

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

BAY CITIES PAVING & GRADING, INC.¹
5029 Forni Road
Concord, CA 94520

Employer

DOCKET 12-R2D1-1665

DECISION

Background and Jurisdictional Information

Bay Cities Paving & Grading, Inc., (Employer) is a street and freeway construction contractor. Beginning December 6, 2011, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Jon Weiss, conducted an accident inspection at a place of employment maintained by Employer at 1890 Parkway Blvd, West Sacramento, California. On April 26, 2012, the Division cited Employer for the following alleged violation of the occupational safety and health standards and orders found in Title 8, California Code of Regulations²:

<u>Cit/Item</u>	<u>Section</u>	<u>Type</u>	<u>Penalty</u>
1/1	1593(f) [Failure to secure load against displacement]	Serious	\$16,200

Employer filed a timely appeal contesting the existence of the violation, the classification of the violation, and the reasonableness of the proposed penalty. Employer asserted three affirmative defenses; independent employee action, lack of employer knowledge of the violation, and that the logical time for compliance had not yet arrived.

This matter came on regularly for hearing before Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Sacramento, California on October 8, 2013. Marlo Manqueros, General Counsel, represented Employer. Jon Weiss, District

¹ Parties herein stipulate that the employer entity name on the citation, Bay Cities & Grading, Inc., be amended/corrected to reflect the correct entity name of Bay Cities Paving & Grading, Inc.

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

Manager, represented the Division. The parties presented oral and documentary evidence. Both parties submitted post-hearing briefs. The matter was submitted for decision on November 7, 2013. The Administrative Law Judge (ALJ), on his own motion, extended the submission date to February 7, 2014.

Citation 1, Serious, §1593(f)

Summary of Evidence

The parties, in relevant parts, stipulated to the following (Exhibit 3):

1. An accident occurred on November 23, 2011.
2. Bay Cities Paving & Grading, Inc., was the employer of the injured employee at the time of the accident.
3. The accident site was located at 1890 Parkway Boulevard in West Sacramento, California.
4. Heriberto “Eddie” Fernandez was the injured employee and sustained a serious injury (amputation to several toes) as defined by §330(h) and Labor Code §6432(e) as a result of the accident.
5. Weiss revisited the accident site on March 23, 2012, for the purpose of viewing an example of K-Rail and how it was rigged on the day of the accident.
6. On average, a typical K-Rail weighs between 6,000 to 8,000 pounds and is 20 feet long.
7. At the time of the accident, a CAT loader with a boom was being used to load a flatbed trailer with K-Rails.
8. The flatbed trailer involved in the accident held six K-Rails when fully loaded.
9. The K-Rail that fell off the trailer was the sixth or last K-Rail to be loaded onto the flatbed.
10. The K-Rail fell completely off the trailer.
11. The penalty associated with the citation was calculated in accordance with the Division’s policies and procedures.

Heriberto “Eddie” Fernandez (Fernandez) testified for the Division.³ Fernandez has worked for Employer for 11 to 12 years. Employer is involved in the construction of streets and freeways. On the day of the accident Fernandez was working as a regular labor employee. Sometimes Fernandez serves as a foreman. On the day of the accident Mark Thompson (Thompson) was serving as the foreman. Fernandez was loading K-Rail⁴ on to a flatbed trailer on the day of the accident. Exhibit 4 depicts a K-Rail, composed of concrete, which is used as a safety device at the center of the freeway.

³ Employer placed a standing hearsay objection on the record.

⁴ A modular concrete barrier which is used to separate lanes of traffic, is designed to minimize vehicle damage in cases of incidental contact, can serve to prevent head-on collisions, and also serves to protect workers from exposure to traffic.

