

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

In the Matter of the Appeal of:

SECURITY PAVING, INC.
9050 Norris Avenue
Sun Valley, CA 91352

Employer

Dockets. 13-R4D7-0771 and 0772

**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 hereby denies the petition for reconsideration filed in the above entitled matter by the California Division of Occupational Safety and Health (Division).

JURISDICTION

Commencing on September 20, 2012, the Division conducted an inspection of a place of employment in California maintained by Security Paving, Inc. (Employer).

On February 21, 2013, the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.

On October 8, 2014, the ALJ issued a Decision which granted Employer's appeals and dismissed the citations.²

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

² On November 5, 2014 the ALJ issued an amended decision to correct a typographical error in the docket number contained in the Decision.

The Division timely filed a petition for reconsideration of the Decision as to Citation 2 only.

Employer filed an answer to the petition.

ISSUE

Was the Decision correct in granting Employer's appeal of Citation 2?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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 Division's petition does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (Labor Code sections 6616 [petition must set forth in detail grounds for petition], 6617; *UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (June 25, 2009), citing, *Bengard Ranch, Inc.* Cal/OSHA App. 07-4596, Denial of Petition for Reconsideration (Oct. 24, 2008).) Liberally construed, however, the petition may be deemed to assert that the evidence does not justify the findings of fact.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer was cited after one of its employees was struck and injured by a truck operated by a different employer, J. Perez Mata Trucking, Inc. Mata's truck driver moved his truck in reverse after receiving a signal to stop from

Employer's employee, who then moved out of view of the driver to the rear of the truck to empty it fully. Mata's driver was not supposed to move in reverse unless signaled to do so.

Citation 2, at issue here, alleged that Employer had violated section 1511(b), which provides:

(b) Prior to the presence of its employees, the employer shall make a thorough survey of the conditions of the site to determine, so far as practicable, the predictable hazards to employees and the kind and extent of safeguards necessary to prosecute the work in a safe manner in accordance with the relevant parts of Plate A-2-a and b of the Appendix.

In turn, Plate A-2-a of the Appendix begins with the following observations:

Each operation of a construction job should be planned in advance. Such planning is needed at all stages of the project. It should start with the estimators, prior to preparation of bids, and continue throughout the job, with superintendents and foremen doing their share.

Construction planning will eliminate some accidents automatically, by creating a well-organized job. But expert planning gives special attention to safety, and thus is highly effective in making the operation safe and efficient.

There follows a list of more than two dozen items or activities which it may be appropriate to plan in advance. Included in the topics addressed are "1. Safe Access and Movement (a) workers (1) Adequate work areas. [¶] "(b) Vehicles (3) Adequate signs, signals, etc., to route vehicles on job." Scheduling of the work, and work procedures are other topics in the list.

Plate A-2-b addresses "(2) Methods of loading and unloading." Within this subject as pertinent here it states: "(A) Adequate space. [¶] (c) Workers and Foremen. (1) Proper job placement. (2) Adequate training and supervision."

The Decision held that the Division had not met its burden to prove by a preponderance of the evidence that Employer had violated section 1511(b). (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983) [Division has burden of proof].)

Section 1511(b) requires employers to “make a thorough survey of the conditions of the site to determine, as far as practicable, the predictable hazards to employees” the . . . safeguards necessary to prosecute the work in a safe manner in accordance with the relevant parts of” the Plates summarized above. The Decision points out that the Division’s inspector in this matter did not ask Employer or anyone else if Employer had conducted such a survey. Consistent with the facts and our reasoning in *C.A. Rasmussen, Inc.*, Cal/OSHA App. 96-3953, Decision After Reconsideration (Sep. 26, 2001), she held that in the absence of such evidence it would have been speculation to hold Employer had violated section 1511(b). In addition, the Decision found that Employer’s evidence showed that it had made the required survey.

The Division’s petition for reconsideration contends that the survey did not go far enough, and that the specific hazard of a truck driver’s not knowing hand signals or not complying with the system for their use was not covered by the survey.

This appears to us as an argument based on 20-20 hindsight. As we have said, “[T]he law does not require perfection of a party, but rather good faith and diligence in the pursuit of his or her actions.” (*Arthur J. Brewster Corp dba Prestige Kitchens, Inc.*, Cal/OSHA App. 08-1121, Denial of Petition for Reconsideration (Jul. 25, 2008); accord Civ. Code § 3531 [law does not require impossibilities].) In *Arthur J. Brewster, supra*, the cited employer argued that the Division acted arbitrarily in misidentifying the cited employer. We held that it was not arbitrary or capricious to make an initial error and timely move to correct it by motion to amend. Here, the Division failed to meet its burden of proof, and now argues that Employer’s survey did not adequately anticipate the hazard that another employer’s employee might not understand signals or fail to follow procedures.

Since one can almost always determine after an accident that if certain other steps or safeguards had been take the accident would not have occurred, we don’t find such *post hoc* reasoning helpful in determining if a violation of section 1511(b) occurred. The better inquiry is to ask, whether what the employer did before the event in question to discover and address the workplace’s hazards was an exercise of reasonable diligence. In light of the evidence detailing the nature and extent of the survey and training regarding movement of trucks and use of hand signals given by Employer, we agree with the ALJ that the evidence is insufficient to find a violation. Further, it is another act of speculation to conclude that the driver moved in reverse because of ignorance of procedures. It is at least equally reasonable to infer that he did so inadvertently.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: December 31, 2014