BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: **DYNAMIC CONSTRUCTION SERVICES, INC.** 3020 Old Ranch Parkway, Suite 300 Seal Beach, CA 90740 Employer	Docket No. 14-R4D1-1471 and 1472 Inspection No. 1005890 **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 Dynamic Construction Services, Inc. (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Employer performs construction related services. On October 24, 2014, the Division commenced an inspection, through Associate Safety Engineer Christian Nguyen (Nguyen), at Employer's worksite in Century City, California. The worksite consisted of an excavation.

On April 1, 2015, the Division cited Employer with three violations of California Code of Regulations, title 8[1], and proposed civil penalties. Employer appealed the citations and administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. Following the hearing, only one citation remains at issue.

Through its Petition for Reconsideration, Employer challenges the ALJ's affirmance of Citation 2, Item 1 asserting a serious violation of section 1541.1, subdivision (a)(1) [failure to protect employees in an excavation with an adequate protective system]. The Board has taken Employer's Petition for Reconsideration under submission.

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

ISSUE

1. Did the evidence establish that employees of Employer were exposed to the violation asserted in Citation 2, Item 1?

FINDINGS OF FACT

1. The evidence demonstrates that employees of Employer were exposed to the violation asserted in Citation 2, Item 1, which asserts a violation of section 1541.1, subdivision (a)(1) [failure to protect employees in an excavation with an adequate protective system].

DECISION AFTER RECONSIDERATION

The Board has independently reviewed and considered the entire record in this matter, including the arguments presented in the Petition for Reconsideration. In making this decision, the Board has taken no new evidence.

1. **Did the evidence establish that employees of Employer were exposed to the violation asserted in Citation 2, Item 1?**

Citation 2, Item 1 asserts a violation of section 1541.1, subdivision (a)(1). That section provides the following:

> (a) Protection of employees in excavations.
> (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with Section 1541.1(b) or (c) except when:
> (A) Excavations are made entirely in stable rock; or
> (B) Excavations are less than 5 feet in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

In the citation, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on October 24, 2014, employees working inside an excavation were not protected from cave-ins by an adequate protective system. The employer or his designee did not construct the hydraulic shoring system in accordance with the manufacturer's tabulated data including all

> specifications, recommendations, and limitations issued or made by the manufacturer.

Within the Decision, the ALJ affirmed this citation, and assessed a penalty of $8,100. The citation was affirmed because Employer failed to install excavation shoring per the manufacturer's specifications—Employer improperly installed some of the rails horizontally rather than vertically, which was contrary to the manufacturer's recommendations and tabulated data. Within its Petition, Employer does not dispute the ALJ's findings that there was a failure to comply with the cited standard. Consequently, we accept the ALJ's findings on that point. (Lab. Code § 6618.[2]) Rather, Employer contends the Division did not meet its burden of proof to show its employees were exposed to the hazard addressed by the citation. The sole issue for review is whether Employer's employees were exposed to the violation of the cited standard.

The Division bears the burden of proving employee exposure to a violative condition addressed by a safety order by a preponderance of the evidence. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003) [citations omitted]; see also *Cambro Manufacturing Co.,* Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).) "'[P]reponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Ibid.,* citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, review denied.) In evaluating whether the Division met its burden of proof, we first review Board precedent pertaining to exposure. We also consider Federal Commission decisions regarding exposure since the Board's current exposure analysis is informed by those Federal decisions. (See *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).)[3]

The Division may establish exposure in one of two ways. First, the Division may demonstrate employee exposure by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).) Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. (*Gilles*

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[2] Labor Code section 6618 states, "The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration."

[3] The Board has acknowledged the similarity between its role and the Federal Commission and in its decisions occasionally turns to Federal Commission decisions and related Federal authority for guidance, even if it is not required to do so. (See, e.g., *McCarthy Building Co.,* Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016).) This is particularly true in the case of employee exposure. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).)

& Cotting, Inc., 3 O.S.H. Cas (BNA) 2002, 1975-76 O.S.H. Dec. (CCH) ¶ 20448, 1976 OSAHRC LEXIS 705 (Feb. 20, 1976) fn 4.)

