

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

In the Matter of the Appeal of:

O.C. JONES & SONS, INC.
1520 4th Street
Berkeley, CA 94710-1748

Employer

Docket. 13-R2D2-0310

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by O.C. Jones & Sons, Inc. (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Employer is a highway and road construction company. Following a report of an accident, the Division of Occupational Safety and Health (Division) conducted an inspection at Employer's construction site located at Busch and Hale Ranch Roads, Fairfield, CA 94533 (worksite). On January 8, 2013, the Division cited Employer for violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹ Citation 1, Item 1 alleged a general violation of section 1597(h) [failure to require use of seat belts]. Citation 1, Item 2 alleged a general violation of section 1598(a) [failure to provide traffic controls]. Employer timely appealed each citation.

On September 19, 2013, a hearing was held before Mary Dryovage, Administrative Law Judge (ALJ) for the Board. The Division was represented by Lisa Matta, District Manager. The Employer was represented by Lisa Baiocchi, Esq., of Walter & Prince, LLP. Donald Maietto (Maietto), the injured Employee, was granted party status and also participated in the hearing. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on December 9, 2013 (Decision). The Decision denied

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

Employer's appeal of the section 1597(h) citation, but granted the appeal of the section 1598(a) citation.

Employer filed a timely Petition for Reconsideration of the ALJ's Decision. The Petition for Reconsideration challenges the ALJ's affirmance of the section 1597(h) citation [failure to require use of seat belts]. The Petition argues that Employer established affirmative defenses to the citation, including the Independent Employee Act Defense (IEAD), requiring the dismissal of the citation. Employer petitioned for reconsideration on the basis of Labor Code section 6617 (a), (c), and (e). The Division did not file an answer to the Petition.

ISSUES

- 1) Does the evidence in the record support the ALJ's finding that Employer failed to require the use of seat belts, as required by section 1597(h)?**
- 2) If the evidence in the record supports the ALJ's finding of a violation of section 1597(h), did Employer establish any affirmative defenses that defeat that citation?**

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issues presented.

Maietto was operating a water truck at the worksite. He was spraying water for the purpose of dust control. Maietto was heading west on a road surface, under construction, and watering the soil. The road surface was atop an embankment. After he finished watering one side of the road, he intended to turn around and head east to water the other side of the road.

Before fully turning the truck around, Maietto unfastened his seat belt and got out of the truck to pick-up a cable and chain lying on the road surface, and he threw those items to the other side of the road. He moved those items to prevent an approaching roller from burying them in the soil.

After moving the aforementioned items, Maietto climbed back into his truck and began maneuvering the water truck to proceed east. When Maietto got back into the truck, he did not re-fasten his seat belt because he planned to get out of his truck in a few moments to readjust the water sprayer; he had only approximately twenty feet to the point at which he would complete his turn.

Maietto then proceeded to back-up his truck in order to maneuver it in the other direction. As the truck neared the edge of the embankment, it started to lean and then it rolled. Maietto suffered injuries as a result of the accident. Maietto was unbuckled maybe a minute, or less, when the accident occurred.

Evidence introduced at the hearing demonstrated that Maietto's failure to wear his seat belt was atypical. During the hearing, Maietto acknowledged that he generally wore his seat belt the whole time. Also, when asked if anyone had ever checked to see if he wore his seat belt, Maietto stated "It was obvious...I wore it." Foremen, Lucas Perry (Perry), testified that he never observed Maietto without his seat belt. Perry stated that Maietto followed the safety rules. Greg Rainey (Rainey), Employer's Risk Engineer, also testified that he never observed Maietto without his seat belt.

Next, it is undisputable that Employer maintains a policy requiring employees to wear their seat belts at all times. Employer maintains an "Employee Code of Safe Practices," which specifically states:

No one is permitted to ride on any machine or vehicle unless it is provided with a stationary seat and seat belt for each passenger. This includes construction equipment and trucks. Seat belts must be worn at all times. (Exhibit D.)

Maietto repeatedly acknowledged that he reviewed the Employee Code of Safe Practices. He printed his name on the "New Employee Orientation Checklist," acknowledging that he reviewed the Company's Employee Code of Safe Practices. (Exhibit C.) He signed a document entitled "Safety Orientation Initial Training and Documentation for New Hires &/or New Assignments" that acknowledged that the Code of Safe Practices had been explained to him. (Exhibit C.) He also signed a copy of the Company's Employee Code of Safe Practices. (Exhibit D.) Additionally, during the hearing, Maietto admitted that he knew the Employer's safety rules.

