

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

In the Matter of the Appeal of:

**MURRAY PLUMBING AND HEATING
CORPORATION
dba MURRAY COMPANY
18414 SOUTH SANTA FE AVENUE
COMPTON, CA 90221**

Employer

Inspection No.
1229599

DECISION

Statement of the Case

Murray Plumbing and Heating Corporation (Employer) is a company that provides plumbing services. Beginning May 1, 2017, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Robert Salgado (Salgado), conducted an inspection arising from an injury at a hospital construction site at 4000 Fourteenth Street, in Riverside, California (the site).

On September 25, 2017, the Division issued one citation to Employer alleging a violation of California Code of Regulations, title 8.¹ Citation 1, Item 1, alleges that Employer failed to control earth-moving operations in such a manner as to ensure an excavator operator knew of the presence of workers on foot in the area of operation.

Employer filed timely appeals of the citation, contesting the existence of the violation, its classification, and the reasonableness of the proposed penalty. Additionally, Employer asserted various affirmative defenses.²

This matter came regularly before Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on January 27, 2021 and April 9, 2021. ALJ Avelar conducted the hearing with the parties and witnesses appearing remotely via the Zoom video platform. Kevin Bland, Attorney at Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Clara Hill-Williams, Staff Counsel,

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

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

represented the Division. At the commencement of the hearing, the Parties stipulated that the injury sustained by the injured worker was a serious injury.

The matter was submitted on June 28, 2021.

Issue

1. Did Employer fail to control earth-moving operations in such a manner as to ensure that the excavator operator knew of the presence of workers on foot in the area of operation?

Findings of Fact

1. Michael A. Torres (Torres) was Employer's excavator operator at the site. Torres was assigned to remove the dirt over a decommissioned sewer line in an alley.
2. Juan Vega (Vega) worked with Torres as his spotter. Vega was also responsible for dismantling the old pipe as it was exposed.
3. Excavation halted when Vega stopped spotting to cut and remove the exposed segments of pipe, and excavation only resumed when Vega stopped cutting to continue spotter duties.
4. On the day of the injury, Employer conducted a pre-task meeting with Torres and Vega regarding the excavation area.
5. After the meeting, Vega left the site to retrieve gas for his saw. No excavation had taken place yet on the day. No excavation was going to take place for at least 20 minutes after Vega's return, when Vega would then cut the exposed pipe.
6. While Vega was away, and Torres was seated in the Bobcat which was not in operation, employees Tyler Thomas (Thomas), Andrew Sampson (Sampson), and Malaquias Mojarro (Mojarro), arrived at the alley.
7. Employer trained employees to not approach heavy equipment until they make eye contact with the operator and receive assurance that the operator sees them.
8. Thomas and Sampson hailed Torres, requesting to travel on foot through the alley. Torres acknowledged their requests. Mojarro did not hail Torres but Torres acknowledged Mojarro.

9. Torres was aware of the locations of each of the three workers on foot while they were in the excavation area.
10. The Bobcat was positioned safely and not in operation when Thomas, then Sampson, and finally Mojarro, walked through the alley.
11. Mojarro headed through the alley towards his lunch pail to the left. While walking by the Bobcat, he turned around to look behind for his foreman. When Mojarro spun back around, he struck a rock tooth on the bucket of the Bobcat, seriously injuring his eye.
12. The Bobcat was not in operation when Mojarro became injured.

Analysis

1. **Did Employer fail to control operations in such a manner as to ensure the excavator operator knew of the presence of workers on foot in the area of operation?**

The Division cited Employer for a violation of section 1592, subdivision (e), which provides:

Hauling or earth moving operations shall be controlled in such a manner as to ensure that equipment or vehicle operators know of the presence of rootpickers, spotters, lab technicians, surveyors, or other workers on foot in the areas of their operations.

In citing Employer, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, on April 17, 2017, the employer failed to control earth-moving operations in such a manner as to ensure that the excavator operator knew of the presence of workers on foot in the area where he was conducting earth-moving operations. As a result, on April 17, 2017, an employee sustained a serious injury when he entered the area where earth-moving operations were taking place and made contact with a suspended excavator bucket.

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct 11, 2019).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more

convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

Does the Safety Order Apply?

To establish a violation of the safety order, the Division must demonstrate the applicability of the safety order to the facts of the case. (*Dish Network California Service Corporation*, Cal/OSHA App. 12-0455 (Aug. 28, 2014).) In determining applicability of a safety order, the Appeals Board applies the principles of statutory construction to determine intent of the regulation’s drafters. If the language of the regulation is unambiguous, the plain meaning of the language controls because it is presumed “the legislature meant what it said.” (*Michels Corp, dba Michels Pipeline Construction*, Cal/OSHA App. 07-4274, Denial of Petition for Reconsideration (Jul. 20, 2012).) In order to establish the applicability of section 1592, subdivision (e), the Division must show that a haulage vehicle was engaged in excavation or earth moving activities.

