

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

In the Matter of the Appeal of:

TECHNO COATINGS, INC.  
1391 Allec Street  
Anaheim, CA 92805

Employer

Docket No. 01-R5D2-4607

**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 in the above-entitled matter by Techno Coatings, Inc. (Employer) under submission<sup>1</sup>, makes the following decision after reconsideration.

**JURISDICTION**

Commencing on June 7, 2001, the Division of Occupational Safety and Health (the Division), through Compliance Officer Dan Ford, conducted a planned, mandated inspection at a place of employment maintained by Employer at the Huasna River Bridge, on Highway 166, nine miles east of U. S. Highway 101, San Luis Obispo, California (the site).

On September 7, 2001, the Division issued a citation to Employer with a proposed civil penalty of \$4,500 for an alleged serious violation of section 1598(a) [traffic control] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations:<sup>2</sup>

Employer filed a timely appeal contesting the existence of the alleged violation.

On July 10, 2002, a hearing was held before a Board Administrative Law Judge (ALJ) in Ventura, California. Ben Remley, Director of Safety, represented Employer. Albert Cardenas, Staff Counsel, represented the Division.

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<sup>1</sup> The Board's order taking petition under submission inadvertently refers to Docket Nos. 01-R5D2-4607 and 4608. Only Docket No. 01-R5D2-4607 was referenced in Employer's petition and is the only one before the Board in this matter.

<sup>2</sup> Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

On August 30, 2002, the ALJ issued a written decision denying Employer's appeal and assessing a civil penalty of \$4,500.

On September 26, 2002, Employer filed a petition for reconsideration of the ALJ's decision to deny its appeal. The Division filed a response on October 18, 2002. On November 15, 2002, the Board took Employer's petition under submission and stayed the ALJ's decision.

### **EVIDENCE**

The site is a bridge in a rural area outside of San Luis Obispo. It consists of two lanes, one for eastbound traffic and one for westbound traffic. The outside edge of each lane is demarked by a continuous white line. Beyond the white line, the road surface continues for approximately 18 inches to the base of a concrete curb approximately 6 to 8 inches high. The top of the curb is a flat, surfaced concrete band, approximately 18 inches wide. A concrete barrier-type railing, approximately 30 inches high, runs along the outside edge of the curb on each side of the bridge.

Employer applies and removes coatings from structural steel. The bridge was being improved and retrofitted by a general contractor. Employer entered into a subcontract with the general contractor to sandblast or strip the existing lead-based paint coating from the piers that support the bridge.

On June 7, 2001, Foreman Richard Staker (Staker) and employee Gabriel Ochoa (Ochoa) walked westward on the curb along the south side of the bridge to a point above the nearest of several piers supporting the bridge [Pier 9]. Staker was pushing a wheeled compressor and Ochoa was carrying a container of paint stripper they intended to use that day to remove paint from Pier 9. They stopped above Pier 9, set-up the compressor and lowered the paint stripper to the work platform around Pier 9 from which they would be working. Then they walked back off the bridge in the direction they had come.

Compliance Officer Dan Ford, who was driving on Highway 166 toward the bridge to make a planned inspection of the work being performed there, observed and photographed Staker and Ochoa as they were walking westward on the curb out to Pier 9 with the compressor and paint stripper. He testified that the compressor slipped off the curb several times and Ochoa entered the eastbound traffic lane to lift it back onto the curb.

Ford drove across the bridge and turned around. He estimated that it took approximately 2 minutes for him to turn around and head back toward the bridge in the westbound lane. As he re-crossed the bridge he observed and photographed the men, who were still on the curb. He estimated that Staker and Ochoa were on the bridge for approximately 20 to 25 minutes.

The speed limit was 55 miles per hour. The only traffic control measures Ford observed in the vicinity of the bridge were signs approximately ½ mile from the bridge in either direction that read, "Road Construction Ahead."

There was no traffic on the bridge within Ford's "field of vision" while he photographed the two men on the curb. Trucks came by shortly before and after. He used Highway 166 often; it was a main route of travel between the Santa Maria area and the San Joaquin Valley. Mining operations he inspected were accessed from Highway 166, contributing to truck traffic.

In Ford's opinion, to protect Staker and Ochoa against the traffic hazard to which they were exposed while on the bridge, and comply with section 1598(a), the eastbound lane had to be closed. The citation was issued because that had not been done.

