

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

In the Matter of the Appeal  
of:

**SECURITY PAVING, INC.**  
9050 Norris Avenue  
Sun Valley, CA 91352

Employer

DOCKETS 13-R3D7-0771  
and 0772

**DECISION**

**Statement of the Case**

Security Paving, Inc. (Employer) (sometimes referred to as Security Paving) is a paving contractor. Beginning September 20, 2012, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Paul Ricker, conducted an accident inspection at a place of employment maintained by Employer on the Westside Parkway westbound onramp for Calloway Drive, Bakersfield, California (the site). On February 21, 2013, the Division issued Employer two serious citations. The first was for failure of Employer's written Illness and Injury Prevention Program (IIPP) to provide for training employees and dump truck drivers on appropriate hand signals to be used when directing dump trucks<sup>1</sup>. The second was for Employer's failure to conduct a survey of the site to determine the predictable hazards to employees and the safeguards necessary to protect employees while dump trucks were in close proximity<sup>2</sup>.

Employer filed timely appeals. Before the hearing, Employer amended its appeals<sup>3</sup> to contest the existence of the alleged violations, their

---

<sup>1</sup> Citation 1 was an alleged serious violation of § 3203(a)(7) with a proposed penalty of \$9,000. Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

<sup>2</sup> Citation 2 was an alleged serious accident-related violation of § 1511(b) with a proposed penalty of \$18,000.

<sup>3</sup> Employer made a motion to amend its appeals, which was not opposed. Good cause being established, the motion was granted.

classifications, and the reasonableness of the proposed penalties. Employer asserted twelve affirmative defenses<sup>4</sup>.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Bakersfield, California on June 24 and 25, 2014. Eugene F. McMenemy, Attorney, represented Employer. William Cregar, Staff Counsel, represented the Division. David K. Cohn, Attorney, represented the Third Party (Justin Todahl.) The parties presented oral and documentary evidence. Leave was granted to file briefs. The matter was submitted on August 11, 2014. Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ. The submission date was extended to September 8, 2014 on the ALJ's own motion.

This matter was consolidated with J. Perez Mata Trucking (Mata Trucking), Docket 13-R3D7-0862 for hearing. Mark G. Cunningham, Attorney, represented Mata Trucking.

### **Issues**

1. Did the Division meet its burden of proof to establish that Employer's Illness and Injury Prevention Program (IIPP) did not require training on hand signals for directing dump trucks when workers on foot were close to the trucks?
2. Prior to the beginning of the paving operation, did Employer conduct a thorough survey of the conditions of the site to determine the predictable hazards to employees and the safeguards necessary to protect their employees?

### **Findings of Fact**

1. On August 28, 2012, Employer was performing concrete paving for a highway. Employer engaged the services of J. Perez Mata Trucking, Inc. (Mata) to haul concrete.
2. When a dump truck hauling concrete neared the paving machine, it backed up and dumped the concrete into the paving machine hopper.
3. Standard practice in the trucking industry to keep the drivers of dump trucks informed of the location of people and vehicles while dumping concrete into a hopper was to use a spotter or dump man when backing up and to communicate to the truck drivers using hand signals.
4. On August 27, 2012, Justin Todahl (Todahl) was assigned the duties of spotter or dumpman. This was a new job assignment Todahl. He had not previously received training on this job assignment.

---

<sup>4</sup> Affirmative defenses for which Employer did not present evidence are not discussed in this Decision.

5. On August 27, 2012, Colvin trained Todahl on appropriate hand signals to use when directing dump trucks. After giving the instructions, Colvin observed Todahl correctly signaling dump trucks on his own before Colvin left the area.
6. On August 28, 2012, Todahl used hand signals to instruct a Mata Trucking driver, Flavio E. Orantes (Orantes) to stop and he came to a full stop.
7. As of August 28, 2012, Orantes had been driving trucks for Mata Trucking for the last two years. Orantes knew hand signals used to direct trucking operations, but had not been trained by Employer.
8. While Todahl was cleaning out the hopper, Orantes began backing up without receiving a signal to proceed and hit Todahl.
9. On September 20, 2012, Associate Safety Engineer R. Paul Ricker (Ricker) began an inspection of Todahl's accident. Ricker made a document request, but training was not part of the document request. He did not ask if safety meetings had been held.
10. For each day of the paving project, before work began, Labor Foreman Heath Colvin (Colvin) determined what work would be done, which employees would be needed, if any training would be needed, when an employee would be needed, when a cement pour would start, where the pour would take place, which direction the paving would go, how much cement would be poured, the route that the trucks would take from the concrete batch plant to the paving machine, how to keep all vehicles out of the way of the paving machine, what grading needed to be done and what attachments should be used for the paving machine.
11. The Division inspector, Associate Safety Engineer, Paul Ricker (Ricker), did not ask Colvin or anyone else whether a survey had been performed.

