

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

HB PARKCO CONSTRUCTION, INC
3188 H Airway Avenue
Costa Mesa, CA 92626

Employer

Docket No. 07-R4D2-1731

**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 by HB Parkco Construction Inc. (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

On March 26, 2007, the Division of Occupational Safety and Health (Division) issued two citations to Employer after investigating an accident which occurred on January 24, 2007, at a place of employment maintained in California by Employer. Employer filed a timely appeal contesting the citations, their classifications, the proposed penalties, and the abatement requirements. An evidentiary hearing was held over several days by an Administrative Law Judge (ALJ) of the Board, and a Decision was issued on January 18, 2009, denying Employer's appeals.

Employer petitioned for reconsideration of the denial of its appeal of citation 2, item 1, an alleged violation of California Code of Regulations, Title 8, section 1592(e) [earth moving equipment was not controlled in the required manner]¹ which was affirmed as a Serious, accident-related violation. The Division answered the petition, and the Board took the matter under submission. After review of the record, we affirm the Decision and assess a civil penalty of \$18,000.00.

¹ All references are to Title 8, California Code of Regulations, unless otherwise indicated. Also, in the ALJ's Decision on page one the section number for Citation 2, Item 1 is mis-identified as section 1509(e). The citation contains the reference to section 1592(e) as does the summary table. This was a typographical error.

Evidence

Employer was a contractor on a commercial construction project in Glendale installing the foundations of several large structures for a project which occupied an entire city block. This work required building footings for the large structures. Employer contracted with the owner of the property to complete the excavation, framing and pouring of some of the concrete footings.² Employer had many of its own employees, including a layout crew, a concrete crew, and various lead men and project managers, working on site. It hired Spates Inc., to provide excavators, and a shotcrete³ company, to complete the job. Regarding the excavator equipment and operators, Employer entered into a “purchase agreement” with Spates, Inc. who provided equipment and operators on an hourly rate basis to complete necessary excavation. Employer met daily with its foremen and the lead man for Spates, Inc., and gave instruction on the day’s tasks. No plans were supplied ahead of time to Spates, Inc. and the excavation work assignments were made each morning by Employer’s project manager, Dave Davee.

In the contract between Employer and the owner of the project, American at Brand LLC, Employer was responsible to provide flagmen, barricades and traffic control during work operations.

An employee of Employer was fatally injured when he was struck by a type of earth moving equipment called a loader which backed into a designated vehicle area to perform a three point turn while transporting dirt spoil from one designated location on the construction site to another. The deceased employee was walking in the designated vehicle area to retrieve materials needed for his work on the footing framing crew to which he was assigned. The area where the accident occurred was traversed by heavy equipment, construction site vehicles, and pedestrians.

Employer’s plan for controlling the vehicle operations so that operators were aware of the location of on-foot workers was for the operator and any on-foot workers to make eye contact and acknowledge each other through waving or other clear method, which was left to the employees to devise. On January 24, 2007, the date of the fatal accident, Employer assigned the Spates, Inc. two-vehicle crew to dig a large footing on the eastern edge of Employer’s work area, and to move the spoils from that excavation to a large staging pile approximately 100 yards away. For several days previous to the date of the accident, the two-vehicle excavating crew was digging this large footing.

² Other contractors were also working on the site, building other large structures. A portion of the area where the loader drove while moving the spoils was used as a general access road to the project.

³ Employer’s manager, David Davee, testified that a shotcrete company applies concrete to vertical locations, and he could not recall the name of that sub-contractor.

The other employees of Employer were laying out footing framework and pouring concrete, but were working in an area away from the excavation area such that the loader operator, on days prior to the accident, was able to turn the loader around as soon as the bucket was filled with dirt, without nearing the form layout crew. This allowed him to drive to the spoils staging pile while driving the loader in forward gear, thus requiring little or no travel in reverse.

On the day of the accident, the form layout crew had moved in to the area previously used by the loader operator to turn the loader around. Surrounding this area, light weight portable barriers were used to mark where the form layout crew was working, and beyond which the loader was prohibited. These barriers were moved on the day of the accident into the area previously used by the operator to turn the loader. This required the loader to drive in reverse for a longer distance, and to perform the three point turn in a different area which was heavily used by other vehicles and workers on foot. There was some dispute as to whether the operator was told to perform the three point turn toward the west side of the site or toward the east side. The operator stated he was not informed of where to turn the vehicle, but the layout crew lead man indicated he instructed the operator to turn using the westerly portion of the work site.