Foreman Staker testified that it took him and Ochoa no more than 5 minutes to walk out the curb to a point above Pier 9, get the compressor and paint stripper ready for use in their work below the surface of the bridge, and return. He denied that the compressor ever fell off the curb or that either he or Ochoa entered the traffic lane. Striker also testified that approximately two trucks crossed the bridge while he and Ochoa were on it, that he considered the flow of traffic to be "light", and that, from on the bridge, he was certain that he had a clear view of Highway 166 for 500 feet in one direction, and estimated that he also had a clear view of the highway for 500 feet in the other direction.

### **ISSUE**

Did the Division establish a violation of section 1598(a)?

### **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

Section 1598(a), under which Employer was cited, reads as follows:

Where a hazard exists to employees because of traffic or haulage conditions at work sites that encroach upon public streets or highways, a system of traffic controls in conformance with the "Manual of Traffic Controls for Construction and Maintenance Work Zones—1996" which is herein incorporated by reference and referred to as the "Manual", published by the State Department of Transportation (Caltrans), shall be required to abate the hazard.

NOTE: Additional means of traffic control, such as continuous patrol, detours, barricades, or other techniques for the safety of employees may be employed. Criteria for position, location and use of traffic control devices described in the "Manual" is (sic) not mandatory. It is furnished solely for the purpose of guidance and information.

The introduction to the Manual (Exhibit A, p. 6.) includes these provisions:

Before work begins, traffic control plans, when developed for handling traffic through a construction or maintenance project, shall be approved by the Engineer of the public agency or authority having jurisdiction over the highway.

Nothing contained in this Manual shall prevent Caltrans from modifying, changing, or adopting new specifications deemed necessary.

The text and figures shown in the Manual are not legal standards except as they describe a device. Criteria for position, location, and use of traffic control devices is furnished solely for the purpose of guidance and information, and is not a legal standard. Engineering judgment must be used to apply these guidelines and typical applications, or adjust them to fit individual field site conditions.<sup>3</sup>

Caltrans was the public agency having jurisdiction over the Highway 166 bridge at the site. The cover of the Code of Safe Practices for the “Huasna Retrofit” project, upon which Employer was working, is captioned in large letters, “State of California, Engineering Service Center, Division of Structure Construction, Code of Safe Practices.” The Division of Structure Construction is part of Caltrans. It is inferred from the fact that the Caltrans unit concerned with “structure construction” is the only entity named on the cover that the Caltrans project engineer did adopt the Code of Safe Practices, including the traffic control plans set forth on pages 7 and 8 of the Code.<sup>4</sup>

The Caltrans project engineer was authorized by the Introduction to the Manual and, through the California Occupational Safety and Health Standards Board’s incorporation of the Manual, section 1598(a), to exercise his or her engineering judgment in adopting a project traffic control plan. It is inferred from the fact that Caltrans is the only entity named on the cover of the project Code of Safe Practices and included traffic control plan, that the Caltrans engineer exercised that judgment when approving the traffic control plan and its exception from lane closure and signing requirements for “brief operations” that meet three specified conditions.

Section 5-06.3 of the Manual is captioned “Selecting the Typical [traffic control] Application.” It states that “selecting the most appropriate application and modifications for a temporary traffic control zone requires knowledge and understanding of that zone” and that three factors used to categorize traffic control zones are “work duration, work location and highway type.” Subsection A. is captioned “Duration of Work” and breaks that factor down into five

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<sup>3</sup> The underlining is included in the Manual.

<sup>4</sup> Exhibit A, p.9 is page “8 of 53” of the Code of Safe Practices, page 7 is not included in the exhibit, but the top of page 8 starts with a paragraph designated “B.”, so page 7, and possibly preceding pages, also addresses traffic control.

categories ranging from “1. Long-term stationary Work” to “5. Mobile-Work.” The fourth category, “4. Short-duration-work”, provides:

During short-duration work, there is exposure involved for the crew in setting up and taking down the traffic controls. Also, since the work time is short, the time during which motorists are affected is significantly increased as the traffic control is expanded. Considering these factors, it is generally held that simplified control procedures may be warranted for short-duration work. Such shortcomings may be offset by the use of other, more dominant devices such as special lighting units on work vehicles.

The site-specific temporary traffic control plan (TCP) developed and approved by a Caltrans project engineer, is set forth in the Code of Safe Practices and reads, in pertinent part, as follows:

Employees SHALL NOT work in the traveled way or within six feet of the edge of traveled way without signing and a lane closure.