Loading K-Rails is a fairly quick process, taking about five to six minutes to load six rails on a trailer. Page 10 of Exhibit D includes a diagram which shows the numeric order for the steps taken to load K-Rail onto a trailer. The K-Rail loading process involves a loader with a boom, and attached to the boom, a swivel with cables. Prior to the lifting, with the K-Rail on the ground near a truck, two workers attach cables to the K-Rail through two holes on opposite ends of the K-Rail, and then secure each cable with a pin, each of which is over one foot in length (Exhibit 4). The other end of the cable is attached to a swivel with a hook on it, and the swivel is at one end of a boom, which is attached to the loader, a large vehicle operated by another employee of Employer. Generally, the operator knows that he can lift and load the K-Rail onto the trailer when he sees the employees step away from the load. When the cable is tight the pins cannot be removed. After the K-Rail is loaded onto the trailer one person stands on each side of the K-Rail and each pulls the pin and cable out at each end of the K-Rail. The employee pulls the cable entirely from the hole to keep the ring on the end of the cable from catching the K-Rail as the loader backs up. Once the pins are removed and the cable removed from the K-Rails, the loader operator backs up and that action pulls the cable away from the K-Rails and the truck.

The truck driver is not allowed in the loading area during the loading process because of the dangers associated with that process. Once the loading process is complete for all K-Rails that are to be placed on the flatbed, the truck driver is signaled to pull away. The driver is responsible for tying down his load after he pulls two to three hundred feet away from the loading area. The driver, at that point, uses chains to secure the load to the sides of the flatbed trailer. At the loading site the process is then repeated, as another truck and trailer arrive to load K-Rail.

The loading process on the night of the injury took place at Employer's storage yard. The brother of Fernandez, Oscar Fernandez (Oscar), was working with him at the time of the accident. The operator of the CAT loader which was being used to load the K-Rail, Mike Taylor (Taylor) was also present at the time of the accident. Foreman Thompson was at the job site, some distance away. Thompson was aware of the K-Rail loading operation. Thompson explained to Fernandez his duties at the beginning of his shift, and checked back with Fernandez once or twice throughout the night. The loading was being conducted in an open area, which could be seen by others in the area, including Thompson. Fernandez's work shift had started at 9:00 or 10:00 p.m.

Fernandez and Oscar were in charge of rigging the K-Rails. Fernandez is an experienced K-Rail loader, who had previously loaded thousands of feet of K-Rail. It was the sixth and final K-Rail loaded onto the trailer which fell off and hit his foot. Fernandez was the only employee on the trailer immediately prior to the accident. Fernandez remembers pulling both pins from the sixth K-Rail, and then throwing them to Oscar. Fernandez does not remember which

pin he pulled first, the pin toward the front of the trailer, or the pin nearest the rear of the trailer. Fernandez remembers pulling the cable from the hole in the K-Rail nearest the front of the trailer, but cannot recall pulling the cable from the hole nearest the rear of the truck. Fernandez jumped off the left side of the trailer near the rear of the trailer. It was the usual practice of Fernandez to jump off the left side of a flatbed because of the hazards presented by traffic on the right side of the truck when working on highways. Fernandez estimated the height of the trailer to be somewhere between three and four feet.

Fernandez cannot remember if he or his brother Oscar signaled the loader operator, in effect telling the loader operator that he could then drive the loader in reverse, thus pulling the cables from the K-Rail, after jumping from the trailer. Fernandez does not know if the operator moved the loader before or after he jumped from the trailer. The truck driver remained in the truck cab or on the steps leading to the cab of his truck during the loading process. The trailer was parked on a level surface while being loaded. As Fernandez was walking away from the trailer the trailer had not moved. He then felt himself fall to the ground. He remembers trying to run after getting up from the ground. It was then Fernandez knew that something was wrong with his right foot.

Fernandez testified as to various safety training provided by Employer. In the past, while acting as a foreman, Fernandez conducted safety training meetings, one topic being K-Rail safety (Exhibit B). At the time of the accident, Employer did not have written procedures related to the loading of K-Rails.

Fernandez described two techniques which drivers use to tie down the load. Typically, the K-Rails are placed in two rows of three. One method involves the driver placing the chains over the top of each of three rails placed side-by-side on the bed of the flatbed. The ends of the chains are then secured to the sides of the flatbed trailer. The other method involves running chains through the holes in each of the three rails also placed side-by-side on the flatbed, again securing the ends of the chains to the flatbed. Securing the first rail as it was loaded would prevent subsequent K-Rail from being loaded because the chain securing the first rail would get in the way. The driver would have to enter the zone of danger every time to individually secure each rail during the loading process.