### **Analysis**

**1. Did the Division meet its burden of proof to establish that Employer's IIPP did not require training on hand signals for directing dump trucks when employees on foot were close to the dump trucks?**

Section 3203 provides as follows:

- (a) Effective July 1, 1991, every employer shall establish, implement, and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum: ...
  - (7) Provide training and instruction:
    - (A) When the program is first established; [Exception omitted]
    - (B) To all new employees;
    - (C) To all employees given new job assignments for which training has not been previously received;

(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.

Citation 1, Item 1 alleges as follows:

On or about August 28, 2012 at approx. 1248 hours an employee of Security Paving was exposed to the hazard of being struck by a dump truck(s) being driven in reverse while performing the duties of directing the dump truck(s).

Security Paving did not train their employee(s) and dump truck(s) drivers employed by J. Perez Mata Trucking, and other trucking firms, on appropriate hand signals to be used when directing the dump truck(s) when employee(s) are working on foot in close proximity to where the dump truck(s) are operating. The employee of Security Paving was subsequently struck and seriously injured when the dump truck(s) driver moved the dump truck(s) without being given a hand signal indicating it was clear to move.

The purpose of section 3203(a)(7) is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through training and instruction. (*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).)

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Travenol Laboratories, Hyland Division*, Cal/OSHA App. 76-1073, Decision After Reconsideration (Oct. 16, 1980) at pp. 2-3; *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

The Division must make some showing that each element of the violation occurred. (*Lockheed California Company*, Cal/OSHA App. 80-889, Decision After Reconsideration (July 30, 1982).)

The existence of facts not in evidence may not be assumed. (*Kenyon Plastering Inc.*, Cal/OSHA App. 10-2710, Denial of Petition for Reconsideration (Aug. 13, 2012), citing *California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009) and *Steve P. Rados*, Cal/OSHA App. 79-1444, Decision After Reconsideration (Oct. 31, 1984); (*Estenson Logistics*, Cal/OSHA App. 05-1755, Decision After Reconsideration (Dec. 29, 2011).)

To establish a § 3203(a)(7) violation, the Division must make some showing that each element of the violation occurred. First, the Division may satisfy its burden of proof by showing that Employer did not have a written IIPP. Second, if Employer has a written IIPP, the Division may satisfy its burden by showing that the IIPP is missing any one of the requirements identified in subsection (a)(7). Third, if Employer's written IIPP has all the requirements, then the Division may satisfy its burden by establishing that any one requirement was not implemented or maintained.

The record was void of any evidence regarding whether Employer had an IIPP, and if so, whether it was in writing, and if so, what the written provisions were concerning training. The IIPP was not in evidence. The Division made a document request, but the document request was not in evidence. The only evidence produced at hearing about the document request was Ricker's testimony that the request did not pertain to training.

The Division has the burden of proof. The Division must present evidence that Employer did not have a written IIPP. Lack of a written IIPP cannot be assumed. Therefore, because the Division has the burden of proof on these issues, it must be found that Employer had an IIPP, that the IIPP was in writing, and that the IIPP contained all the requirements specified in § 3203(a)(7). It cannot be assumed that the IIPP required training on hand signals. It cannot be assumed that Employer failed to implement or maintain its IIPP by failing to provide training on hand signals. It cannot be assumed that the IIPP required training on hand signals. It cannot be assumed that failure to ensure training on hand signals is a failure to implement or maintain its IIPP. Therefore, no violation of § 3203(a)(7) can be found.

Accordingly, the Division did not meet its burden of proof to establish a violation of § 3203(a)(7). Citation 1 is vacated, and the penalty is set aside.

**2. Prior to the presence of employees, did Employer make a thorough survey of the conditions of the site to determine the predictable hazards to employees and the kind and extent of safeguards necessary?**

Section 1511(b) provides:

General Safety Precautions

(b) Prior to the presence of its employees, the employer shall make a thorough survey of the conditions of the site to determine, as far as practicable, the predictable hazards to employees and the kind and extent of safeguards necessary to prosecute the work in a safe manner in accordance with the relevant parts of Plate A-2-a and b of the Appendix.

