

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

In the Matter of the Appeal
of:

J. PEREZ MATA TRUCKING, INC.
13216 Foothill Blvd.
Sylmar, CA 91342

Employer

DOCKET 13-R3D7-0862

DECISION

Statement of the Case

J. Perez Mata Trucking, Inc. (Employer) is a trucking contractor. Beginning January 14, 2013, 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 cited Employer for failure to control a hauling operation in a manner to ensure that a truck operator knew of the presence of a worker on foot in the area of the truck's operation¹.

Employer filed a timely appeal contesting the existence of the alleged violation. Employer asserted the affirmative defense of lack of employer knowledge and alleged that it was not a controlling, creating, or exposing employer.

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. Mark G. Cunningham, 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

¹ The Division issued Citation 2 for a serious accident-related violation of § 1592(e) with a proposed penalty of \$10,800. Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

evidence. Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ. Leave was granted to file briefs. The matter was submitted on August 11, 2014. The ALJ extended the submission date to September 8, 2014.

This matter was consolidated for hearing with Security Paving, Inc. (Security Paving), Dockets 13-R3D7-0771 and 0772. Eugene F. McMenamain represented Security Paving.

Issues

1. Was the hauling operation controlled in such a manner as to ensure that the truck operator knew of the presence of a worker on foot in the area of the truck's operation?
2. Do the multi-employer regulations apply to the employer of the vehicle operators?
3. Did Employer carry its burden of proof to show that it did not know of the violative condition or that it could not have known with the exercise of reasonable diligence?

Findings of Fact

1. On August 28, 2012, Employer employed dump truck drivers to haul concrete at the site.
2. Truck drivers lined up their dump trucks with the hopper of a paving machine and backed up to the hopper with the assistance of a spotter or dump man if available. If none, Employer allowed the drivers to back up and stop in front of the hopper using their best judgment.
3. On August 28, 2012, Justin Todahl (Todahl) was working on foot in the area where the trucks dumped cement. He signaled dump trucks and cleaned cement out from the hopper.
4. On August 28, 2012, Flavio E. Orantes (Orantes) lined up his truck in front of the hopper, started backing up, then came to a complete stop in response to Todahl's hand signals. Using hand signals, Orantes acknowledged Todahl's signal to stop. Todahl did not tell Orantes how long to stay stopped.
5. After fully stopping, Orantes backed up his truck without receiving any signal to proceed or exiting the truck to look for workers behind his truck. Employer did not allow its drivers to exit their trucks.
6. Orantes hit Todahl. Todahl was in one of the truck's blind spots, cleaning out the hopper.
7. Employer and Security Paving both worked at the site. Security Paving planned the paving operation and contracted with Employer. Orantes was Employer's employee. Todahl was an employee of Security Paving.
8. There were no meetings or other communications between Employer and Security Paving regarding control of truck movements, hand signals, how

long a driver must stay stopped, what a driver should do when no spotter was visible, cleaning of hoppers by spotters, other persons who may be on foot in the area of a truck's operation or any other matter.

9. Employer did not observe its employees or exercise any form of supervision at the job site.
10. None of Employer's employees were exposed to the hazards created by the cement hauling operation.

Analysis

1. Was a hauling operation controlled in such a manner as to ensure that a truck operator knew of the presence of a worker on foot in the area of the truck's operation?

Section 1592(e) states:

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.

Citation 2, 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).

J. Perez Mata Trucking did not ensure that their employee maintain control of the dump truck in such a manner to know the presence of a dumpman that was on foot in close proximity to where the dump truck(s) were unloading into a Gomaco paving machine trough.

In order to establish a violation, the Division needs to show that an employer failed to implement control procedures to ensure a truck driver knew of the location of employees on foot in the vicinity of the equipment. (*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.4th 883, 891-892.)

The regulation requires that operations be controlled. The Appellate Court has held that control means "to exercise a directing, restraining, or

governing influence over; to direct, to counteract, to regulate. (citations omitted)” (*HB Parkco Construction, Inc.*, Cal/OSHA App. 07-1731, Decision After Reconsideration (Mar. 26, 2012) citing *Teichert Const. v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App.4th 883, 891). Control is more than general notice that workers are on foot at the job site. (*Id.*) A system of making eye contact between on-foot workers and vehicle operators is, without more, insufficient to establish control and does not ensure that operators know the exact location of workers on foot. (*HB Parkco Construction, Inc.*, Cal/OSHA App. 07-1731, Decision After Reconsideration (Mar. 26, 2012).)