Weiss, who was the Associate Safety Engineer at the time of the accident, conducted the investigation. Exhibit 7 is letter Employer sent in response to the Division's document request. Item 5 on that document indicates that Fernandez is a foreman, but that on the night of the accident he was not acting as a foreman. Item 8 on that same document indicates that Employer does not have operating procedures in writing for the handling of K-Rail. Exhibit 8 is Employer's Post-Accident Investigation report. Exhibit 9 is Employer's Injury and Illness Prevention Program. Exhibit 10 is a diagram showing the measurements of a typical K-Rail.

On March 23, 2012, Weiss met Bob Bunting, Project Manager, at the accident site. At the site, Weiss testified that he observed a K-rail, similar to the one involved in the accident, and typical of the K-Rail described in Stipulation 3 above.

Weiss testified that on the day of the injury the K-Rail was displaced from the flatbed trailer. Exhibit E, The Division's Investigation Summary, indicates that the job foreman made the 911 call after the accident. Weiss indicated that Thompson was the foreman referred-to in that document. Weiss checked the box indicating "Constructive Management Knowledge" on the Documentation Worksheet found on page 6 of Exhibit D. Weiss believed that the violation was readily visible to the crew and Thompson. Weiss opined that the first piece of K-Rail unloaded onto the flatbed was unsecured against displacement. Weiss opined that during the entire loading process the possibility for displacement existed for each of the six K-Rails. Weiss testified that it was Employer's responsibility to select an appropriate method to abate the violation. The CAT loader was involved in the displacement of the sixth K-Rail loaded, which might have had a cable which got hung up on the K-Rail or something behind the K-Rail, which would have impeded the removal of the cable from the hole.

Weiss has never observed K-Rail being loaded onto and off of flatbed trailers. K-Rail is designed to be stable when placed on a road for its intended use; it is unlikely to fall over on its own without any impact. K-Rail is built to withstand the impact of vehicles hitting it.

Bob Bunting, Area Superintendent for Bay Cities, testified for Employer. Exhibit F is Employer's Daily Report, dated November 22, 2012, which reflects that the craft designation of Fernandez was "operator" on the crew of which Thompson was the foreman.

Bunting testified that the load is secured after all the K-Rail is loaded onto the trailer. Bunting explained that there is no way to secure the first piece of K-Rail due to the fact that chains or straps would have to be unsecured in order to load the second piece of K-Rail. Bunting has never seen it done that way, does not know anyone who does it that way, and is not familiar with any mechanisms which are used to secure that first piece of K-Rail. Bunting testified that other companies also secure their loads after all the K-Rail is loaded. Outside haulers provide most of the trucks. CJC Trucking provided the truck involved in the accident. Employer's foreman, in most instances, provides direction to the truck drivers. After the trailer is loaded, the driver pulls ahead 100 feet, and ties down the load. Each driver is responsible for securing and un-securing his own load.

Securing each rail as it is loaded would take more time. Bunting is not aware, in the road construction industry, of any way to load rail and tie it down at the same time. Bunting explained that, by using that method, the restraints

would be in the way of the placement of the next piece of rail. Bunting opined that the risk to workers on a freeway would increase if the rails were tied down one by one, as this method would increase the time employees were exposed to traffic. Employer has not considered having the driver tie down each individual piece of K-Rail as it is loaded. Other companies use the loading method used by Employer.

Exhibit 8 was prepared by Bunting. On that report Bunting concluded that the last piece of cable was not removed from the hole, and got hung up in that hole. Typically, a worker would give the operator of the loader a hand signal when it was time to back up. Bunting testified that loader operator Taylor told him that on the day of the accident he had been signaled that the pins had been removed. Bunting testified that this signal would have indicated to Taylor that both the pins and the cables had been removed from the rail.

