none of the four elements exist to prevail on the *Newbery* defense. As such, the existence of just one element is sufficient to find that the *Newbery* defense does not apply. Accordingly, Employer has failed to meet its burden of proof regarding the unforeseeable employee act *Newbery* defense.

6. Did the Division establish that Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivision (a), in relevant part, states:

> 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:
>
> […]
>
> (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.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, *Inc*. Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

Oesterreich's injury demonstrates not only a realistic possibility that the hazard could result in serious physical harm, but that it was an actuality in this case. Due to the connection pin being removed before the outer jib was properly supported, the outer jib dropped and slid crushing Oesterreich's foot into the outrigger pad of the nearby assist crane.

The parties stipulated that Oesterreich suffered a "serious injury" as defined in section 330, subdivision (h). "Serious injury" is defined as any injury "occurring in a place of employment or in connection with any employment that requires inpatient hospitalization for other than medical observation or diagnostic testing, or in which an employee suffers an amputation, the loss of an eye, or any serious degree of permanent disfigurement…." (§ 330, subd. (h).) As the injuries identified in the definition of "serious injury" are the same as injuries in the definition of "serious physical harm," the parties' stipulation is sufficient to find that Oesterreich suffered serious physical harm as defined in Labor Code section 6432, subdivision (e).

Accordingly, the Division established the rebuttable presumption that the violation in Citation 2 was properly classified as Serious.

7. Did Employer rebut the presumption that the violation in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a Serious violation exists "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." In order to satisfactorily rebut the presumption, the employer must demonstrate both:

> (1) The employer took all 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) [; and]
>
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

(Lab. Code §6432, subd. (c).)

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (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; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

Employer was aware of the hazards involved with the dismantling of the tower crane and the disassembly of the outer jib on the ground. Employer reviewed these hazards with the crew. Furthermore, Employer had a specific procedure in place to ensure that the outer jib was supported during disassembly on the ground, including during pin removal, and Basham was giving detailed instructions during the disassembly. Training records for Basham, Dye, Oesterreich, and Hennessey were submitted by the parties. (Exs. G, H, 32, 37.)

The Division argued that Oesterreich was not trained and did not have sufficient experience in dismantling tower cranes. However, there is evidence that Oesterreich had sufficient training for carrying out his tasks. At the time of the accident, Oesterreich had been an ironworker through a union for seven years.[9] Oesterreich participated in a four-year apprenticeship program where he was trained on welding, rigging, fabrication, and "pretty much everything an iron worker is supposed to do." (Hrg. Tr. Apr. 2, p. 44, ln. 6-12.) Oesterreich also testified that he has a rigging certification, signal person certification, welding certification, and an OSHA-30 certificate. Exhibit G contains a list of the certifications held by Oesterreich as of 2018 and 2019. The signal person and rigging certification is reflected in this list. Oesterreich explained that he received on-the-job training from Employer on assembly and disassembly of cranes, such as where to place rigging, how to swing a jib, how to add counterweights and take them off, and each step of the process for assembly and disassembly. Oesterreich testified that this training included tower cranes.

While Oesterreich had only been employed with Employer for five months and worked on only a few tower cranes prior to the accident, he was being directly supervised by Basham and Dye during the disassembly process. Oesterreich's role was to perform the labor that was needed to disassemble the outer jib; he was to carry out the instructions that were given by Basham and Dye.

The crux of the issue in determining whether Employer took all the steps a reasonable and responsible employer should have taken is whether the supervision and instruction prior to the accident were reasonable. The Division argued that Basham and Dye should have verified that Oesterreich and Hennessey understood instructions. However, it was reasonable for Basham and Dye to expect that their instructions were understood and would be followed. The crew had

[9] At the hearing, Oesterreich testified that he had worked through a union as an iron worker for 11 years. According to Mirza's interview notes, Oesterreich represented that he had been working as an iron worker for seven years. (Ex. 15.) As such, it is found that, at the time of the accident, Oesterreich had at least seven years of experience working as an ironworker.

successfully disconnected one outer jib section prior to the accident. Although pin removal is a dangerous task, the sequence of disassembly was not complicated. As the crew had already completed the process once, it is reasonable to conclude that the crew understood the process. Basham testified that he received an acknowledgement from Oesterreich and Hennessey in the form of a head nod that they understood the next step.