During the hearing, Employer also introduced Safety Meeting handouts which discussed Employer's requirement that employees wear their seat belts at all times, including handouts dated: October 3, 2011, November 7, 2011, November 28, 2011, December 12, 2011, January 3, 2012, January 9, 2012, January 16, 2012, July 16, 2012, August 13, 2012, August 27, 2012, September 17, 2012, and September 24, 2012. (Exhibit E.) Maietto admitted signing copies of these aforementioned handouts.

Employer also demonstrated that it engaged in efforts to enforce its seat belt requirement. Perry testified that he routinely watched his employees to ensure that they wore their seat belts. He stated that occasionally he had to provide employees verbal reprimands when he caught them not wearing seat

belts. After the violation occurred, Perry stated he would closely monitor the person's use of seatbelts. In addition, Rainey testified that he regularly conducted site inspections to check for safety issues. Employer introduced documentation showing that Employer had formally disciplined, and suspended, employees for failing to wear their seat belt. (Exhibit J.)

DECISION AFTER RECONSIDERATION

The Board has independently reviewed and considered the entire record in this matter. In making this decision, the Board has taken no new evidence.

Within her Decision, the ALJ found a violation of section 1597(h).² The ALJ's decision states: "The facts are undisputed: Maietto was driving a water truck which rolled over and he was not wearing a seat belt at the time of the accident. A violation of Section 1597(h) is found to exist." The Decision appears to stand for the proposition that because Maietto failed to wear his seat belt at the time of the accident, Employer failed to require its use. However, that conclusion is not supported.

Section 1597(h) does not prescribe that a violation occurs anytime an employee fails to wear a seat belt. The fact that Maietto failed to wear his seat belt at the time of the accident is not dispositive as to whether there was a violation of section 1597(h). Section 1597(h) states that, "The employer shall require the use of seat belts." Based on the plain wording of the regulation, the Division has the burden to prove that Employer failed to satisfactorily *require* the use of seat belts by policy and/or practice. The Division's burden is not met by merely demonstrating that an employee failed to wear his seat belt on a single occasion.

Here, the weight of credible evidence preponderates to a finding that Employer did satisfactorily require the use of seat belts. Employer's Code of Safe Practices specifically requires that "Seat belts must be worn at all times." Maietto signed multiple documents acknowledging that he read and understood the Code of Safe Practices. (Exhibits C and D.) Maietto admitted he was aware of Employer's safety rules.

Further, Employer provided ongoing training to its employees, including in the form of Safety Meeting Documentation, reminding employees to wear their seat belts at all times. Maietto signed copies of this documentation, thereby acknowledging receipt. (Exhibit E.)

² This section states, in pertinent part:

"Jobsite vehicles as defined in Section 1504 of these Orders, which are utilized on jobsites exclusively and are, therefore, excluded from the provisions of applicable traffic and vehicular codes shall be equipped and operated in the following manner:...

(h) The employer shall require the use of seat belts."

Employer also enforced its Code of Safe Practices with spot checks, verbal warnings, and other discipline, including suspension. Again, Employer introduced documentation showing that employees had been formally disciplined, and suspended, for failing to wear their seat belt. (Exhibit J.)

Thus, the record adequately demonstrates that Employer required the use of seat belts. The Division failed to meet its burden of proof with regard to this citation. While Maietto's failure to use his seat belt on the instant occasion constitutes some evidence that employer failed to *require* the use of seat belts, it is insufficient to establish a violation of section 1597(h) when due consideration is given to the weight of contradictory evidence in the record. The failure of the ALJ to explain why this contradictory evidence was not persuasive demonstrates that the ALJ either ignored evidence in her analysis and/or failed to properly apply the rule.

Based on this holding, it is unnecessary to determine whether Employer established any affirmative defenses to the section 1597(h) citation.

Additionally, we note that section 1597 solely applies to vehicles "utilized on jobsites exclusively." The issue of whether the water truck was "utilized on jobsites exclusively" was not briefed by the parties. Although the evidence suggests that the water truck might not be covered by this section, the issue is ultimately unclear given the state of the record and the lack of briefing on the issue.

DECISION

For the reasons stated above, we reverse the Decision of the ALJ affirming the section 1597(h) citation.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: NOVEMBER 20, 2014