Evidence about the classification and the penalty

Weiss issued a Cal/OSHA form 1BY to Employer, advising them of the Division's intent to file a Serious violation. Employee did not respond. Weiss issued one citation for a violation of §1593(f), classified as Serious, and characterized as accident-related.

The parties stipulated that the penalty associated with the citation was calculated in accordance with the Division's policies and procedures.

Findings and Reasons for Decision

- a) Although the evidence would otherwise support a prima facie case for the existence of a violation of §1593(f), Employer presented sufficient evidence to establish its "Logical Time" defense.**
- b) The citation is dismissed and the penalty is set aside.**

Section 1593(f), under "Haulage Vehicle Operation," provides the following:

Securing Loads. Loads on vehicles shall be secured against displacement.

In the citation, the Division alleges the following:

On November 23, 2011 at a worksite located at 1890 Parkway Blvd in West Sacramento, an employee of Bay Cities & 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.

The Division’s burden is to prove a violation, including the applicability of the safety order, by a preponderance of the evidence (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006).) To sustain a violation, the Division must also show that the employer exposed its employees to a hazard that the cited safety order was designed to protect. (*General Motors Corp.*, Cal/OSHA App. 77-573, Decision After Reconsideration (Aug. 9, 1978).)

To establish a violation of §1593(f) it was incumbent upon the Division to prove by a preponderance of the evidence that the K-Rail barrier on the flatbed trailer was not secured against displacement, and that Employer exposed its employee to the hazard for which §1593(f) was designed to protect.

The evidence would support a prima facie case for the existence of a violation of §1593(f): the evidence is clear that the K-Rails were not secured at the exact loading site. However, Employer presented sufficient evidence to establish its “logical time” defense.⁵

In *Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979), the Appeals Board ruled that, "the 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." Applying that rule, the Appeals Board granted the employer's appeal from a section 1621(a) citation [guardrails]. The Board found that it was not logical to require the employer to install railings around the perimeter of the floor until the floor had been decked out to the perimeter. Going out onto the exposed floor joists to install railings before the decking reached the perimeter posed a greater safety risk than would exist once the surface was solid. The Board also noted that employee exposure was minimized by allowing only one employee in the area to do the decking. The rule of this case is sometimes called the logical time defense.

⁵ The "logical time" defense is an affirmative defense in which employer bears the burden of proof. "The logical time defense is a Board created rule which provides that the 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. " (JSA Engineering, Inc., Cal/OSHA App. 00-1367, Decision After Reconsideration (Dec. 3, 2002) citing to Nicholson-Brown, Inc., Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).) This concept recognizes that employers can comply with the requirements only when the logical time has come, given the normal sequence of the construction or work activities, and that a reasonable amount of time is necessary for employers to achieve compliance and make the area safe.

More recently, in *Roland Associates Construction*, Cal/OSHA App. 90-668, Decision After Reconsideration (Jan. 6, 1992), the Appeals Board upheld an ALJ's dismissal of a section 1621(a) citation on the ground that the logical time had not arrived to re-erect railings taken down to enable two employees to attach a staircase to the edge of an upper deck. The railings were down "for only the few hours necessary to construct and install the permanent staircase." The two employees installing the staircase were the only ones exposed to the hazard of falling. The ALJ found that it could have been more hazardous for the employees to attempt to install the staircase with the railings up than with them down.

It was not logical to require the employer to secure each individual piece of K-Rail as it was being loaded on to the flatbed trailer. The ends of the chains are secured to the sides of the flatbed trailer. Securing the first rail with chains would interfere with the loading of the next rail. The truck driver, who is responsible for securing the K-Rails to the truck with chains, normally remains within the safety of his truck's cab during the loading process. Employer did not allow the truck driver in the loading area during the loading process because of the dangers inherent to the process. Securing each individual piece of rail would pose a greater safety risk for the truck driver as it would bring him into the zone of danger six times.