The Division alleged that the relevant parts of Plate A-2 were a (b)(3), b (c)(2) and b (c)(4). These parts read as follows:

Plate A-2-a

ADVANCE PLANNING SUGGESTED FOR  
CONSTRUCTION WORK

Each operation of a construction job should be planned in advance. Such planning is needed at all stages of the project. It should start with the estimators, prior to the preparation of bids, and continue throughout the job, with superintendents and foremen doing their share.

Construction planning will eliminate some accidents automatically, by creating a well-organized job. But expert planning gives special attention to safety, and thus is highly effective in making the operation safe and efficient.

1. Safe Access and Movement

(a) ...

(b) Vehicles

(1) ...

(2) ...

(3) Adequate signs, signals, etc. to route vehicles on job.

Plate A-2-b

(c) Workers and Foremen

(1) ...

(2) Adequate training and supervision.

(3) ...

(4) Plans for maintaining interest in safety.

(A) Safety bulletins, record charts, and posters.

(B) Recognition for groups or individuals with safety records.

- (C) Investigation and reporting on all accidents.
- (D) Knowledge of safety orders
- (E) Safety meetings.

The violation description in Citation 2 reads as follows:

On or about August 28, 2012 at approx. 1248 hours an employee of Security Paving was exposed to the hazard of being struck by a dump truck(s) being driven in reverse while performing the duties of directing the dump truck(s).

Security Paving did not conduct a thorough survey of the conditions of the site to determine the predictable hazards to their employee(s), and the safe guards necessary to protect their employee(s) while dump truck(s) were in close proximity to their employee(s) during the dumping operations. Security Paving employee was subsequently struck and received serious injuries when a dump truck backed up pinning him between the dump truck box and the Gomaco paving machine trough.

The Appeals Board has held that § 1511(b) is an enforceable safety order. (*Pacific Erectors, Inc.*, Cal/OSHA App. 00-0118, Decision After Reconsideration (Nov. 27, 2001).) In so doing, the Appeals Board held that “survey” means “to examine for some specific purpose; inspect or consider carefully; review in detail,” citing Webster’s Third New World Dictionary (3<sup>rd</sup> college ed. 1989) p. 1348. (*Id.*)

The Appeals Board has held that a violation of § 1511(b) may not be based on speculation. In *C. A. Rasmussen, Inc.*, Cal/OSHA App. 96-3953, Decision After Reconsideration (Sep. 26, 2001), the Board dismissed a violation of § 1511(b) as pure speculation because the Division never asked if Employer conducted a survey to identify predictable hazards. The inspector concluded that no survey had occurred because an accident occurred and he believed that a through survey would have discovered the hazard.

As in *C. A. Rasmussen, Inc.*, Cal/OSHA App. 96-3953, Decision After Reconsideration (Sep. 26, 2001), the inspector in the instant matter did not ask Employer or anyone else if Employer conducted a survey to identify predictable hazards. As held in *C. A. Rasmussen, Inc.*, Cal/OSHA App. 96-3953, Decision After Reconsideration (Sep. 26, 2001), this makes the citation speculative.

Additionally, the evidence adduced at hearing establishes that the required survey was made and that predictable hazards and relevant safeguards were identified. The relevant hazard is that of a truck hitting something, such as a person on foot. (See *R & L Brosamer, Inc.*, Cal/OSHA App. 03-4832, Decision After Reconsideration (Oct. 5, 2011) p. 4, citing *Teichert Const. v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App.4<sup>th</sup> 883.) Colvin addressed that hazard each day by evaluating and planning the job to be done the next day, by planning the location of the paving machine, by planning the route for vehicle traffic, and by planning which employees were needed to perform the tasks planned for the next day. Colvin was aware of the hazards posed by dump trucks. He planned to have a spotter present to signal the dump trucks, and trained Todahl on the use of hand signals.

Here, the vehicles were routed in a safe manner, hand signals were used to direct the trucks, and Colvin personally trained Todahl when he gave Todahl a new job assignment. This is sufficient to establish that Colvin included the existence of adequate hand signals, adequate training and supervision, and creation of an acceptable interest in safety as suggested by Plate A-2.

Therefore, it is found that the Division failed to meet its burden of proof to establish that Employer did not conduct a thorough survey of conditions of the site to determine predictable hazards. Citation 2 is set aside and the penalty is vacated.