Employer’s methods here were also eye contact and hand signals only when a spotter was visible. When a spotter was not visible, Employer allowed its drivers to back up on their own. Employer did not allow Orantes to exit the truck to assure himself that no workers were in a blind spot. Employer allowed its drivers to back up to the hopper when a spotter was not visible. There was no way for a truck driver to know if a worker was in a blind spot when a truck was lined up to dump its load. Todahl did not have any way to communicate to Orantes that he was going to be cleaning the hopper.

Eye contact and hand signals are insufficient to establish control within the meaning of the safety order. (See *HB Parkco Construction, Inc.*, *supra.*) This method did not tell the truck driver the exact location of the person on foot at all times. It did not tell the driver when the person would be out of the truck’s intended path. Similarly, allowing drivers to back up when no spotter was visible failed to ensure that drivers knew of persons who may be in a blind spot.

Accordingly, it is found that the methods used to control the concrete hauling operations did not ensure that truck drivers knew of the presence of workers on foot in their immediate vicinity. The Division established a violation of § 1592(e).

2. Do the multi-employer regulations apply to the employer of the vehicle operators?

A multi-employer worksite exists where more than one employer works at a site. (§ 336.10) An employer is subject to the citations issued under the multi-employer worksite regulation, regardless of whether its own employees were exposed to the hazards. (§ 336.10 Note; *Airco Mechanical, Inc.*, Cal/OSHA App. 99-3140, Decision After Reconsideration (Apr. 25, 2002).)

Section 336.10² provides:

On multi-employer worksites, both construction and non-construction, citations may be issued only to the following categories of employers when the Division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the Division:

(a) The employer whose employees were exposed to the hazard (the exposing employer);

(b) The employer who actually created the hazard (the creating employer):

(c) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer)³; or

(d) The employer who had the responsibility for actually correcting the hazard (the correcting employer).

Note: The employers listed in subsections (b) through (d) may be cited regardless of whether their own employees were exposed to the hazard.

An employer's statutory duty to furnish a safe and healthful place of employment is non-delegable. (*Labor Ready, Inc.*, Cal/OSHA App. 99-3350, Decision After Reconsideration (May 11, 2001); *Southern California Gas Co.*, Cal/OSHA App. 81-0259, Decision After Reconsideration (Sep. 28, 1984).) Employers may not shift responsibility for safety at a multi-employer worksite to another employer. (See *DeSilva Gates Construction*, Cal/OSHA App. 01-2742, Decision After Reconsideration (Dec. 10, 2004).)

Here, a multi-employer worksite exists because Employer and Security Paving were working at the same site. The hazard addressed by § 1592(e) is that of a vehicle operator hitting a worker on foot. (*R & L Brosamer, Inc.*,

² Effective January 1, 2000, the Legislature passed AB 1127, which enacted into law the provisions found in Labor Code § 6400 (b), as adopted in § 336.10.

³ See *United Association Local Union 246, AFL-CIO v. Occupational Safety and Health Appeals Board* (2011) 199 Cal. App. 4th 273 at 281 ("Local 246"); *DeSilva Gates Construction*, Cal/OSHA App. 01-2742, Decision After Reconsideration (Dec. 10, 2004).

Cal/OSHA App. 03-4832, Decision After Reconsideration (Oct. 5, 2011) p. 4, citing *Teichert Construction v. California Occupational Safety and Health Appeals Board* (2006) 140 Cal.App.4th 883.)

Section 1592(e) does not identify who must exercise control, nor does it limit the number of employers who may exercise control. Employer is subject to § 1592(e) if it is an exposing, creating, controlling, or correcting employer.

An exposing employer is the employer whose employees are exposed to the hazard. None of Employer's employees were exposed to the hazard of a vehicle operator hitting a worker on foot. Therefore, Employer is not an exposing employer.

A creating employer is the employer who created the hazard. Here, the hazard was created when Orantes did not know Todahl's location. Employer did not have a system that informed its drivers of the presence of persons on foot. Employer allowed its drivers to back up when no spotter was visible and did not allow them to exit the truck to check for people. The system Employer used, eye contact and hand signals, did not inform drivers of the location of persons on foot. Therefore, Employer is a creating employer.