The loading and unloading of K-Rail is a fast-moving operation. While loading on a freeway the truck and trailer move forward as the rail is loaded one piece at a time until the six rails are on the truck. At that point the truck driver moves ahead and secures the six rails. The driver is at that point exposed to the zone of danger one time. The same approach would apply in a K-Rail storage facility, as in the case in the instant matter. After the six K-Rails were loaded onto the truck, the driver would pull forward, park, then leave his cab to work on the bed with the chains and thereby enter the zone of danger one time, rather than the six times which would be required if the driver had to secure each rail as it was loaded onto the flatbed. As in *Nicholson-Brown, supra*, employee exposure is minimized, in these given circumstances, by having the truck pull the load ahead to secure it.

It was never Employer's intention to not secure the load; it was the employer's intent to secure the load after all six K-Rails were loaded on to the truck, away from the loading area in the area designated for the truck driver to secure his load. As in *Roland Associates, supra*, it would be more hazardous to secure each K-Rail at the loading point than at the designated load securing area. In the instant matter, the requirements of § 1593(f) did not begin to apply until the necessary and logical time had arrived for Employer to make provisions to correct the violation and abate the hazard. That logical time, given this set of facts, would have been after the truck driver had pulled his load to the designated load securing area.

In its Post-Hearing Brief the Division references *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001), which held that "... the words 'secures against displacement' require that the load be safe from the type of movement that may have occurred in this case ab initio."⁶ The facts as set forth in that matter are very different from the facts in the instant matter. In *Obayashi, supra*, the citation was issued because an unsecured load fell from a CAT front loader.

The Division also references *Traylor Bros. Inc./Frontier Kemper Construction Inc., Joint Venture* Cal/OSHA App. 98-2345, Decision After Reconsideration (June 12, 2002), in which the Board noted that "failure to secure a load is the necessary element to establish a violation of section 1593(f)." In *Traylor Bros, supra*, the citation was issued because an unsecured stack of pallets fell as they were being set down by a CAT front loader. In that matter the pallets being transported were not secured to the loader.

In both *Obayashi, supra*, and *Traylor Bros., supra*, neither load was secured to the CAT loader. In the instant matter the K-Rail was secured as it was moved to the flatbed. K-Rail, by its very nature, is stable when set on a flat surface. And the evidence is that it was secured by cables attached to a loader when first placed on the flatbed. The holes in the K-Rail which were used in the loading process were to be the same holes which the driver would have threaded the chains through to secure all six rails to the trailer. It was during this transition time that one securing method, for loading the trailer, was to be substituted for another, for transportation. The end of one cable snagged the K-Rail, an action which, by all indications, was an aberration. It is not clear whether any other type of securing method would have prevented the rail from falling from the trailer when the loader jerked it from its resting place.

A regulation should be construed with reference to the entire regulatory system of which it forms a part, in such a way that harmony may be achieved among the parts. *People ex rel Younger v. Superior Court* (1976) 16 Cal.3d 30, 41. The various parts of a regulatory enactment must be harmonized by considering the particular clause or section in the context of the regulatory framework as a whole, and significance should be given, if possible, to every word, phrase, sentence, and part of the regulatory enactment. *Moyer v. Workmen's Comp. Appeals Board* (1973) 10 Cal.3d 222, 230.

Those principals apply here. Another safety order, section 3704 provides that "all loads shall be secured against dangerous displacement either by proper piling or other securing means." That section, on its face, clearly provides that a load may be secured by proper piling. Section 1593(f), when harmonized with section 3704, allows employers to utilize "proper piling" as an effective means to secure a load. The K-Rails, each weighing six to eight thousand pounds, were securely piled on the flatbed one at a time, one high

⁶ Latin, meaning "from the beginning, at the onset, from the instant of the act."

and three across on the front of the flatbed, and three across on the back of the flatbed. After the K-Rails were securely loaded onto the flatbed, the truck driver would have chained the load to the trailer to make them even more secure for transport on the roads and highways.

Decision

The evidence supports a finding that the logical time to secure the load against displacement had not yet arrived. Employer presented sufficient evidence to support its logical time defense. The citation is therefore dismissed and the penalty is set aside.

Dated: March 6, 2014

KEVIN J. REEDY
Administrative Law Judge