### **Conclusion**

Employer's appeals are granted. Citations 1 and 2 are dismissed and the proposed penalties are set aside.

### **Decision**

It is hereby ordered that the citations be vacated as indicated above and as set forth in the attached Summary Table.

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

Dated: October 8, 2014

---

**DALE A. RAYMOND**  
Administrative Law Judge

DAR:ml

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD**

**J. PEREZ MATA TRUCKING, INC.  
Docket 13-R4D7-0862**

**Date of Hearing: June 24 and 25, 2014**

**Division Exhibits — Admitted**

| <b>Number</b> | <b>Description</b>                                       |
|---------------|--|
| 1             | Jurisdictional Documents for Mata Trucking               |
| 1A            | Jurisdictional Documents for Security Paving             |
| 2             | Order Granting Third Party Status in Mata Trucking       |
| 2A            | Order Granting Third Party Status in Security Paving     |
| 3             | Cal/OSHA Form 1BY for Mata Trucking                      |
| 3A            | Cal/OSHA Form 1BY for Security Paving                    |
| 4             | Penalty Worksheet for Mata Trucking                      |
| 4A            | Penalty Worksheet for Security Paving                    |
| 5             | Copy of hand drawn diagram of site                       |
| 6             | Security Paving/Rangel Trucking Transportation Agreement |
| 7             | Photograph of paving machine 1/28/13 side view           |
| 8             | Photograph of paving machine 1/28/13 rear view           |
| 9             | Manual for paving machine                                |
| 10            | Black and white photograph of paving machine             |
| 10A           | Color photograph of Exhibit 10                           |

**Employer Exhibits — Admitted**

| <b>Letter</b> | <b>Description</b>                    |
|---------------|---------------------------------------|
| A             | Hand-drawn diagram created at hearing |

**Witnesses Testifying at Hearing**

1. Flavio E. Orantes
2. Justin Todahl
3. R. Paul Ricker
4. Heath Colvin
5. Jamie Perez

**CERTIFICATION OF RECORDING**

*I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.*

---

Dale A. Raymond

---

October 8, 2014



## SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**SECURITY PAVING, INC.**  
**Dockets 13-R3D7-0771 and 0772**

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

IMIS No. 313387706

| DOCKET           | C<br>I<br>T<br>A<br>T<br>I<br>O<br>N | I<br>T<br>E<br>M | SECTION    | T<br>Y<br>P<br>E | MODIFICATION OR WITHDRAWAL | A<br>F<br>F<br>I<br>R<br>M<br>E<br>D | V<br>A<br>C<br>A<br>T<br>E<br>D | PENALTY<br>PROPOSED<br>BY DOSH<br>IN<br>CITATION | PENALTY<br>PROPOSED<br>BY DOSH<br>AT<br>HEARING | FINAL<br>PENALTY<br>ASSESSED<br>BY BOARD |
|------------------|--------------------------------------|------------------|------------|------------------|----------------------------|--------------------------------------|---------------------------------|--|---|--|
| 13-R3D7-0771     | 1                                    | 1                | 3203(a)(7) | S                | ALJ vacated violation      |                                      | X                               | \$9,000  | \$9,000   | <b>\$0</b>                               |
| 13-R3D7-0772     | 2                                    | 1                | 1151(b)    | S                | ALJ vacated violation      |                                      | X                               | 18,000   | 18,000  | <b>0</b>                                 |
|                  |                                      |                  |            |                  |                            |                                      |                                 |  |   |  |
|                  |                                      |                  |            |                  |                            |                                      |                                 |  |   |  |
|                  |                                      |                  |            |                  |                            |                                      |                                 |  |   |  |
|                  |                                      |                  |            |                  |                            |                                      |                                 |  |   |  |
|                  |                                      |                  |            |                  |                            |                                      |                                 |  |   |  |
| <b>Sub-Total</b> |                                      |                  |            |                  |                            |                                      |                                 | \$27,000   | \$27,000  | <b>\$ 0</b>                              |

**Total Amount Due\*** **\$ 0**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: *Please do not send payments to the Appeals Board.*  
**All penalty payments should be made to:**  
 Accounting Office (OSH)  
 Department of Industrial Relations  
 P.O. Box 420603  
 San Francisco, CA 94142

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call (415) 703-4291 if you have any questions.

ALJ: DR/ml  
 POS: 10/08/14