

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

In the Matter of the Appeal
of:

PAR ELECTRICAL CONTRACTORS INC.
525 Corporate Drive
Escondido, CA 92029

Employer

DOCKET 14-R3D1-0310

DECISION

Statement of the Case

PAR Electrical Contractors Inc. (Employer) is a construction contractor. Beginning December 10, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Thurman Randall Johns (Johns), conducted an inspection at a place of employment maintained by Employer at El Toro Road between Summerwood Way and Destry Lane, Lake Forest, California (the site). On January 7, 2014, the Division cited Employer for a single violation of California Code of Regulations, title 8, for failing to supply a washing station outside of and not attached to a non-water carriage toilet.¹

Employer filed a timely appeal contesting the existence of the alleged violation, and the reasonableness of the proposed penalty. Employer also alleged the logical time affirmative defense.

This matter came regularly for hearing before Howard I. Chernin, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on May 28, 2015. Robert B. Humphreys, Attorney, of Akins Gump, represented Employer. Richard Fazlollahi, Division Manager, represented the Division. The parties presented oral and documentary evidence.

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

The Alleged Violation Description (AVD) was amended at the hearing to correct the first inspection date from December 12, 2013 (12/12/2013) to December 10, 2013 (12/10/2013), to correctly reflect the facts of the alleged violation, and was amended to correct the spelling of the word “potable” to “portable”, to correct a typographical error.

The matter was submitted on June 11, 2015. The ALJ extended the submission date to July 11, 2015, on his own motion.

Issues

1. Did Employer provide a washing station compliant with the requirements of section 1527, subdivision (a)(1), either inside or outside the portable toilet that it provided at the site on December 10, 2013?
2. Did the Division propose a reasonable penalty for Employer’s alleged violation of section 1527, subdivision (a)(1)?

Findings of Fact

1. On December 10, 2013, Employer was performing work to enlarge three underground utility vaults at the site, which comprised a work area alongside El Toro Road between Summerwood Way and Destry Lane, Lake Forest, California. The vaults are small boxes containing cables and equipment.
2. On December 10, 2013, Employer provided a non-water carriage toilet (portable toilet) at the site near one of the vaults.
3. Approximately 3 of Employer’s employees were working at the site when Johns conducted his inspection on December 10, 2013.
4. Employer did not make water, soap and towels readily available for hand-washing either inside or outside the portable toilet on December 10, 2013.
5. On December 10, 2013, Employer provided its employees with access to trucks that they could use to drive to nearby independent, privately owned businesses to use their toilets and washing facilities.

Analysis

- 1. Did Employer provide a washing station compliant with the requirements of section 1527, subdivision (a)(1), either inside or outside the portable toilet that it provided at the site on December 10, 2013?**

Section 1527, subdivision (a)(1) states in relevant part:

(a) Washing Facilities.

(1) General. Washing facilities shall be provided as follows: A minimum of one washing station

shall be provided for each twenty employees or fraction thereof. . . [and] shall at all times:

(F) When provided in association with a nonwater carriage toilet facility in accordance with Section 1526(c),

2. Be located outside of the toilet facility and not attached to it.

Exception to subsection (a)(1)(F)(2.): Where there are less than 5 employees, and only one toilet facility is provided, the required washing facility may be located inside of the toilet facility.

Exception to subsection (a)(1): Mobile crews having readily available transportation to a nearby toilet and washing facility.

Section 1504 defines “readily available” as “in a location with no obstacles to prevent immediate acquisition for use.” In *Davey Tree Surgery Company*, Cal/OHSA App. 00-032, Decision After Reconsideration (June 14, 2002), the Board held that basic personal hygiene standards require that hand-washing facilities be used in conjunction with toilet facilities, thus requiring the hand-washing facility to be close enough to the toilet for an employee to wash their hands before returning to work to minimize transmission of disease to other employees.

In the amended citation, the Division alleges in relevant part:

When inspected on 12/10/2013, employer failed to have provided a handwashing facility available for its employees using a portable toilet at the construction site. When inspected again on 1/2/2014, there were 7 employees working and the portable toilet facility was found to have its hand wash facility inside the toilet, instead of outside as required by this standard.²

The Division has the burden of proving every element of its case, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Cambrío Manufacturing Co.*, Cal/OSHA App. 84-923, Decision

² As discussed below, the undersigned ALJ found good cause to affirm the citation based on evidence of a violation on December 10, 2013. Accordingly, this decision purposefully omits discussion of the evidence adduced at hearing regarding the alleged violation on January 2, 2014.