The accident occurred when the operator used the easterly portion of the vehicle area to turn the loader. He looked in the rear view mirrors and behind the vehicle prior to backing out of the spoils pile with the load. He then looked over his right shoulder, as that was the direction the loader was travelling while in reverse and making the first portion of a three point turn. The engine of the loader prevents the operator from seeing directly behind him for approximately 15 feet closest to the vehicle. While the operator was driving in reverse and turning the vehicle to the right, he felt a bump as a tire ran over an object. He shifted the loader in to forward gear and saw the decedent out of the corner of his eye on the left side of the vehicle. He testified he looked behind him and over his right shoulder as he made the three-point turn and never saw the decedent.

Decedent was a member of the layout crew. Decedent appears to have been carrying a large sack of chalk, lime or similar substance used by the layout crew to mark the footings. Such material was stored in a location that required employees to traverse the vehicle access road on the site, which was also part of the area used by the loader to transport spoils from the excavation to the assigned spoils staging area.

Although Employer used portable, waist high, light weight free standing barriers to denote areas where vehicle traffic was prohibited, the accident did not occur in one of these areas. No barriers were used to mark off an area for pedestrian use for retrieving needed materials. No flagger, spotter, two-way radio, or any other method was implemented by Employer to inform equipment

operators of the location of foot traffic other than the previously mentioned instruction that on-foot employees and equipment operators were told to look out for each other and to make eye contact before crossing one another's path of travel.⁴

ISSUE

Whether Employer violated the safety order.

DECISION

Section 1592(e) states:

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

The safety order requires employers to control earth moving operations in a manner that ensures the equipment operators know of the presence of on-foot workers within the immediate vicinity of the operators. Simply informing the operator that workers will be in the area, and to look out for them, does not ensure the operators obtain knowledge of those workers' location sufficient to satisfy the requirements of the safety order. (*Teichert Construction v. Occupational Safety and Health Appeals Board* (2006) 140 Cal. App. 4th 883.) Applying this Court of Appeal interpretation of the standard, we have held that requiring the on-foot worker to inform the operator of his or her presence does not satisfy the employer's obligation to ensure the operator knows of the location of the on-foot worker. (*R. L. Brossamer, Inc.*, Cal/OSHA App. 03-4832, Decision After Reconsideration (Oct. 5, 2011).)

In *R.L. Brossamer*, the employer had a system in place whereby the on-foot workers were to make eye contact and waive to the operator to inform him when they were in the travel path of the equipment. The vehicle involved there had a small but critical blind spot. Workers on foot entered the immediate vicinity of the vehicle as part of their assigned work. The eye contact system in *R. L. Brossamer* failed to inform the operator of the presence of a worker in the travel path of the vehicle arm and established the violation. We rejected the employer's argument that placing full responsibility on the on-foot employees to inform the operators of their presence fulfilled employer's requirement to implement the required control of operations contemplated by the safety order.

⁴ This evidence summary is intended to provide sufficient context for the analysis below and is not a complete summary of the record, which was lengthy. Facts pertinent to various sub-issues, or to Employer's various arguments, will be included in the discussion as needed.

Here, Employer had the same ineffective system in place which did not ensure the operators were actually aware of on-foot workers in their immediate vicinity. Employer left it to the on foot worker to stay out of the operator's path of travel as the on foot worker retrieved needed materials, or to make eye contact with the operator prior to entering the path of travel. Even more ineffective than the system and work method employed in *R.L. Brossamer*, here Employer was allowing, if not requiring, the loader operator to travel in reverse, through an area traveled by its own on-foot workers, its own construction vehicles and those of other general contractors and sub-contractors, and stored construction materials where on-foot workers had to cross this busy roadway to get them. While Employer did designate some areas as no-vehicle areas, it had no plan in place for ensuring the safety of its on-foot workers who entered the travel-way other than telling such workers to make eye contact with any vehicle operators. This is equivalent to a general admonition to be safe, and it is insufficient to satisfy the control requirements of 1592(e). (*Pouk & Steinle*, Cal/OSHA App. 03-1496, Decision After Reconsideration (Jun. 10, 2010).)