Alternatively, "the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability[4] that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger." (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).) Stated another way, employee exposure may be established by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger. (*River Ranch Fresh Foods-Salinas, Inc.* Cal/OSHA App. 01-1977, Decision After Reconsideration (July 21, 2003); *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003) [citations omitted].)[5] Under this "access" exposure analysis, the Division may establish exposure by showing that it was reasonably predictable that during the course of their normal work duties employees "might be" in the zone of danger. (*Field & Associates*, Inc., 19 O.S.H. Cas (BNA) 1379, 2001 O.S.H. Dec. (CCH) ¶ 32,330, 2001 OSAHRC LEXIS 19 (April 17, 2001).) "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003) [citations omitted].) The scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue. (*Fabricated Metal Products, Inc.* 18 O.S.H. Cas (BNA) 1072, 1997 OSAHRC LEXIS 118 (Nov. 7, 1997).)

Applying the foregoing legal standards, we conclude that the Division demonstrated access to the zone of danger or hazard based on evidence that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger.

Nguyen, the Division Investigator, testified he opened an inspection of Employer's worksite on October 24, 2014. At the worksite, he spoke to Employer's representatives Peter Wiesner and Michael Nixon. During the inspection, Nguyen said he saw employees working inside a trench and also

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[4] "Reasonable predictability is an objective standard and is *not* analyzed from a subjective point of view…." (*River Ranch Fresh Foods-Salinas, Inc.,* Cal/OSHA App. 01-1977, Decision After Reconsideration (July 21, 2003), citing *Phoenix Roofing, Inc.,* 17 OSHC 1076, 1079, 1993-95 OSHD ¶ 30,699 (1995).)

[5] We observe that the public policy rationale for this latter "access" test have been thoroughly discussed in cases such as *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003) and *Gilles & Cotting, Inc.,* 3 OSH Cas (BNA) 2002 1975-76 O.S.H. Dec. (CCH) P 20448 (1976). We need not, and do not, restate the sound rationale in support of the access standard here.

saw a backhoe moving along the trench. Nguyen also took pictures during his site visit, which were admitted into evidence. Some of the pictures depict workers inside, and near to, the excavation. (See, e.g., Exhibits 9-1 and 9-10.) For instance, Exhibit 9-1 depicts persons standing atop the trench wall near the improperly placed horizontal rails. Several of the pictures also depict ladders placed in various areas of the trench, including near the improperly placed horizontal rails. (See Exhibits 9-1, 9-4, 9-5, 9-6, 9-7, 9-10, 9-11, and 9-16.)

Employer argues Nguyen's testimony was insufficient to demonstrate exposure. For instance, Employer contends "The Division did not assert Petitioner was the only employer at the site with employees working in the excavation"; "The Division did not state whether other employers may have had employees working in the excavation"; and "The Division did not identify any particular work to be conducted by employees of other employers in the excavation…." (Petition pgs. 7-8.) However, Employer's arguments are not persuasive.

First, the record only substantively discusses one employer at the worksite. Nguyen identified Dynamic Construction as being at the worksite. No other Employers were elucidated upon in the record. While Nguyen did not specifically identify the workers he observed in the trench by name, he referred to these workers as employees. Because Nguyen did not substantively discuss or mention any other employers at this worksite other than Employer, we can logically conclude that the "employees" Nguyen referred to were in fact the employees of Employer. In reaching this holding, we are mindful that Employer made no attempt to contradict the Division's evidentiary showing on exposure and "[a]n administrative board must accept as true the intended meaning of uncontradicted and unimpeached evidence." (*Martori Bros. Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 728; see also, e.g., *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal. 2d 408, 413; *Lamb v. Workmen's Comp. Appeals Bd.,* (1974) 11 Cal. 3d 274, 283.)