After Reconsideration (Dec. 31, 1986); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) To establish a violation on December 10, 2013, the Division must prove that 1) Employer provided a portable toilet; and, 2) Employer failed to provide a compliant washing station outside of and unattached to the portable toilet.

Johns testified that when he inspected the site on December 10, 2013, there were approximately 3 employees present. He observed a portable toilet, but there was no hand-washing station in or around it. Employer's foreperson, Jeffrey Barrows ("Barrows"), conceded there was no hand-washing station inside the portable toilet. Instead, Barrows testified that water, soap and single-use towels were available on site in the supervisor truck, but he admitted that he did not show Johns the supplies or mention them to Johns during the inspection. Employer also offered no further evidence or corroborating testimony at hearing to establish that it made hand-washing supplies readily available by locating them in a truck at the site.³ Accordingly, the Division met its burden⁴ of establishing a violation on December 10, 2013.⁵

³ Exhibit 3, which depicts several trucks in proximity to a portable toilet, is not sufficient evidence that Employer complied with the safety order. For one thing, Barrows stated that the location depicted in Exhibit 3 was approximately one-half mile away from what Johns observed on December 10, 2013. Furthermore, section 412 of the Evidence Code states: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Although the Appeals Board is not required to adhere to the Evidence Code in all respects, Board decisions have practiced caution in weighing the credibility of particularly weak evidence. (See, e.g. *C.C. Meyers, Inc.*, Cal/OSHA App. 94-1862, Decision After Reconsideration (Nov. 25, 1998).) Here, Barrows' testimony is deemed weak.

⁴ The purpose of the Occupational Safety and Health Act of 1973 is to encourage employers to "maintain safe and healthful working conditions". (Cal. Lab. Code, § 6300.) Employer did not provide evidence of how the water, soap and towels were allegedly stored, dispensed, or accessed other than Barrows' testimony that they were in a nearby truck. His testimony, therefore, was insufficient to establish compliance with the safety order.

⁵ Employer urges in its closing brief that Johns' statement to Barrows that a citation would not issue for the alleged December 10, 2013 violation if Employer immediately abated the violation, constitutes inadmissible settlement discussions under Evidence Code section 1152. Section 1152 states in relevant part:

- (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

Even if the undersigned ALJ were to agree that Employer preserved its objection, raised for the first time in its closing brief, and that the objection should be sustained, Employer's purported agreement to abate the condition in order to not receive a citation does not affect the determination of Employer's liability in the instant matter, because the Division still proved by other preponderant evidence that a violation existed on December 10, 2013.

Employer further argued in its closing brief that the Division "should be required to live up to its end of the bargain and not base its citation on conduct that occurred on December 10." Employer offered no

Even though the Division met its burden of proving a violation, Employer still had the opportunity at hearing to avoid liability by showing that it was entitled to application of one or more exceptions to the cited safety order. An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden of raising and proving at the hearing. (See *Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (June 21, 1982); *Roof Structures, Inc.*, Cal/OSHA App. 81-357, Decision After Reconsideration (Feb. 24, 1983); and *The Koll Company*, Cal/OSHA App. 79-1147, Decision After Reconsideration (May 27, 1983).) An exception, however, must be read narrowly; a reading of an exception that “consumes the rule” is an absurd interpretation and is disfavored under rules of statutory construction. (See *Thyssenkrupp Elevator Corp.*, Cal/OSHA App. 11-2217, Denial of Petition of Reconsideration (Mar. 11, 2013).) One exception to section 1527, subdivision (a)(1) can be proven by preponderant evidence that 1) less than 5 employees were present; 2) only one toilet was provided; and, 3) Employer provided a hand-washing inside the toilet.⁶

Employer did not meet its burden of establishing the “less than 5 employees” exception to the alleged December 10, 2013 violation. The evidence at hearing established that less than 5 employees were present. Nonetheless, the first exception is not applicable because Employer conceded it did not provide a hand-washing facility inside the portable toilet at the time of inspection. Thus, Employer failed to meet its burden as to the first exception.