Such plan was especially ineffective given the circumstances at the site on the January 24, 2007. The loader operator could not turn near the excavation area into which he drove to scoop the spoil because there was insufficient room. South of the previous turn around area, which was now under construction by the footing lay out crew and delineated by portable barriers, was another materials storage location. The operator had to back out of the spoils pile, past the crew on the ground behind the barriers, and past some stored materials before making a three point turn. Once in a forward direction, he would pass the other stored materials location, then dump the spoils at the designated staging location (this was another larger pile of "spoil" and is referred to herein as the staging pile to distinguish it from the spoils pile immediately adjacent to the excavation.) The operator had to make his three point turn between these two materials locations, and elected to perform his three point turn in an easterly direction. Although the employer's foreman testified he told the operator to make this turn in a westerly direction at approximately the same distance from the excavation, if such was the instruction, it was not enforced. That foreman observed the excavators and the form setters at work, and discussed the travel path of the loader with the operator's lead man in the few hours prior to the accident. If the operator was driving contrary to Employer's instructions, it had the opportunity to make corrections.

Under these circumstances, the method selected by Employer to control earthmoving operations did not ensure the operators were aware of on foot workers in their immediate vicinity. (*Teichert, supra.*) Since Employer had control and the right to control the excavators' work, and undertook the traffic control responsibility by the express terms of the contract with the owner, Employer was both the operator's and the decedent's employer. (Labor Code section 3300; *Sully-Miller Contracting Company v. California Occupational*

Safety and Health Appeals Board (2006) 138 Cal.App.4th 684, 693; *Strategic Outsourcing Inc.*, Cal/OSHA App. 10-0734, Denial of Petition for Reconsideration (Sep. 16, 2011.) Thus, the violation is established.

The petition asserts that the operator's testimony as to what he was doing while operating the loader, and what he saw, was not credible. Employer argues the accident happened because the operator was not looking where he was going, rather than that he did not see the decedent while looking, as he testified. As to credibility, "the Board will not reverse a fact finding, especially a credibility finding, of an ALJ absent evidence of substantial weight." (*Brent Gausden dba Discount Ceramic Tiles of Riverside*, Cal/OSHA App. 04-3141, Denial of Petition for Reconsideration (Oct. 3, 2008).) Here, although the ALJ did not make a specific credibility finding as to the operator, she did conclude he looked where he was going while driving in reverse, looked over his right shoulder while executing the three point turn to the right, and that in spite of this he did not observe the decedent. (Decision, page 10.) There is no evidence to the contrary, let alone evidence of "substantial weight" which is required to alter the reasonable factual findings of an ALJ. (*Brent Gausden, supra.*)⁵

Next, Employer argues that the equipment operator was not one of its employees, and therefore Employer cannot be held responsible for his actions. We reject this argument for two reasons. First, Employer actually controlled the earth moving equipment, as the lead man for the equipment supplier met each morning with Employer's project manager to receive instruction as to where and how to undertake needed excavation. If Employer needed additional equipment on a given day to accomplish any task, the equipment supplier would provide such equipment and charge an hourly rate. The equipment provider actually followed the direction of Employer, and those instructions can and did change throughout each day, as testified to by Employer's project Manager Dave Davee. As the Employer in control of the equipment, it had to control those operations in a manner that ensured the operator was aware of the location of the on foot workers. It failed to provide such a plan.

⁵ Employer argues the *Teichert* case issued by the Court of Appeal improperly establishes a "strict liability" requirement on employers. Employer thus asserts it faces some liability without fault. Employer declines to accept that it needs to implement a plan other than asking the employees exposed to the hazard to avoid the hazard when Employer's operations expose its employees to the hazard. A traffic control plan is not established by instructing employees to stay safe in spite of known hazards. Employer could have supplied a traffic control officer, or monitor, with radio contact with the operator, and positioned that person in a location with a vantage point over the foot traffic going and coming to the supply area. Other vehicle traffic posed a hazard to any employee walking outside the blue portable barriers, including employees going to the porta potty located outside the blue worker barrier. Employer could have located a porta potty and the supplies within the blue barrier and thus eliminated the hazard of foot traffic entering the earth moving vehicle-way. Certainly other suitable methods could have been employed on this jobsite. Employer opted for none of them. The poor administrative controls over the earth moving operation were a cause of the accident.