We also find it reasonably predictable that Employer's employees have been, are, or will be in the zone of danger created by the improperly shored excavation. The safety order is designed to prevent cave-ins and the zone of danger is the area surrounding the improperly-shored portions of the excavation. Nguyen saw employees within the excavation, demonstrating that the employees had access to the excavation and that they performed work in the excavation. He also took pictures showing ladders descending into the excavation. Some of the ladders were placed in relatively-close proximity to the improper horizontally installed rails. (See Exhibits 9-1, 9-5, 9-6, 9-7, and 9-16.) It is reasonably predictable that the employees have used, or will be using, those ladders for access and egress into the excavation. Upon use of those

ladders they would enter into the zone of danger presented by the improperly-shored walls.[6] We decline to find that the placement of the ladders was idle.

Finally, Employer argues that the access standard found in *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003) (*Benicia Foundry*) is no longer controlling authority. Employer claims it has been superseded by *Ja Con Construction Systems, Inc. dba Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (March 27, 2006) (*Ja Con Construction*). Employer is mistaken.

Ja Con Construction was not an effort to replace or supersede the "access" test found in *Benicia Foundry*. Rather, it was an effort to ensure that the "reasonably predictable" standard within the "access" test was appropriately understood, applied, and given meaning. Reasonable predictability requires more than a mere hypothetical possibility of exposure. As stated by the Federal Commission, we "emphasize that … the inquiry is not simply into whether exposure is theoretically possible." (*Fabricated Metal Products, Inc.* 18 O.S.H. Cas (BNA) 1072, 1997 OSAHRC LEXIS 118 (Nov. 7, 1997).) The mere fact that exposure is not impossible does not itself prove exposure. (*Rockwell International Corporation*, 9 O.S.H. Cas. (BNA) 1092, 1980 O.S.H. Dec. (CCH) ¶ 24979, 1980 OSAHRC (Nov. 28, 1980)—stating, "Whether the point of operation exposes an employee to injury must be determined based on the manner in which the machine functions and how it is operated by the employees.") *Ja Con Construction* merely reiterated that the reasonable predictability standard required some consideration of the "likelihood" of employee access to make sure that exposure determinations were not made solely on tenuous theoretical or hypothetical possibilities. (*Ja Con Construction Systems, Inc. dba Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (March 27, 2006).) "Reasonable predictability" requires consideration of such things as "the nature of the work, the work activities required, and the routes of arrival and departure." (*Benicia Foundry & Iron*

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[6] There is also further evidence in the record bolstering the Board's conclusions that it was Employer's employees that were observed by Nguyen in the trench at the worksite. While the bulk of this evidence is hearsay (with the exception of the Inspection Report, which is an official record), the hearsay evidence is admissible to supplement and explain other evidence. (See section 376.2.) First, we observe that the contents of the Inspection Report (Exhibit A) and the training certificates (Exhibits B, C, and D) lend support to the conclusion that it was Employer's employees that were observed within the trench. Nguyen testified that one page of the Inspection Report was prepared by Mr. Everest, who was another Division Investigator that assisted in the inspection. Nguyen said he instructed Mr. Everest to get the names of the persons in the trench, which is what appears on one of the identified pages of the report. When the names of the persons interviewed by Mr. Everest are compared to Employer's training record certificates (Exhibits B, C, and D), it shows that at least some of the persons Mr. Everest interviewed were employees of Employer. Next, further evidence also supports the conclusion that Employer installed the shoring. Nguyen testified that Employer's personnel told him that they intended to protect employees by installing shoring in compliance with manufacturers' tabulated data. This testimony indicates that it was Employer and its employees that installed the shoring. Pages 2 through 3 of the Inspection Report also include indications that Employer's employees were digging the excavation and installing the shoring.

Works, Inc., Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003) [citations omitted].) In short, *Ja Con Construction* was an effort to give further meaning to the "reasonable predictability" "access" standard, and to avoid a misreading, not to supplant it.[7]

The evidence discussed herein, including Nyuyen's observations and photographs, sufficiently demonstrates that exposure was based on more than mere theoretical or hypothetical possibilities, distinguishing this matter from *Ja Con Construction.*

DECISION

The ALJ's Decision is affirmed for the reasons stated herein.

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

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[7] However, to the extent that any language in *Ja Con Construction, supra* or any subsequent decisions, can be construed as supplanting *Benicia Foundry's, supra* "reasonably predictable" "access" test with an alternative standard, it is specifically disapproved.