

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

In the Matter of the Appeal of:

**CITY OF LONG BEACH, DEPARTMENT OF
PUBLIC WORKS**

2929 E. Willow Street
Long Beach, CA 90806

Employer

DOCKETS 14-R3D5-0970

DECISION

STATEMENT OF THE CASE

The City of Long Beach, Department of Public Works (Employer) operates the city's physical infrastructure and transportation systems. Employer provides a variety of community services including the repair, rehabilitation and general upkeep of city streets, trees, sidewalks, and city structures and emergency support services for the city of Long Beach.

On October 23, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer, Onkar Bhaskar conducted an accident inspection at a place of employment maintained by Employer at 1651 San Francisco Avenue, Long Beach, California. On February 26, 2014, the Division cited Employer for failing to make toilet facilities accessible to employees at all times.¹

The Employer filed an appeal contesting the existence of the violation of the safety order, and the reasonableness of the proposed penalty. Employer pleaded affirmative defenses as indicated in Employer's Appeal filed with the Occupational Safety and Health Appeals Board (Exhibit 1).

The matter came on regularly for hearing before Clara Hill-Williams, administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on January 15, 2015. Employer was represented by Attorney Gary Anderson and the City of Long

¹ The following alleged violation of the occupational safety and health standards and orders found in California Code of Regulations, title 8: Citation 1, Item 1

Beach Safety Officer Emilyn Zuniga. The Division was represented by Senior Safety Engineer Joel Foss. The ALJ extended the submission date to August 18, 2015.

ISSUES

1. Were the toilet facilities kept clean, maintained in good working order and accessible to the employees at all times pursuant to safety order section 3364, subdivision (b)?
2. Did Employer meet the exception to the safety order as a mobile crew by providing readily available transportation or other effective arrangements to nearby toilet and washing facilities pursuant to section 3360?
3. Did the Division propose a reasonable penalty for Employer's alleged violation of section 3364?

FINDINGS OF FACT

1. On and before October 22, 2013, mobile crews² were transported in city trucks to toilet facilities³ at fast food locations and to city parks for restroom breaks.
2. On and before October 22, 2013, Employer's trucks were sometimes unavailable to transport workers to toilet facilities for restroom breaks.
3. On and before October 22, 2013, some of the crew members did not have commercial drivers' licenses, which were required to drive certain trucks used to transport crew members for restroom breaks.
4. At times before October 22, 2013, crew members used Employer's trucks as a substitute for a toilet facility when transportation was not readily available.
5. At times on and before October 22, 2013, Employer's trucks were not readily available continuously as required by the exception to section 3364.

ANALYSIS

- 1. Were the toilet facilities kept clean, maintained in good working order and accessible to the employees at all times pursuant to safety order section 3364, subdivision (b)?**

² The parties stipulated that the large tree trimming crew, which operated on October 22, 2013 is a mobile crew.

³ The parties stipulated that toilet facilities are not always available within 200 feet.

Section 3364, subdivision (b) provides:

Toilet facilities shall be kept clean, maintained in good working order and be accessible to the employees at all times. Where practicable, toilet facilities should be within 200 feet of locations at which workers are regularly employed and should not be more than one floor-to-floor flight of stairs from working areas. (Title 24, part 5, section 5-910(a)(1))

Section 3360 provides the following exception:

Mobile crews or normally unattended work locations provided employees have readily available potable water for drinking, and readily available transportation or other effective arrangements to nearby toilet and washing facilities.

Section 1504 defines “readily available” as “in a location with no obstacles to prevent immediate acquisition for use.” In *Davey Tree Surgery Company*, Cal/OHSA App. 00-032, Decision After Reconsideration (June 14, 2002), the Appeals Board (Board) held that basic personal hygiene standards require that hand-washing facilities be used in conjunction with toilet facilities, thus requiring the hand-washing facility to be close enough to the toilet for an employee to wash their hands before returning to work to minimize transmission of disease to other employees.

The Division alleged:

Following an inspection on October 22, 2013, it was determined that the Loader crew, tree trimming crew, were not supplied a portable restroom. The crew did not meet the exception to restroom requirements in section 3360 because they do not continually have readily available transportation.

The Division has the burden of proving every element of its case, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Cambrio Manufacturing Co.*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) To establish a violation on October 22, 2013, the Division must prove that 1) Employer did not maintain toilet facilities in good working order and accessible to the employees at all times; and 2) Employer failed to meet the conditions for the exception by not continually having readily available transportation or other effective arrangements to nearby toilet and washing facilities.