Secondly, the regulation requires that operations be *controlled*. *Teichert, supra*. Control means “to exercise a directing, restraining, or governing influence over; to direct, to counteract, to regulate.” *Teichert, supra*. Control requires far more than the mere passive provision of general information. *Teichert, supra*. The contract Employer entered into with the subcontractor which provided the earth moving equipment and operators, gave Employer the right to control the operations. Thus, the Employer had the right to direct and control the actions of the equipment operators, and the obligation to do so to protect its own workers on foot at the site. (*DeSilva Gates Construction, Cal/OSHA App. 01-2741, Decision After Reconsideration (Dec. 10, 2004).*)

Employer next argues that the citation failed to state the nature of the violation with reasonable particularity and is vague and ambiguous. That circumstance is said to have “seriously compromised” Employer’s “right” to defend itself, which we construe to be a claim of inability to answer the accusation against it contained in the citation. (Petition, part V, p. 7, l. 12 et seq.)

The charging language of the citation recites the accident briefly and then states: “The employer did not ensure that the earth moving operation was controlled in such a manner as to ensure the loader operators knew of the presence of employees who may need to pass through their operating area on foot during their work activities.”

The citation at issue satisfies the requirements of due process. In *Cranston Steel Structures, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 21, 2002)* the Board held:

As to Employer's due process argument the Appeals Board requires only general ‘notice’ pleading (via citation) from the Division. (See, e.g., *Sacramento Bag Mfg. Co., Cal/OSHA App. 91-320, Decision After Reconsideration (Dec. 11, 1992).*) Due process requires the Division to include within its citations a sufficiently detailed description of the circumstances surrounding the alleged violation. (*Hauswald Construction Company, Cal/OSHA App. 75-1060, Decision After Reconsideration (Apr. 26, 1977).*) The description in the citation itself must give the employer fair notice and enable it to prepare a defense. *Certified Grocers of California, Ltd., Cal/OSHA App. 78-607, Decision After Reconsideration (Oct. 27, 1982).* Where an employer alleges that a citation lacks sufficient particularity, the Appeals Board has held that it must show prejudice in order to sustain a due process argument. (*Contra Costa Electric, Inc., Cal/OSHA App. 90-1067, Decision After Reconsideration (Mar. 5, 1992); Novo-Rados Constructors,*

Cal/OSHA App. 78-135, Decision After Reconsideration (Apr. 28, 1983).

The citation met the above requirements. It specified the Safety Order allegedly violated and summarized the circumstances giving rise to the violation. Employer had adequate notice to fully litigate the citation. In fact, Employer's petition states as much with colorful rhetoric. For example, it "argued with gusto" (p. 4, l. 8); and "aggressively litigated" (p. 7, l. 19) its case. Moreover, Employer does not demonstrate prejudice.

Employer next argues that it lacked knowledge of the violation, and focuses on a portion of the Decision regarding the presence of a blind spot in the operator's field of view when backing up.⁶ The issue of whether Employer knew that the equipment had a blind spot, or whether it does, is not relevant.⁷ The safety order requires control of the earth moving operations with a particular purpose in mind, specifically, informing the operator of his surroundings and the presence of workers on foot in them. Whether Employer knew or should have known that its exercise of control was inadequate to satisfy the safety order is the relevant inquiry. Employer argues the operator's "idiosyncratic" driving caused the injury, specifically, driving in reverse and making a wide, rather than a tight, three point turn. Recall, Employer arranged the jobsite so that the operator was required to back up for a longer distance than previously. The operator attempted to move a barricade to create a better turn around point, and Employer prohibited this effort, forcing him to operate in reverse. The operator testified he had performed several three point turns in the same location previous to the accident. There was no evidence to the contrary, and Employer had workers on the site capable of observing the excavator who could have countered this testimony if it was inaccurate.

It was Employer's obligation under the Safety Order to control the earth moving operations, because it was Employer's employees who were working on foot and thus exposed to the hazard addressed by the Safety Order. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).)

⁶ The petition is not precise on this factual question. It seems to argue that there was no blind spot if the operator were looking backwards, over one shoulder. The Decision notes, however, that the operator testified that he not only looked over his shoulder, but then drove the front end loader in reverse using the side view mirror. Employer's testimony and argument do not address the differences in the field of view available using those two different methods of looking. That the ALJ may have missed a point but still reached the correct result is not reversible error. *Chinese Yellow Pages Co. v. Chinese Overseas Marketing Service Corp.* (2008) 170 Cal.App.4th 868.