The safety order also provides an exception to the requirement that an employer provide hand-washing stations if the employer employs a mobile crew. To meet its burden, Employer must prove by preponderant evidence that the subject crew was 1) a mobile crew; 2) having readily available transportation; 3) to a nearby toilet and washing facility. “A mobile crew is a group of workers who do not have regularly assigned work sites or who constantly are required to move between multiple work sites during the

evidence that it detrimentally relied on Johns’ statement, nor would affirming such a “bargain” further the clear intent of the Legislature to promote a safe and healthy workplace. Furthermore, it is well established that the Division proposes penalties and the Appeals Board assesses them. (See Labor Code Section 6600 et. seq., and *Capri Manufacturing Co.*, OSHAB 83-869, Decision After Reconsideration (May 17, 1985).) Thus, it is within the province of the Board to determine whether a valid, enforceable settlement was entered into by the parties on December 10, 2013. The undersigned ALJ declines to so find based on the record.

⁶ Employer also raised the “logical time” affirmative defense on appeal, but waived the defense by not presenting any relevant evidence at hearing. Regardless, the defense would not have applied to the present situation. “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.” (*Bay Cities Paving & Grading, Inc.*, Cal/OSHA App. 12-1665, Denial of Petition for Reconsideration (May 16, 2014).) There are no situations that come to mind where requiring an employer to provide a compliant hand-washing station in conjunction with a portable toilet exposes the employee to greater danger, nor did Employer offer any such situations at hearing or in its closing brief.

course of their work day. The fact that a work site may be temporary in nature is not sufficient, standing alone, to establish that a mobile crew existed.” (*Egger & Ghio Company, Inc.*, Cal/OSHA App. 77-281, Decision After Reconsideration (May 1, 1978).) Although the safety order does not define “nearby”, the term is defined in *Webster’s New World Dictionary of American English, Third College Edition* (1988), p. 905, column 1, as “near; close at hand”, and “near” is defined as “close in distance or time; not far”.

Employer did not meet its burden of proof with regard to the mobile crew exception. Barrows testified that his crew was based out of Santa Ana, and that the site was a temporary work location. However, that is insufficient on its own to find that the mobile crew exception applies, because there was no evidence that the crew was working other jobs or other sites during the period of time when work was being performed at the El Toro Road worksite. (See *Egger & Ghio Company, Inc.*, Cal/OSHA App. 77-281, supra.) More importantly, however, Employer failed to establish that its employees had access to nearby toilet and washing facilities. Although Barrows testified that each crew had one or more trucks available on site for employees to drive to local businesses to use toilet and hand-washing facilities, Employer offered no evidence that these private businesses were either controlled by Employer, or in the alternative, obligated by law or by contract to provide toilet and hand-washing facilities to Employer’s employees. If an employer could be excused from compliance with the safety order by merely providing a vehicle at a worksite, the exception to the safety order would quickly consume the rule, which is an illogical result inconsistent with the statutory and regulatory scheme.⁷ (See e.g. *Bendix Forrest Products v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465 [holding that the word “provide” means the employer must pay for the item]; see also *A C Transit*, Cal/OSHA App. 08-4611, Denial of Petition for Reconsideration (June 10, 2011) [Board refused to find readily available water where employer merely provided list of nearby businesses and drinking fountains where water was allegedly available, to employee bus driver].) Accordingly, Employer failed to meet its burden of proving entitlement to either exception to section 1527.

Therefore, for the foregoing reasons, the Division established a violation of section 1527, and Employer failed to establish entitlement to either of the recognized exceptions.

⁷ Myriad examples demonstrate the illogic of an expansive reading of the mobile crew exception. A few that immediately come to mind are: 1) Many businesses provide toilet and hand-washing facilities only to their customers. Employer’s employees would thus have to spend money in order to use those business’ toilets, which would be punitive, or they would need to commit trespass, which potentially exposes the employees to criminal liability; 2) A nearby business may maintain toilet or hand-washing facilities that violate a safety order. Requiring Employer’s employees to utilize such facilities would not promote a safe and healthy workplace; 3) Forcing nearby private businesses to bear the burden of providing toilet and hand-washing facilities for another employer’s employees is unduly burdensome on private businesses and individuals who are neither directing, nor directly benefitting from, the employees’ work.