In determining whether Employer maintained toilet facilities in good working order and accessible to the employees at all times, at the hearing the Division called Lance Whitacre (Whitacre) as a witness. Whitacre is an employee for 29 years with the Employer, and one of Employer's tree-trimming crew members. Whitacre testified that the crew was transported to the various work assignments by trucks as a mobile crew. The mobile crew was also transported to fast food restaurants and city park restrooms for restroom breaks. Whitacre described four types of trucks available for restroom transport, which included: (1) the "utility" truck, also known as the "run around" truck (Exhibit A-2); (2) the "tower" truck (Exhibit A-1); (3) a "front loader" truck (Exhibit A-3 and A-4); and (4) the "roll-off" or "container" truck (Exhibit A-5)⁴.

Whitacre described Employer's practice and procedures in providing transportation for restroom breaks and explained that the trucks were not always readily available. The "utility" truck also known as the "run around truck" is used to clean up equipment and cones. The utility truck is the most convenient for making restroom and lunch break runs. However, the utility truck does not operate on Mondays and Fridays. The "tower truck" has a boom that fold out 55 feet, with outriggers. It generally takes approximately five minutes to pull in the outriggers and bring the person in the bucket down before it can be driven. The "front loader" truck is designed to pick up dirt and can pick up tree pieces. Because the front loader is nine feet wide, the front loader is difficult to drive on some residential streets and requires the driver to have a commercial driver's license. The "roll-off container" truck also requires a commercial driver's license. While most of the crew members have commercial licenses, there are some crew members that do not have commercial driver's licenses to drive toe container truck.

Whitacre further testified that if a crew has seven people, two trucks will be provided; however, if it is a light crew, taking a restroom break is an interruption because work is stopped to drive to restroom facilities. Whitacre stated that while transportation is provided, taking a restroom break is a big interruption in the crew's work flow. He preferred taking a natural break, which was during the crew's lunch break. Whitacre testified that he has observed evidence of crew members using the roll off containers as a toilet. Some crew members even carry toilet paper with them. He has also observed crew members urinate into a paper cup or a box on the trucks. Whitacre acknowledged that he was "written-up" for urinating in a truck on June 10, 2013. According to Whitacre, crew leaders are on the truck with the crew members and are aware of the crew members urinating and defecating in the trucks but have never told them not to void in the trucks. Supervisors do not

⁴ The parties stipulated that the photos of the trucks, A1 through A5 are vehicles used by the Employer's tree trimming mobile unit on October 22, 2013.

usually come out to the field where the crews are assigned and restroom breaks have not been a topic of tailgate safety meetings he has attended.

At the hearing, Senior Safety Engineer, Joel Foss (Foss) testified that portable toilets as depicted in a photo brochure (Exhibit 4)⁵, towed by Employer's trucks would be a more efficient means to provide accessibility to the employees at all times. Employer did not offer any evidence to rebut the toilet practices described by Whitacre at the hearing to establish that it maintained toilet facilities in good working order and accessible to the employees at all times. Therefore the Division established that Employer violated the safety order.

2. Did Employer meet the exception to the safety order as a mobile crew by providing readily available transportation or other effective arrangements to nearby toilet and washing facilities pursuant to section 3360?

The Division has met its burden of proving a violation; however, Employer may avoid liability by showing that it was entitled to an application of one or more exceptions to the cited safety order. An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden of raising and proving at the hearing. (See *Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (June 21, 1982); *Roof Structures, Inc.*, Cal/OSHA App. 81-357, Decision After Reconsideration (Feb. 24, 1983); and *The Koll Company*, Cal/OSHA App. 79-1147, Decision After Reconsideration (May 27, 1983).) An exception, however, must be read narrowly; a reading of an exception that "consumes the rule" is disfavored under rules of statutory construction. (See *Thyssenkrupp Elevator Corp.*, Cal/OSHA App. 11-2217, Denial of Petition of Reconsideration (Mar. 11, 2013).) The exception to section 3364 must be proven by a preponderance of the evidence that mobile crews have readily available transportation or other effective arrangements to nearby toilet and washing facilities.