Torres confirmed that the Bobcat was equipped for the excavation of dirt at the site, having a bucket with rock teeth along the bottom. Justin Myburg (Myburg), Employer’s Safety Director, and Torres both testified that Employer’s task on the day of the injury was to use the Bobcat to excavate the dirt above a disused sewer pipe to then remove the old pipe. The safety standard thus applies because the vehicle was involved in earth moving operations.

Did Employer violate section 1592, subdivision (e)?

Section 1592, subdivision (e), imposes an affirmative obligation upon employers to control such operations so that heavy machine operators are aware of workers on foot in the area of operations. To establish a violation of the safety order, the Division must show that Employer did not implement adequate control measures during earthmoving operations to ensure operators are aware of workers on foot in the excavation area. (*JAFEC USA, Inc*, Cal/OSHA App. 1290383, Decision After Reconsideration (Jun. 2, 2021).)

In *Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal. App.4th 883, the employer did not provide a safety briefing to the operator and had no methods in place to control earthmoving operations other than for the operator to rely on herself to make sure a path was clear. The Court of Appeal determined that simply informing operators that workers will be on foot in the general area of operations does not satisfy the safety order, explaining:

The hazard contemplated under the regulation is the exposure of workers on foot to dangers of hauling or earth moving equipment. [...] Hauling and earth moving operations inherently involve movement of equipment and vehicles in the defined area and the location of such vehicles changes within the area of operation. Only where control measures are used by the employer to ensure that operators know of workers on foot in their immediate vicinity will the safety order have the intended effect of protecting workers on foot from the hazards of hauling and earth moving equipment.

The Appeals Board has found that employers that primarily rely on a plan in which workers on foot are responsible for avoiding the shifting danger zones around moving heavy machinery do not satisfy the requirements of section 1592, subdivision (e). (*JAFEC USA, Inc., supra*, Cal/OSHA App. 1290383), citing *R & L Brosamer, Inc.*, Cal/OSHA App. 03-4832, Decision After Reconsideration (Oct. 5, 2011), and *HB Parkco Construction, Inc.*, Cal/OSHA App. 07-1731, Decision After Reconsideration (Mar. 26, 2012).)

In *R & L Brosamer, Inc., supra*, Cal/OSHA App. 03-4832, the Appeals Board rejected a plan requiring on-foot employees to inform the operators of their presence, finding that such a policy was even less effective than the general warning of people possibly on foot because the plan absolved the operator of any obligation to watch for ground personnel.

In *HB Parkco Construction, Inc., supra*, Cal/OSHA App. 07-1731, an employer required workers on foot to stay out of the operator's path of travel or to make eye contact with the operator prior to entering the path of travel. The Appeals Board explicitly noted that the method relied upon by the employer was the “same ineffective system [...] which did not ensure the operators were actually aware of on-foot workers in their immediate vicinity” that was in place in *R & L Brosamer, Inc., supra*, Cal/OSHA App. 03-4832.

Whether an operator is actually aware of the specific location of employees on foot does not resolve the question of whether an employer controlled earthmoving procedures in such a manner as to ensure equipment operators knew of their presence. However, circumstantial evidence of an operator’s lack of knowledge tends to affirm that an employer’s procedures actually failed to inform the operator of employees on foot. (*R & L Brosamer, Inc., supra*, Cal/OSHA App. 03-4832.)

Here, the excavation area was located in a narrow alley between a hospital and a parking structure. The west end of the alley led out to the street. The east end of the alley was bounded by a cul-de-sac where the parking structure connected to the hospital. A hospital door providing access to the alley was located in the cul-de-sac. The Bobcat was parked in the alley, leaving about three feet of clearance between it and the hospital structure. Torres testified that caution tape was affixed across the outside of a hospital door opening to the pathway as well as across the pathway at the street to the west.

Employer held a pre-task meeting with Torres and Vega on the morning of the injury, informing them that no one was allowed to enter the excavation area. Employer identified two other methods of ensuring Torres was informed of any workers on foot in the excavation area. Myburg testified that Employer provided a spotter at the site and training for employees. Myburg further testified that, as a part of the overall control process, employer trains employees not to approach vehicles until they make eye contact with the operator and receive acknowledgement.

Torres testified that Vega alternated between spotting during excavation, and cutting the newly exposed pipe when excavation paused. When Vega finished cutting, he resumed spotting while Torres exposed the next length of pipe. Torres testified that Vega left the site to retrieve fuel for his saw. Torres testified that no digging had yet occurred that day and that no digging would take place for at least another 20 minutes after Vega's return, during which time Vega would cut the exposed pipe. Torres testified that he remained in the Bobcat with the motor turned off, facing west, watching for Vega's return. Torres testified that no spotter is required when no excavation operations are taking place.

While Vega was away, three employees, Thomas, Sampson, and Mojarro, finished their overnight assignment and exited the hospital through the door to the alley. Thomas was the first to exit. He testified that he opened the door and passed through caution tape to reach the pathway. He testified that he noticed the Bobcat and he shouted to get Torres' attention before proceeding. Thomas testified that it is Employer's policy and a part of his training to make eye contact with operators and verbally communicate the plan to approach.