Furthermore, while Basham and Dye turned away from Oesterreich and Hennessey after giving instructions and did not see the incident, they were not leaving them unsupervised. Basham and Dye were ultimately going to the end of the outer jib section to get the blocking to move it into place. It is unreasonable to expect a supervisor to observe all actions of an employee at all times. (*Synergy Tree Trimming, Inc.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).) The length of the outer jib section that was being prepared for disconnection was approximately 50 feet.[10] Basham and Dye would not have been going beyond that length to retrieve the blocking. Basham and Dye gave similar testimony that about 30 to 45 seconds had passed after they turned and walked away from Oesterreich and Hennessey before they heard Oesterreich scream, which caused them to turn around and see the outer jib and Oesterreich on the ground. Basham and Dye then both signaled the crane operator to lift the outer jib. Basham and Dye estimated that they were about 30 to 40 feet away when the incident occurred.

The Division argues that Basham and Dye should have been able to hear the continuous banging sound of Hennessey knocking out the connection pin with a sledgehammer. The Division asserts that this noise should have alerted Basham and Dye that a connection pin was being knocked out and, based on that noise, they should have turned around and stopped Oesterreich and Hennessey. Basham and Dye both testified that they did not hear the sound of the sledgehammer given the other noises occurring at the construction site, including the sounds of the running engines of the nearby semitrucks and assist crane.

Oesterreich testified that it took about three minutes for Hennessey to knock out the connection pin. However, as discussed above, the accuracy of Oesterreich's testimony regarding the instruction he was provided during the disassembly process is questionable. Given this, it is doubtful that his testimony would be accurate regarding the time it took to remove the connection pin. Basham's and Dye's testimony that only 30 to 45 seconds passed from the time they turned away from Oesterreich and Hennessey is credited. As such, it is found that the

[10] In the tower crane operator's manual, there is a chart that designates each jib section with an alphabetic letter with the length of that section provided. (Ex. 28, p. 4-54.) It is undisputed that the crew was in the process of removing section G and H as a single unit. Section G is 16.4 feet in length and section H is 32.8 feet. (Ex. 28, p. 4-54.) Therefore, the length of the outer jib section being removed was 49.2 feet.

connection pin came out quickly and the incident happened in moments. Due to the short duration, Basham and Dye did not have the opportunity to see or hear the violation.

Based on the foregoing, Employer has established that it took all steps that a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation.

The second element necessary to rebut the presumption is found in Labor Code section 6432, subdivision (c)(2), and requires proof that "]E]mployer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered." Troy Wagner (Wagner), Vice President of Safety, testified that, after the accident, he updated the tower crane JSA to add language that no steps should be taken during the disassembly process until the A/D director gives the direction. Wagner also testified that all ironworkers were retrained on this requirement. Dye testified that, at the next safety meeting he attended involving a tower crane, the requirement of not taking action until instructed to do so was reviewed.

Accordingly, Employer met its burden to establish that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The presumption that the violation was properly classified as Serious is rebutted and Citation 2 is reclassified as General.

8. Are the proposed penalties for Citation 1, Item 3 and Citation 2 reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, *supra,* Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The parties stipulated that the Division calculated the proposed penalties in accordance with the Division's policies and procedures. As such, the proposed penalty for Citation 1, Item 3 is found to be reasonable.

For Citation 2, the penalty must be adjusted to account for the reclassification to General. Based on the parties' stipulation, the information in the Division's penalty calculation worksheet in Exhibit 19 will be used to arrive at the modified penalty.

Section 336, subdivision (b), provides that a base penalty for a General violation will be set initially based on the Severity of the violation and thereafter adjusted based on the Extent and Likelihood. The Severity of the violation was originally rated as High because it was classified as Serious, and no other adjustments to the Base Penalty were permitted because it was Accident-Related. (See §336, subd. (c)(2) and (d)(7).) However, because the citation is reclassified from Serious to General, the Base Penalty from which all other adjustments are made must be reduced in accordance with section 336.

Section 335, subdivision (a), provides in part:

> (a) The Gravity of the Violation--the Division establishes the degree of gravity of General and Serious violations from its findings and evidence obtained during the inspection/investigation, from its files and records, and other records of governmental agencies pertaining to occupational injury, illness or disease. The degree of gravity of General and Serious violations is determined by assessing and evaluating the following criteria:
>
> (1) Severity.
>
> (A) General Violation.
>
> […]
>
> ii. When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows:
>
> LOW-- Requiring first-aid only.
>
> MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.
>
> HIGH-- Requiring more than 24-hour hospitalization.

To determine the proper rating for Severity, it is necessary to evaluate the type and amount of medical treatment required for an injury that will likely be caused by a crane

component that is not properly supported by rigging or blocking during pin removal. Citation 1, Items 1 through 3, were all rated High Severity. Given this and the injury that occurred in this case, a rating of High for Severity is appropriate for Citation 2. As such, Severity is properly characterized as High. A General violation with a High Severity has a Base Penalty of $2,000. (§336, subd. (b).)