2. Did the Division propose a reasonable penalty for Employer's alleged violation of section 1527, subdivision (a)(1)?

“Although penalties established pursuant to the Director's Regulations have been labeled presumptively reasonable by the Appeals Board, the threshold burden is still on the Division to establish that its penalties were calculated in accordance with those regulations. If the Division fails to meet its evidentiary burden with regard to any adjustment factor, the Board will give Employer maximum credit for that factor.” (*BLF, Inc.*, Cal/OSHA App. 03-4428-4429, Decision After Reconsideration (January 21, 2011), citing *RII Plastering, Inc., dba Quality Plastering Company*, Cal/OSHA App 00-4250, Decision After Reconsideration (Oct. 21, 2003) and *Plantel Nurseries*, Cal/OSHA App 01-2356, Decision After Reconsideration (Jan. 8, 2004).) Section 336, subdivision (b), provides that an employer who violates any occupational safety and health standard, where such violation is deemed a General violation, may be assessed a penalty of up to \$7,000 for each violation. The base penalty is determined by evaluating Severity, and the resulting base penalty is then subjected to an adjustment for Extent and Likelihood.⁸ (*Id.*) The resulting figure is considered the “gravity-based penalty”. (*Id.*) The gravity-based penalty may be adjusted further based on the Size of the business, the employer's Good Faith, and the employer's history of previous violations/compliance. (Cal. Code Regs., tit. 8, §§ 335, subds. (b) – (d), 336, subd. (d).) The resulting adjusted figure is called the “Adjusted Penalty”, which is then reduced by 50% on the presumption that the employer will abate the violation by the date imposed by the Division. (Cal. Code Regs., tit. 8, § 336, subd. (e).)

Johns testified that he determined a gravity-based penalty of \$1,000 by finding low severity, high extent due to lack of any compliant hand-washing facilities on site at the time of inspection, and low likelihood due to low risk of injury or hospitalization. (See Exhibit 4.) He further testified that Employer immediately abated the violation (see Exhibit C), warranting a 15% (fair) adjustment for Good Faith. Johns also found Employer had a good History of Compliance, warranting a 10% adjustment, but he determined that Employer's did not qualify for a Size adjustment because Employer employed over 100 employees. Accordingly, Johns testified he arrived at an adjusted penalty of \$750, after which he applied the 50% abatement credit, arriving at a proposed penalty of \$375.⁹ Johns' penalty calculation is consistent with the Board's regulations and the adjustments applied by Johns are supported by the facts adduced at hearing.¹⁰

⁸ Extent and Likelihood are determined pursuant to section 335, subdivision (a).

⁹ Johns' testimony was consistent with the calculations in Exhibit 4, Division's C-10 Proposed Penalty Worksheet.

¹⁰ Employer failed to rebut Johns' calculations.

Conclusion

The evidence supports a finding that Employer violated section 1527, subdivision (a)(1) on December 10, 2013, by failing to provide a compliant hand-washing station outside a portable toilet it provided at the site. Furthermore, Employer did not prove either exception to section 1527 by a preponderance of the evidence. A penalty of \$375 is assessed for Citation 1.

Order

It is hereby ordered that the citation is established as amended and the penalty is assessed as indicated above and as set forth in the attached Summary Table. Total penalty is assessed in the amount of \$375.

Dated: August 7, 2015

HOWARD I. CHERNIN
Administrative Law Judge

HIC:ml

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**Name: PAR ELECTRICAL CONTRACTORS INC.
Docket 14-R3D1-0310**

Date of Hearing: May 28, 2015

Division's Exhibits

Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	CV of Thurman R Johns	Yes
3	Photograph of Site taken 1/2/14	Yes
4	C-10 Proposed Penalty Worksheet	Yes
5	Cal-OSHA Reporter (4 pp.)	No

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Satellite Photograph of Work Sites	Yes
B	Satellite Photograph of Lake Forest	Yes
C	Washing Facility Invoice	Yes

Witnesses Testifying at Hearing

Thurman Randall Johns
Jeffrey Barrows

CERTIFICATION OF RECORDING

*I, **HOWARD I. CHERNIN**, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.*

HOWARD I. CHERNIN

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

PAR ELECTRICAL CONTRACTORS, INC.
Docket 14-R3D1-0310

Abbreviation Key: Reg=Regulatory
 G=General W=Willful
 S=Serious R=Repeat
 Er=Employer DOSH=Division
 AR-Accident Related

IMIS No. 317386134

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R3D1-0310	1	1	1527(a)(1)	G	AVD amended as described in the Decision. Citation and penalty affirmed by the ALJ.	X		\$375	\$375	\$375
								\$375	\$375	\$375

\$375

NOTE: *Please do not send payments to the Appeals Board.* **All penalty payments should be made to:**
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

(INCLUDES APPEALED CITATIONS ONLY)

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

ALJ: HIC/ml
 POS: 08/07/15