Torres testified that he turned around in his seat and acknowledged Thomas. Torres testified that he started the Bobcat engine, moved the boom and bucket to the ten o'clock position, and suspended the bucket approximately three feet above ground. He thus made space on the pathway between the Bobcat and the glass wall of the hospital for Thomas to walk. Torres and Thomas both testified that Torres raised his hands after turning off the engine to indicate it was safe for Thomas to pass through.

Torres and Myburg testified that a raised bucket was the standard position when an operator is seated and the engine is not running, to keep a line of sight. Torres testified that he determined that positioning the bucket at ten o'clock and suspending it above the ground was the safest placement at the time. He testified that lowering the bucket completely to the ground would then expose the claw of the bucket attached to the top of the bucket.

Torres testified that, approximately 20 seconds later, he heard Sampson call out to him to ask if he could proceed. Torres testified that he turned around to respond while keeping his hands free of the vehicle controls. Sampson testified he could hear Torres respond affirmatively. Torres

testified that he suspected that more people would be coming by and so he remained turned around in his seat with his hands still up in the air.

Torres testified that he was still watching behind him, when approximately 30 seconds later, Mojarro appeared. Torres testified that he saw Mojarro moving in a hurry and told him to slow down, and that it was okay to come by the machine. He testified that he observed Mojarro stumble towards the bucket before becoming injured.

Mojarro testified that he walked at a normal pace towards his lunch box located on the left side of the pathway. As he passed by the Bobcat, he turned around to speak with his foreman behind him. At that moment, the foreman reentered the hospital, so Mojarro turned around again. Mojarro testified that, when he spun back, his eye hit a tooth of the bucket. He testified that he did not observe the caution tape or the bucket, did not call out to Torres, or stumble. Mojarro, at a height of five feet, six inches tall, recalled that the teeth of the bucket were at eye level.

The Division stipulated that the Bobcat engine was off when Thomas, Sampson, and Mojarro walked by the vehicle. Salgado also testified that a spotter is not necessary when the motor is turned off and there is no movement. Thus, no spotter was required.

While other subdivisions of section 1592, entitled “Warning Methods,” require employers to adjust the worksite or adapt vehicles to avoid or alert unwitting or distracted individuals, the particular subdivision at issue charges employers to ensure operators know of the location of people in the vicinity of the vehicle. (*JAFEC USA, Inc, supra*, Cal/OSHA App. 1290383.) Incidentally, Employer did adjust the worksite, having affixed caution tape to the entrances to the alley, which Myburg testified served as a means of boundary control.

Further, section 1592, subdivision (e), contemplates the hazards associated with the movement of equipment and associated shifting danger zones. (*Teichert Const. v. California Occupational Safety and Health Appeals Bd., supra*, 140 Cal.App.4th 883, and *JAFEC USA, Inc., supra*, Cal/OSHA App. 1290383.) In the instant case, the Bobcat was not in operation. Although the three workers on foot and the operator were left to communicate among themselves regarding their own locations, unlike any of the precedential cases, no excavation was taking place.

Also unlike any of the precedential cases, Employer did not primarily rely only on operators to spot for themselves, or workers on foot to alone notify operators of their location. In addition to training employees to hail the operator and wait for the operator to confirm it is safe to approach, Employer provided a spotter, and conducted a pre-task briefing for the operator and spotter.

Finally, it is undisputed that Torres was aware of all three employees that walked by the machine. The circumstantial evidence that Torres had knowledge of the exact locations of Thomas, Sampson, and Mojarro, tends to support a finding that Employer adequately controlled operations to ensure the operator knew of the presence of workers on foot in the area.

Conclusion

The Division failed to show that Employer did not control excavation operations to ensure the operator knew of the presence of workers on foot in the area of excavation. Employer controlled operations by conducting a pre-task meeting, assigning a spotter, and training employees to communicate and ensure safe movement. Further, the excavator motor was off when the workers on foot were present, and the operator was actually aware of the presence of all three workers on foot in the area of excavation. Thus, the Division did not show by a preponderance of the evidence that Employer failed to control the excavation operation in such a manner as to ensure the excavator operator knows of the presence of workers in the area.

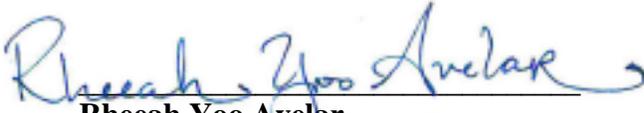
Accordingly, Employer's appeal of Citation 1, Item 1, is granted.

Order

It is hereby ordered that Citation 1 is vacated as indicated above and set forth in the attached Summary Table.

It is further ordered that the \$18,000 proposed penalty is set aside as indicated above and set forth in the attached Summary Table.

Dated: 07/20/2021


Rheeah Yoo Avelar
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.**