In determining whether Employer met the conditions for the exception by having readily available transportation or other effective arrangements to nearby toilet and washing facilities, *City of Los Angeles, Department of Water and Power*, Cal/OSHA App. 86-405, Decision After Reconsideration (Sept. 11, 1987) is applicable. The Board found the evidence in *City of Los Angeles, supra*, where vans used to transport groups of three to six employees who read meters with routes in the same general area were driven to their routes by a team leader. The team leader then circulated among the routes in the van to check on progress and assist where needed, including providing periodic transportation to and from toilet facilities in the field. The team leader contacted each employee every two to two and one-half hours during the workday. The employer was in

⁵ *Single & Dual Restroom Trailer Restroom Rentals* brochure.

radio communication with all team leaders. Employees who needed to make an emergency visit to a toilet facility could call the employer by telephone and ask for restroom transportation. Team leaders attempted to accommodate employees with such needs, responding generally in five to ten minutes. In *City of Los Angeles, supra*, the Board held that section 3360 applies to mobile crews dispatched to work in commercial and residential areas of Los Angeles that were not permanent places of employment maintained by Employer, no violation was established because transportation was readily available to nearby toilet and washing facilities.

In applying the Board's holding in *City of Los Angeles, supra*, here, Employer asserted that its mobile crews were provided transportation for restroom break, as provided in Employer's document titled "Public Works Department Service Bureau/Street Maintenance Division- Tree Maintenance Group (Exhibit 3), which satisfied the exception under section 3360 to section 3364 safety order requirements. Employer's written policies indicated "Restroom use is permitted at any time during the work shift. Employees may use any available work vehicles to travel to a public restroom if there are none within walking distance." Employer's trucks were provided to accommodate the restroom needs, however, according to Whitacre's testimony, Employer's policies and procedures were not consistently implemented and did not meet the conditions of the exception.

Employer's transportation program did not meet the standards set forth in *City of Los Angeles, supra*: crew members were allowed to void in trucks, with the crew leaders knowledge; some of the trucks were difficult to drive requiring time consuming dismantling before driving or required crew members to have commercial licenses; and using the trucks to transport crew members for a restroom interrupted the work flow. Thus, Employer does not meet the exception to section 3364, subdivision (b) because transportation was not readily available to nearby toilet and washing facilities.

3. Did the Division propose a reasonable penalty for Employer's alleged violation of section 3364?

The Division must calculate proposed penalties in accordance with its regulations and present proof sufficient to support its calculations on likelihood, etc. (*Gal Concrete Construction Co.*, Cal/OSHA App. 89-317/318, DAR (Sept. 27, 1990).) The Division must properly rate the employer's safety program and its experience to justify a penalty. (*Monterey Abalone*, Cal/OSHA App. 75-786, DAR (March 15, 1977).) The parties stipulated that penalty calculations (See C-10 Worksheet - Exhibit #4) were correctly determined in accordance with the Division's policies and the California Code of Regulations. Here, the proposed penalty for the violation was \$150, which is assessed.

Conclusion

The Division established a violation of section 3364, subdivision (b) because Employer failed to meet the conditions to the exception pursuant to section 3360 because Employer did not continually have readily available transportation for its employees' restroom needs.

Order

It is hereby ordered that Citation 1, Item 1 is affirmed, 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 assessed.

Dated: September 14, 2015

CLARA HILL-WILLIAMS
Administrative Law Judge

CHW: ao

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**CITY OF LONG BEACH, DEPARTMENT OF PUBLIC WORKS
Dockets 14-R3D5-0970**

Date of Hearing: January 15, 2015

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents	X
2	Document Request Form	X
3	Employer's response to Document Request Form	X
4	Single Dual Restroom trailer rental brochure	X

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A-1	Photo – Tower truck	X
A-2	Photo – Utility truck	X
A-3	Photo – Utility truck	X
A-4	Photo – Front Loader truck	X
A-5	Photo – Roll off Container truck	X
B	Response to Document Request Form p. 2	X

Witnesses Testifying at Hearing

1. Onkar Bhaskar
2. Lance Whitacre

CERTIFICATION OF RECORDING

I, Clara Hill-Williams, 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.

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**CITY OF LONG BEACH, DEPARTMENT OF PUBLIC WORKS
Docket 14-R3D5-0970**

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division
Ee=Employee	
A/R=Accident Related	

IMIS No. 313649030

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE-HEARING or STATUS CONF.	FINAL PENALTY ASSESSED BY BOARD
14-R3D5-0970	1	1	3364(b)	G	Affirmed	X		\$150	\$150	\$150
Sub-Total								\$150	\$150	\$150

Total Amount Due*

\$150

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board. **All penalty payments must 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: CHW/ao
POS: 09/14/2015