The Division's Proposed Penalty Worksheet does not indicate how the Division assessed Extent and Likelihood for Citation 2. However, for Citation 1, Items 1 through 3, the Division assigned a Low Extent and a Medium Likelihood.

When a violation pertains to employee injury, Extent is "based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is." (§ 335, subd. (a)(2).) The Division's Proposed Penalty Worksheet reflects that there was one instance of a violation of section 1611.2, subdivision (h)(7). There is no indication that this violation occurred at any other time during the relevant period. Accordingly, the violation is assigned an Extent of Low, which results in a 25 percent reduction in the Base Penalty. (§§ 335, subd. (a)(2), and 336, subd. (b).)

"Likelihood is the probability that injury, illness or disease will occur as a result of the violation." (§ 335, subd. (a)(3).) The number of employees exposed to the hazard and the extent to which the violation has resulted in injury in the past is considered in determining Likelihood. (*Id*.) The Proposed Penalty Worksheet reflects that eight employees were exposed to the hazard in Citation 1, Items 1 through 3, and a Medium Likelihood was assessed for these items. The Proposed Penalty Worksheet reflects that two employees were exposed to the hazard in Citation 2. As the Division determined that there were only two workers exposed to this hazard, a Low rating for Likelihood is appropriate. As such, Likelihood is rated as Low, which results in a 25 percent reduction to the Base Penalty. (§§ 335, subd. (a)(3), and 336, subd. (b).)

Applying the adjustments for Low Extent and Low Likelihood, the Base Penalty of $2,000 is reduced by 50 percent ($1000), for a Gravity-Based Penalty of $1,000.

Section 335 provides for further adjustment to the Gravity-Based penalty for Good Faith, Size, and History. The Division's Proposed Penalty Worksheet indicates that, for Citation 1, Items 1 through 3, Employer was granted a 15 percent adjustment for Good Faith, a 10 percent adjustment for Size, and a five percent adjustment for History. Because Citation 2 was previously characterized as Accident-Related, no adjustments were permitted other than for Size. (See §336, subd. (c)(2) and (d)(7).) Due to the reclassification of Citation 2 to a General violation, the adjustment factors for Good Faith and History can be applied to the Gravity-Based Penalty resulting in an Adjusted Penalty of $700.

Section 336, subdivision (e), provides that the Adjusted Penalty is subject to an abatement credit of an additional 50 percent. Citation 2 indicates that the violation was "Corrected During Inspection." The abatement credit was not previously applied because it is not available for Serious Accident-Related violations. (§336, subd. (e)(3)(D).) However, due to the reclassification to a General violation, Employer is entitled to an abatement credit of 50 percent of the Adjusted Penalty, for a final penalty of $350, which is found to be reasonable.

Conclusion

The Division did not establish by a preponderance of the evidence that Employer failed to follow applicable manufacturer's procedures during disassembly of a tower crane's outer jib as required by section 1611.1, subdivision (a).

The Division did not establish by a preponderance of the evidence that Employer's A/D director failed to ensure crew members understood the hazardous positions/locations that they needed to avoid in accordance with section 1611.2, subdivision (d)(1)(C).

The evidence supports a finding that Employer violated section 1611.2, subdivision (h)(3)(B), by failing to ensure the proper location of blocking to prevent dangerous movement of an outer jib. Employer failed to establish the logical time defense and *Newbery* defense. The violation was properly classified as General. The proposed penalty is found reasonable.

The evidence supports a finding that Employer violated section 1611.2, subdivision (h)(7), by failing to ensure that an outer jib was rigged or supported to maintain stability upon the removal of a connection pin. Employer failed to establish the logical time defense and *Newbery* defense. The citation is reclassified to General due to lack of Employer knowledge and the penalty is modified.

Order

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

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

It is hereby ordered that Citation 1, Item 3, is affirmed and the penalty of $525 is sustained.

It is hereby ordered that Citation 2 is affirmed with an amended classification of General and the penalty is modified to $350.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

/s/ Jennie Culjat

_____

Dated: 09/14/2026

Jennie Culjat
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.**

If no petition is filed, the penalty amount set forth in the Summary Table is due and payable 30 days after the Order or Decision is issued. If the Appeals Board approved a payment plan, all payments are due in accordance with the dates indicated in the Summary Table. If a Petition for Reconsideration is filed, no payment should be made until the final outcome of the appeal.