

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

BAY CITIES PAVING & GRADING, INC.
5029 Forni Road
Concord, CA 94520

Employer

Docket No. 12-R2D1-1665

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (“Board”), acting pursuant to authority vested in it by the California Labor Code and having considered the petition for reconsideration filed by the Division of Occupational Safety and Health, Department of Industrial Relations (“Division”), hereby denies the petition for reconsideration.

JURISDICTION

On November 23, 2011, an employee of Bay Cities Paving & Grading, Inc. (“Employer”) suffered an industrial injury at employer’s worksite located at 1890 Parkway Boulevard, West Sacramento, California. The Division subsequently conducted an accident inspection through District Manager Jon Weiss (“Weiss”). On April 26, 2012, the Division issued a citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹ The citation alleged a Serious violation of section 1593(f) [failure to secure load against displacement].

Employer filed a timely appeal of the citation and asserted affirmative defenses. Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. Employer was represented by General Counsel, Marlo Manqueros and the Division was represented by Weiss. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on March 6, 2014 (“Decision”). The Decision granted Employer’s appeal and dismissed the section 1593(f) citation based on the logical time affirmative defense.

The Division timely filed a petition for reconsideration of the ALJ’s Decision. The Division Petitioned for Reconsideration on the basis of Labor Code section 6617 (a), (c), and (e). The Petition for Reconsideration raises several concerns with the ALJ’s Decision. The Division

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

takes the position that all K-Rails should be individually secured when loaded. The Division also notes:

Of concern to the Division is the ALJ determination (page 9) that the K-Rail, when placed onto a trailer is secured against displacement based solely on its weight even though the K-Rail fell off the trailer. The Decision (Page 10) appears to suggest that just the placement of K-Rails onto a trailer is sufficient even when transported on public roads and that chaining the load just makes them more secure.

The Division next challenges any reference to the off-loading process on highways as a basis for application of the logical time defense to this matter, since the accident occurred during the loading process in a K-Rail storage yard. Finally, the Division takes issue with the Decision's reference to section 3704, and any suggestion within the Decision that the K-Rails were secured via piling. The Employer filed an answer to the petition.

As will be seen in our discussion and analysis below, the K-Rail did not just "fall" from the flatbed, rather it was pulled off; there is no requirement in the safety order that each K-Rail be individually secured, and so holding would read terms into the safety order, which we may not do; and the Decision's discussion of the K-Rails' stability and of section 3704 were unnecessary to the resolution of Employer's appeal.

ISSUE

Does the evidence support granting the appeal based on the logical time affirmative defense?

EVIDENCE

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

1. K-Rail Loading Process.

On the day of the accident, Employer's K-Rail loading process involved a loader operator and two riggers. A loader was used to lift and move the 20' foot long, 6000 to 8000 pound K-Rails from storage to the truck flatbed. The loader had a boom on it with a swivel. Cables with looped ends hung from the swivel. Riggers fed the looped ends of the cables through two holes within the K-Rail. Once the cable was fed through the holes, the riggers placed pins through the cable loops to secure them in place. The loader then lifted the K-Rail. Once the loader lifted the K-Rail, the cables became taut and the pins could not be removed. After driving the requisite distance suspending the load, the loader placed the K-Rail onto a flatbed truck trailer and aligned it. After the K-Rails were placed and aligned on the flatbed, the loader lowered the boom a few feet to provide slack in the cables. The riggers then pulled the pins from the cable loops and de-threaded the cables from the holes—one rigger per side. The riggers then signaled the loader to back-up, away from the truck bed, and the loader backed-up pulling the cables away. Thereafter, the process was repeated.

In general, the loading of six K-Rails on a flatbed trailer can take as little as five or six minutes. Three K-Rails are placed on the front of the flatbed, and three are placed on the rear of the flatbed. There is no vertical stacking of the K-Rails. There is also often a line of trucks to keep production going—sometimes there are ten to twenty trucks lined up in a production line fashion in the loading yard.

2. K-Rail Securing Process.

The truck drivers secured their own loads. The truck drivers that hauled the K-Rails were not employed by Employer. The trucking company's policy, and Employer's policy, required truck drivers to secure their own loads. The drivers were told to stay in their cabs, or away from the loading area, as the K-Rails were loaded.

The K-Rails were not secured to the flatbed individually as they were loaded. After six K-Rails were loaded, and the loader cables were disconnected from the K-Rails, and the loader backed away from the truck bed to a safe distance, the truck drivers were directed to pull forward, typically two hundred to three hundred feet (although sometimes less). The drivers then secured their truck loads using cables or chains, which are either placed over the K-Rails or through the holes in the K-Rails. This also allowed the next truck driver to pull forward into the loading zone.