Exception: Brief operations may be conducted without using a lane closure or signs if the following conditions are met:

1. Traffic volume is light. Employee must be able to walk from the shoulder to the site on the traveled way, do the job and walk back to the shoulder without interfering with traffic.
2. Sight distance is at least 500 feet in each direction. Where 500 ft. of sight distance is not available, one or more lookouts must be posted to extend visual coverage.
3. Parking or working within six feet of the traveled way is limited to no more than 20 minutes.<sup>5</sup>

Section 5-06.3A.4. of the Manual states that, “it is generally held that simplified control procedures may be warranted for short-duration work.” (Emphasis added.) Since the site traffic control plan approved by the Caltrans project engineer allows “brief operations” to be conducted “without using a lane closure or signs” and does not state that other “simplified control procedures” must be used, it may be argued that, by failing to do so, the engineer exceeded his authority under the Manual and section 1598(a).

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<sup>5</sup> The Division argues that the phrase “within six feet of the traveled way”, as used in the third condition, means that the “brief operation” exception applies only to operations performed in the six-foot “shoulder” area beyond the outside edge of the traveled way, and not to operations that require employees to step over that line and enter the traveled way itself. We disagree. The first condition clearly contemplates application of the exception to work performed on the traveled way by describing light traffic volume in terms of whether an employee can “walk from the shoulder to the site on the traveled way, do the job and walk back to the shoulder without interfering with traffic.”

However, the generality of section 5-06.3A.4., and the broad discretion granted in the Manual's introduction to those developing site or temporary traffic control plans in accordance with the direction provided by the Manual, suggest that, with the conditions imposed, and the "Road Construction Ahead" warning signs at either end of the project, the Caltrans engineer did not exceed his authority by approving the "brief operations" exception in the site traffic control plan. Moreover, even if the engineer exceeded his authority, we do not believe Employer should be held responsible for a violation of section 1598(a) if it acted in accordance with the site traffic control plan that he approved. Accordingly, we now review the evidence relevant to whether the operation performed by Staker and Ochoa met the three conditions determining applicability of the "brief operations" exception.

No quantitative standard is provided for measuring whether traffic volume is light and, thus, satisfies the first of the three conditions. The second sentence offers some guidance by suggesting that if an employee can "...walk from the shoulder to the site on the traveled way, do the job and walk back to the shoulder without interfering with traffic", traffic volume is light.

It is not clear that Staker or Ochoa ever "walked on the traveled way" of Highway 166 while they were on the bridge.<sup>6</sup> Presumably, the "traveled way" is the portion of the road upon which vehicular travel is generally permitted, and the solid white lines along the outside edges of the two traffic lanes were painted there for a reason. It is inferred that they are there to delimit the "traveled way" of Highway 166 as it crosses the bridge.

Staker testified that they remained on the curb at all times. Ford testified that he saw the compressor slip-off the curb several times and Ochoa step off the curb to lift it back up there.<sup>7</sup> Even if Ford's testimony is accurate, it does not prove Ochoa ever entered the traffic lane because, as Ford's photographs show, there is a paved "shoulder", approximately 18 inches wide, between the white "traveled way" demarcation line and the base of the curb. Moreover, Staker testified, without refutation, that traffic was light and they did not interfere in any way with traffic.

Neither Ford's testimony nor photographs tend to prove otherwise. He testified that he observed two trucks and a car cross the bridge during the ten minutes immediately before Staker and Ochoa went out on the bridge and that no traffic was in his "field of vision" when he photographed them there. Accordingly, it is found that the traffic volume was light.

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<sup>6</sup> "Traveled way" is not defined in the safety orders and no definition of that term in the Manual was identified by either party.

<sup>7</sup> Ford testified that the 19 photographs the Division introduced as Division Exhibits 2-1 through 2-19 were selected from a larger group of photographs he took during his inspection. None shows either employee off the curb. Ford testified that he did not photograph any of the instances in which Ochoa allegedly stepped off the curb because they happened too fast.

As to the second condition, Staker testified that, from the bridge, there definitely was more than 500 feet of sight distance along Highway 166 in one direction. He was less certain of the sight distance in the other direction, but estimated it to be at least 500 feet, and the Division did not question the accuracy of his estimates or offer conflicting evidence. Staker's testimony is accepted as proving, by a preponderance of the evidence presented, that there was 500 feet of sight distance in both directions from the bridge.