A controlling employer is the employer responsible, by contract or through actual practice, for safety and health conditions on the worksite, and has the authority to correct the violative condition⁴. Employer exclusively controlled the dump trucks at the job site. Employer is responsible for addressing hazards created by operation of its dump trucks, and it is well established that this duty cannot be delegated. Orantes was Employer's employee as were the other truck drivers. Employer is responsible for the safe operation of the trucks that its drivers operate. Employer's responsibility to safely operate its trucks included ensuring that rules existed for its drivers to ensure that persons on foot would not be injured. Employer was responsible to ensure that its own drivers knew these rules. These rules included, but were not limited to, instructions on how to ensure a worker was not in a blind spot, what to do if no spotter was available or what to do if a spotter disappeared from sight for a long time. Employer was responsible to ensure Security Paving personnel knew and agreed on the relevant rules.

Employer had authority to correct the violative condition. For example, it could implement a rule that a driver may not back up unless someone gives a signal to back up. Therefore, Employer is a controlling employer.

⁴ See *United Association Local Union 246, AFL-CIO v. Occupational Safety and Health Appeals Board* (2011) 199 Cal. App. 4th 273 at 281 ("Local 246"); *DeSilva Gates Construction*, Cal/OSHA App. 01-2742, Decision After Reconsideration (Dec. 10, 2004).

A correcting employer is the employer who has the responsibility for actually correcting the hazard. As discussed, Employer had the authority to correct the violative condition because it controlled the truck drivers. Employer had the responsibility to actually correct the hazard because it operated the trucks. Employer is not absolved of responsibility just because Security Paving controlled the paving machine and determined the route for the trucks to take. Employer was responsible to bring the hazard Security Paving's attention and to take measures to abate the hazard such as coordination with Security Paving and implementation of rules. Therefore, Employer is a correcting employer.

Accordingly, it is found that the site was a multi-employer work site and the multi-employer regulations apply to Employer with respect to the violation of § 1592(e).

3. Did Employer carry its burden of proof to show that it did not know of the violative condition, or that it could not have known with the exercise of reasonable diligence?

Employer asserted lack of employer knowledge.

Under Labor Code § 6432(c), a serious violation is not found where employer demonstrates that "it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation". To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, DAR (Apr. 1, 2003).) An employer may not ignore the activities of its employees and claim lack of knowledge of the violative condition. Reasonable diligence requires adequate supervision of employees. (*Id.*) Failure to inspect an employee's work demonstrates a lack of adequate supervision. (*Sunrise Windows*, Cal/OSHA App. 00-3220, Decision After Reconsideration (Jan. 23, 2003).)

Lack of employer knowledge is an affirmative defense which Employer has the burden to establish. (*Home Depot USA, Inc. # 6617*, Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec, 24, 2012), citing Labor Code § 6432; *Kirkland Enterprises Inc.*, Cal/OSHA App. 08-2803, Denial of Petition for Reconsideration (Mar. 30, 2011); *WF Hayward Co.*, Cal/OSHA App. 10-2021, Denial of Petition for Reconsideration (Feb. 15, 2012).)

Here, the violation consisted of a failure to control the hauling operations. It is irrelevant that Orantes backed up without receiving a signal to back up because the substance of the violation is a failure to control the

hauling operations. Employer failed to exercise adequate control by its failure to observe its drivers at the job site and by its failure to conduct safety meetings to ensure that truck drivers knew and understood the hand signals, what to do when a spotter was not visible, when drivers could exit a truck, and other safety issues. Employer failed to meet with Security Paving to discuss and agree upon safety issues. Employer should have been aware of the methods used, e.g., eye contact and hand signals. Employer was aware that its drivers backed up when no spotter was visible as Jaime Perez Mata, Employer's Owner and manager, testified at hearing. Thus, Employer knew, or reasonably should have known, of the violative conditions.

Therefore, Employer's defense of lack of knowledge fails.

Conclusion

Employer's appeal is denied. The Division established a serious accident-related violation of § 1592(e) and its applicability to Employer through operation of the multi-employer regulations. Citation 2 and the proposed penalty of \$10,800 are affirmed.

Order

It is hereby ordered that Citation 2 be established as indicated above and as set forth in the attached Summary Table.

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

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

Number	Description
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

Letter	Description
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 Mata

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