3. Circumstances Surrounding Fernandez's Industrial Accident.

On November 23, 2011, Employer's employee Heriberto Fernandez ("Fernandez") was loading K-Rails onto flatbed trucks at a worksite in West Sacramento, California. He worked the night shift. Fernandez testified that the outdoor worksite was a large and flat paved area. Likewise, the Division's Inspector noted that the worksite was a large and flat area, and his report states, "The accident site in general is an open paved area..." (Ex. D; *see also*, Ex. 5.)

Fernandez worked as a rigger on a three-person crew. On the day of the injury, Fernandez was on top of a flatbed truck trailer, which was parked on a level surface. The sixth piece of K-Rail had just been loaded onto the flatbed. After the K-Rail was placed, Fernandez pulled the pins from the looped ends of the cable, throwing them to the other rigger, who at this time had moved away from the trailer. Fernandez then pulled one cable from the hole in the K-Rail, but cannot remember if he pulled the other cable from the hole.

Fernandez remembers jumping off the side of the flatbed. Fernandez cannot remember whether he signaled the loader operator to backup. At the time he jumped off the flatbed, Fernandez was not aware of the loader moving. He began to walk away from the truck. He then remembers hitting the ground. He got up and tried to run away, but stopped running after a short distance because his right foot was injured. He was subsequently taken to the hospital via ambulance, and hospitalized. He suffered amputation to several toes.

Although the exact mechanism of the accident is unclear, the Parties stipulated that, "As the loader backed up, the cable associated with the hole closest to the rear of the trailer was stiff." It appears likely that the K-Rail and the loader somehow remained connected via a cable as the loader backed away from the trailer, causing the K-Rail to be pulled off the trailer onto Fernandez. There is no evidence that the truck or flatbed trailer moved at the time of the accident.

Citation

Following an investigation of the accident, the Division cited the Employer for violation of section 1593(f), which states: “Securing Loads. Loads on vehicles shall be secured against displacement.” The citation states:

On November 23, 2011 at a worksite located at 1890 Parkway Blvd. in West Sacramento, an employee of Bay Cities Paving & Grading, Inc. based in Concord sustained an accident related serious injury when a concrete “K-Rail Barrier” that had been loaded onto a trailer was not secured against displacement resulting in the “K-Rail Barrier” falling off the trailer and striking the employee.

Employer appealed on the basis of the logical time defense.

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

The Division petitioned for reconsideration on the basis of Labor Code section 6617(a), (c), and (e). Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

The Board has reviewed and considered the Division’s petition for reconsideration and the Employer’s answer. In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. Based on our review of the record, we find that the Decision was supported by a preponderance of the evidence in the record as a whole and appropriate under the circumstances, subject to the modifications addressed herein.

1. The Logical Time Defense.

The primary issue presented in this matter is whether the ALJ properly dismissed the section 1593(f) citation based on the logical time defense. The logical time defense is a Board created affirmative defense, which the employer has the burden to prove. The logical time defense is a Board created rule which provides that “[t]he requirements of any safety order will not begin to apply until the necessary and logical time has arrived for an employer to make provisions to correct the violation and abate the hazard.” (*See, JSA Engineering, Inc.* Cal/OSHA App. 00-1367, Decision After Reconsideration (Dec. 3, 2002), citing *Nicholson-Brown, Inc.* Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).) An employer must be allowed time to do that which a safety order requires. “This is especially true of the ever-changing conditions of a

construction site, where new hazards are created and old ones abated as construction advances.” (*Roland Associates Construction*, Cal/OSHA App. 90-668, Decision After Reconsideration (Jan. 6, 1992), citing *Nicholson-Brown Inc.*, CAL/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).

The logical time defense exists to protect employees from situations where the otherwise suitable application of a safety rule illogically exposes the employee to greater danger. For example, in *Nicholson-Brown Inc.* (above), the Board found that it was not logical to require an employer to install guardrails around the perimeter of the floor before the floor had been decked out to the perimeter. The installation of guardrails on exposed floor joists, prior to decking, illogically exposed employees to greater danger. (*Nicholson-Brown Inc.* Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).) Thus, if Employer can prove by a preponderance of the evidence that the employee(s) would be exposed to greater danger if the safety order were applied at a particular stage of the work rather than a later time, the safety order will not apply until compliance does not create the added or greater hazard.

2. The Logical Time Defense Applies.

The Division cited the Employer for a violation of section 1593(f) [failure to secure loads against displacement]. The citation noted that K-Rail loaded onto a trailer had not been secured against displacement when it fell on Fernandez. However, we determine the evidence in this record shows that securing the K-Rail to the flatbed, at the time of Fernandez’s injury, would have been more hazardous than non-compliance. Fernandez’s accident occurred before the loader and its affixed cables had fully cleared away from the K-Rail and the truck. Consistent with the logical time defense, we find that securing the K-Rail to the trailer before the loader clears away exposes employees, or truck drivers, to greater danger than non-compliance.