The third condition requires that "working within six feet of the traveled way... [be] limited to no more than 20 minutes." The Division introduced three photographs Ford took of Staker and Ochoa while he was driving his truck on the bridge. Those photographs were numbered Exhibits 2-2, 2-3 and 2-4.

Ford testified that he took Exhibit 2-4 last, but that appears to be inconsistent with other evidence indicating that Exhibit 2-4 was taken first. Exhibit 2-3 appears to show the men headed back to the east end of the bridge without the compressor and Exhibit 2-4 shows them with the compressor, headed west in the direction of the set up point. Staker testified that he and Ochoa only went out on the bridge once for the sole purpose of positioning the compressor and bucket of stripping compound, and the Division presented no evidence tending to prove that they had reason to go onto the travel level of the bridge more than once.

Also to be considered is Ford's testimony that only approximately two minutes elapsed between the taking of Exhibit 2-3 and Exhibit 2-4. Ford drove approximately one-half of a mile past the bridge to turn around. He observed no vehicles on the bridge while photographing the employees. From this it is inferred that traffic did not delay his turnaround and the Highway 166 speed limit in that vicinity was 55 miles per hour. His two minute estimate is, thus, supported by the evidence presented through his testimony and is found to be reasonable.

If Ford took Exhibit 2-4 last, it means that the men initially walked a considerable distance out from the east end of the bridge without the compressor, as Exhibits 2-2 and 2-3 depict, then turned around, walked back to the east end of the bridge, acquired the compressor, and pushed it onto the bridge before Ford took Exhibit 2-4. That might be possible to do in two minutes, but why leave the compressor behind on the first trip out to the set up point and make two trips onto the bridge necessary when one would do? Such a course of action is at odds with common sense.

We find that a preponderance of the totality of evidence presented concerning the order of events proves that Exhibit 2-4 was taken before Exhibits 2-2 and 2-3.

Ford initially estimated that the employees were on the bridge for a total of 25 to 30 minutes. Later, he lowered that estimate to 20 to 25 minutes. Staker estimated that they were on the bridge for no more than five minutes.

Ford's estimate that only two minutes elapsed between the taking of Exhibits 2-3 and 2-4 is more consistent with Staker's testimony that he and Ochoa were only on the bridge for five minutes than it is with Ford's estimates that they were there for 20 to 30 minutes.

Employer was a subcontractor on "Earthquake Retrofit Project No. 849". The Division introduced the plans and specifications for the project as Exhibit 3. The "General Plan" of the bridge, included in that exhibit, states that the total length of the "structure" is 1,569 feet, four inches, and that the length of each of the nine spans supported by the abutments at the ends of the bridge and the nine intervening piers is 174 feet.

Pier 9 is one span or 174 feet from the abutment [Abutment 10] at the east end of the bridge. At the reduced walking speed of 2 miles per hour, a person can walk 548 feet [2 x 174 feet], the "round trip" distance between Abutment 10 and Pier 9, in slightly less than two minutes. Even if they had gone out to Pier 8, another 174 feet, at that rate of speed, the travel time would have been less than four minutes. When these travel times are added to the two minutes it took them to set up the compressor on the bridge, and allowance is made for the fact that the times are estimated, the evidence tends to prove that the employees were on the bridge for ten minutes or less. We find that to be a fact.<sup>8</sup>

Hence, Employer proved that the compressor set-up operation performed by Staker and Ochoa was a "brief operation" that met the three conditions set forth in the site traffic control plan. Under section 1598(a) and the Manual the Caltrans project engineer was authorized to exercise considerable discretion in developing a traffic control plan for the site. Having found that Employer, through the actions of Staker and Ochoa, did not violate the site traffic control plan, we conclude that the Division failed to prove Employer violated section 1598(a).

### **DECISION AFTER RECONSIDERATION**

Employer's appeal from the citation for a violation of section 1598(a) is granted and the \$4,500 civil penalty is set aside.

MARCY V. SAUNDERS, Member  
GERALD P. O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: April 16, 2003

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<sup>8</sup> We note that the low end of Ford's second estimate of the time the employees were on the bridge, 20 to 25 minutes, was an admission that they may have been within six feet of the roadway for "no more than 20 minutes", the maximum period that may qualify for a "brief operation" exception under the project's traffic control plan.