⁷ Despite Employer's argument, whether there was a blind spot, and whether it was in the view available using the side view mirror, knowing there is a blind spot is critical to understand the limits of the operators' point of view and therefore to the design and implementation of a control plan.

Lastly, Employer argues that the Division did not prove the violation was accident-related, again framing the issue as the violation having resulted from the operator's "idiosyncratic" conduct, not its own failure to have an adequate control plan in place. To be classified as serious, accident related, the Division must prove a serious violation caused an accident. (*Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) The Division met this burden. The evidence establishes the plan provided did not inform the operator of the decedent's presence, as it inadequately left it to the decedent to inform the operator of his presence.⁸ Had the operator been aware of decedent's location, by any of a variety of potentially compliant plans or methods of control, the operator would not have moved the loader where he did, striking decedent. The lack of an adequate plan led to the decedent being unaware of the direction of the loader's travel, and of the operator being unaware of the presence of the employee, and thus, but for the lack of an adequate traffic control plan, the accident would not have occurred. (*New England Sheet Metal Works*, Cal/OSHA App. 02-2091, Decision After Reconsideration (Dec. 5, 2005); *K.V. Mart Company*, Cal/OSHA App. 01-638, Decision After Reconsideration (Nov. 1, 2002).)⁹

In sum, the Board considers all of the evidence submitted, and draws reasonable inferences from such evidence. (*Hollander Home Fashion*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 13, 2012); *SMUD*, Cal/OSHA App. 08/4887, Denial of Petition for Reconsideration (Oct. 28, 2010).) Here, we conclude the operator was unaware of the presence of the decedent within the vehicle travel way¹⁰, and we conclude decedent did not appreciate or anticipate the intended travel path of the loader. Employer's

⁸ The evidence supporting the classification as serious was provided by the division's witness, Porter, who testified to the likelihood of a serious injury from the event of a loader of this size striking a pedestrian. The petition does not challenge this portion of the decision. The petition argues Employer lacked knowledge of the violation because it could not know Longers would fail to look out for a pedestrian. Although the Petition cites no authority, we conclude Employer attempts to satisfy the affirmative defense of Labor Code 6432, which allows a serious classification to be reduced to a general classification if the employer neither knew nor could have known of the violation. However, Employer knew of the content of its "plan" which is the violation here. Employer has not established that it neither knew nor could have known of the existence of its plan.

⁹ The Petition is essentially a factual argument asserting operator Longers drove recklessly or was not paying attention, and thus there should be no violation since Longers' actions caused the accident. The general rule that vehicles yield to pedestrians was not followed, and the result was the fatal accident. However, such operating errors are to be reduced and / or eliminated by the employer implementing a plan that assumes these operator errors occur even to the most careful of drivers, and thus takes necessary additional steps to ensure the operator knows of the presence of on-foot workers. Also, the Petition asks the Board to reverse the Court of Appeals *Teichert, supra*, case, which we are unable to do

¹⁰ The Petition relies heavily on Employer's belief that the operator lacked credibility, and that the Employer's cross examination of the operator showed that the operator was lying when he said he looked in the direction of travel at all times, and thus the only conclusion to draw is that the operator recklessly failed to look for pedestrians. The ALJ did not share this belief with Employer. A review of the record similarly does not provide substantial compelling evidence that the operator lacked credibility. The operator testified he looked behind him before and while backing up, and did so by looking over his right shoulder. One can only drive a vehicle in reverse while looking over one shoulder or the other, which necessarily leaves some portion of the area surrounding the vehicle out of the operator's view.

admonition to all workers to make eye contact prior to entering a vehicle's travel path is not, in such circumstances, a method of earthmoving-vehicle control that will ensure the operator is aware of the location of on foot workers in his immediate vicinity. The decision so holds, and in the absence of compelling evidence to the contrary, we decline to reverse the ALJ's decision. (*Watson Roofing, Inc*, Cal/OSHA App. 07-0491 Denial of Petition for Reconsideration (Jul. 11, 2008).)

ART R. CARTER, Chairman
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MARCH 26, 2012