If employees or truck drivers are required to secure the K-Rail before the loader clears away, they would be exposed to significant hazards. They include hazards of movement of heavy equipment, swinging cables, and overhead booms dragging loose cables. Requiring an employee, or a truck driver, to enter into this operational area to tie an individual or a set of K-Rails not only reads into the safety order a provision it does not contain, doing so would increase employee, or truck driver, exposure to the hazards of the taut and loosened overhead cables, the boom, the movement of the K-Rail and the loader, whether intended or inadvertent. (See *E. L. Yeager Construction Company, Inc.*, Cal/OSHA App.01-3261, Decision After Reconsideration (Nov. 2, 2007) [Board may not read terms into or out of safety order].)

In addition, if employees or truck drivers secure their load before the loader successfully clears away, there is an increased danger that when the loader backs away from the flatbed, its cables could become entangled, ensnared, and/or entrapped in the K-Rail securing straps, chains, or other securing mechanism. This creates numerous hazards, including: the straps breaking, the cables breaking, the K-Rails falling over, the K-Rails becoming displaced, and the loader losing control. Indeed, the cables attached to the loader could even become entangled around the feet or other body parts of truck drivers and other employees. These hazards could cause serious injury to employees or truck drivers in the immediate vicinity.

Further, employees, or truck drivers, in the area before the loader backs away could suffer serious injury if the loader accidentally drives forward during the securing process. Loader

operator error, a hazard always associated with working near heavy equipment, could cause catastrophic injury in such a circumstance.

The aforementioned hazards are even greater for the truck drivers, who were tasked with securing the loads. The Employer did not employ the drivers. The Employer's policy and the truck drivers' companies' policy required the truck drivers to secure their own loads. There is no evidence that the truck drivers had any experience working in loading zones, or securing loads around heavy equipment in the loading zone.

Fernandez's accident occurred before the loader had fully backed away from the flatbed and the K-Rails. Even if the K-Rail needed to be individually secured when loaded (as opposed to secured in sets of three), we find that the logical time to individually secure the K-Rail to the flatbed did not arrive until the loader, and its cables, had all been detached and moved from the K-Rail, and the loader successfully relocated away from the truck. Here, the logical time defense applied at the time of Fernandez's injury because requiring compliance with section 1593(f) at that time would expose load-securing employees and/or truck drivers to greater danger. The logical time defense exists to protect employees from situations where the otherwise suitable application of a safety rule illogically exposes the employee to greater danger. (*See, Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).) Since the safety order could not apply at the earliest until after the loader and the cables had cleared the truck area safely, we find no violation here for failing to secure the load prior to that time.

Additional argument and evidence was presented by the parties concerning when it would be safe to apply the safety order. This issue is not before us, and we decline to address such arguments. The only violation alleged was that the safety order applied at the time of Fernandez's injury, which was before the loader and cables cleared the K-Rail and truck. We only conclude that requiring application of the safety order at that time, on balance, would be more hazardous than applying it at a later time. Since the Division did not cite employer for failing to secure the K-Rails during the movement of the truck 200 feet to the securing location, we need not resolve the relative safety of that hypothetical circumstance. There is also no evidence that Fernandez's injury had anything to do with the movement of the truck. The logical time defense bars the Division's citation without necessitating reaching the hypothetical question of truck movement.

There was also a significant amount of credible testimony in the record that established no current mechanism exists to individually secure K-Rails to the flatbed without interfering with the placement of subsequent pieces of K-Rail. The evidence demonstrates that individually securing the first piece of K-Rail with chains and/or straps would interfere with the loading of the next rail. In the absence of any method to individually secure the K-Rails, we see little logic to any procedure requiring K-Rails be immediately individually secured as they are loaded, particularly when the restraints must be undone only moments later to allow the loading of the next piece of K-Rail. Any modicum of safety would be lost as the straps are repeatedly undone to allow the loading of each subsequent piece of K-Rail. This proposed compliance method requires load-securing employees to remain exposed to the loading hazards during the entire loading process. We decline to require employees remain so-exposed to those added hazards.

The Division also argues that the Decision improperly suggests that K-Rail loads are secured against displacement based on their weight when placed on the flatbed trailers, even for traveling on public roads. The Board does not interpret the Decision as making such a finding,

and, in any event, the Board does not make such a finding. As discussed herein, the Board need not, and does not, address the issue of the movement of the truck, or the proper method of securing the K-Rails. We only conclude any effort to require the K-Rail to be secured to the flatbed truck trailer before the loader and cables successfully cleared away from the truck created a greater hazard than waiting until after the loader cleared the truck.

The Division also contests the Decision's reference to section 3704. However, the Board need not, and does not, address the issue of whether the K-Rails were securely piled as referenced in section 3704, as they were not "piled" and doing so is unnecessary to this holding.

Finally, the Division argues that the K-Rail loading and unloading operations on the highway were irrelevant to the application of the logical time defense in this matter. We agree and have not considered the highway operations in reaching this holding.

For the reasons stated herein, we find the logical time affirmative defense was properly applied to dismiss the section 1593(f) citation.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: May 16, 2014