

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

In the Matter of the Appeal of:

**LOS ANGELES ENGINEERING INC
633 N. BARRANCA AVENUE
COVINA, CA 91723**

Employer

Inspection No.
314864661

DECISION

Statement of the Case

Los Angeles Engineering, Inc. (Los Angeles Engineering or Employer), provides construction services including pipe installation. On March 14, 2013, the Division of Occupational Safety and Health (the Division), through associate safety engineers Frederick Porter (Porter) and Kevin Chu (Chu), commenced an accident investigation of a work site located at 200 Temescal Canyon Road, Los Angeles, California (the job site).

On September 13, 2013, the Division cited Employer, alleging seven violations of California Code of Regulations, title 8¹: failure to train employees regarding heat illness prevention; four instances of failure to effectively implement its Injury and Illness Prevention Program (IIPP); failure to perform inspections of excavations and protective systems; and failure to protect employees in excavations from cave-ins.

Employer filed timely appeals of the citations. Employer disputes the existence of the violations, the classifications of the citations, and the reasonableness of the penalties. Additionally, Employer asserted a series of affirmative defenses to each citation.² The appeal was stayed during the pendency of criminal proceedings against Los Angeles Engineering.

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board. The hearing was conducted on November 29, 2022, and January 4, 2023, from West Covina, California, with the parties and witnesses appearing remotely via the Zoom video platform. Kevin D. Bland, attorney with Ogletree,

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

² Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Deakins, Nash, Smoak & Stewart, P.C., represented Los Angeles Engineering. Sandra Hitt, Staff Counsel, represented the Division. The matter was submitted on March 26, 2024.

Issues

1. Did Employer train employees regarding heat illness prevention?
2. Did Employer implement its IIPP?
3. Did Employer fail to perform required inspections of excavations and protective systems?
4. Did Employer protect each employee in an excavation from cave-ins?
5. Had the logical time arrived for protecting employees from cave-ins?
6. Did independent employee action cause the failure to protect employees from cave-ins?
7. Did the Division establish a rebuttable presumption of a Serious violation for Citation 2, Citation 3, or Citation 4?
8. Did Employer rebut the presumptions of Serious violations for Citation 2, Citation 3, or Citation 4?
9. Was the failure to protect employees from cave-ins a cause of a serious injury?
10. Was the failure to protect employees from cave-ins properly classified as Willful?
11. Were the proposed penalties calculated in accordance with the penalty-setting regulations?

Findings of Fact

1. Los Angeles Engineering has the following IIPP procedure: “Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.”
2. Michael Bangs (Bangs) was the foreman of the crew.

3. The trench shoring had not been fully installed in the excavation.
4. The partial installation of the trench shoring did not protect employees inside the excavation from the hazards of a cave-in.
5. The installed portion of the trench shoring was not installed in accordance with the manufacturer's tabulated data.
6. Bangs was aware of a cave-in prior to the crew's lunch break.
7. Bangs did not inspect the excavation after the first cave-in.
8. Bangs directed Gilbert Vargas (Vargas) and Arturo Guillen (Guillen) to reenter the excavation after the crew's lunch break.
9. Bangs did not restrict Vargas and Guillen to the area of the partially-installed trench shoring.
10. Vargas suffered fatal injuries as a result of the second cave-in.
11. Guillen was hospitalized for three days as a result of the second cave-in.
12. The failure to provide an adequate protective system was a cause of Vargas's fatal injuries.
13. The failure to remove Vargas from the excavation was a cause of his fatal injuries.
14. The failure to provide an adequate protective system was a cause of Guillen's hospitalization.
15. The failure to remove Guillen from the excavation was a cause of his hospitalization.
16. Los Angeles Engineering pled guilty to a felony violation of an occupational safety and health order where the violation caused the death of an employee.
17. Los Angeles Engineering was convicted of a felony violation of an occupational safety and health order where the violation caused the death of an employee.

18. Los Angeles Engineering did not train Bangs on its IIPP.
19. Los Angeles Engineering did not discipline Bangs upon discovering that he did not remove employees from the excavation after the first cave-in.
20. The proposed penalties were calculated in accordance with the penalty-setting regulations.

Analysis

1. Did Employer train employees regarding heat illness prevention?

At the time of the inspection, section 3395, subdivision (f)(1), provided for heat illness prevention training:

Employee training. Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness:

- (A) The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment.
- (B) The employer's procedures for complying with the requirements of this standard.
- (C) The importance of frequent consumption of small quantities of water, up to 4 cups per hour, when the work environment is hot and employees are likely to be sweating more than usual in the performance of their duties.
- (D) The importance of acclimatization.
- (E) The different types of heat illness and the common signs and symptoms of heat illness.
- (F) The importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves, or in co-workers.
- (G) The employer's procedures for responding to symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.
- (H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.

- (I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

Citation 1 alleges:

On or about March 14, 2013, at 200 Temescal Canyon Rd. the employer did not train new employees on the required elements of the Heat Illness Prevention Program before they began work for the employer.

The Division bears the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance 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. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

Porter and Chu went to the job site on March 14, 2013, in response to an accident report. The job site was a construction site where Los Angeles Engineering was digging an excavation in order to install a pipeline. (Ex. 21; Ex. U at p. 6.) Porter and Chu interviewed multiple employees.

Porter testified that one employee stated he had not received heat illness training from Los Angeles Engineering. Los Angeles Engineering objected to this testimony on hearsay grounds. Neither party introduced other evidence regarding the alleged violation.

Porter's testimony is evidence of an out-of-court statement made by an employee of Los Angeles Engineering. Porter's testimony is offered for the truth of the matter asserted in the statement—namely, that the employee did not receive heat illness training from Los Angeles Engineering. Thus, Porter's testimony is hearsay evidence.

Under the Appeals Board's rules, hearsay evidence may be used for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. (§ 376.2.)

The California Evidence Code recognizes multiple exceptions to the hearsay rule. Neither party addressed whether Porter's testimony on this point would be admissible over objection in a

civil action. A review of the exceptions to the hearsay rule indicates that Porter's testimony would not be admissible over objection in a civil action.

Because Porter's testimony is hearsay evidence that would not be admissible over objection in a civil action, the testimony is not sufficient in itself to support a finding that an employee did not receive heat illness training. Porter's testimony is the only evidence regarding the alleged violation. Thus, the preponderance of the evidence does not establish that Los Angeles Engineering failed to provide required training on heat illness prevention.

Accordingly, Citation 1 is vacated.

2. Did Employer implement its IIPP?

At the time of the inspection, section 1509 required employers engaged in construction work to comply with section 3203: "Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders." In turn, section 3203, subdivision (a), provided:

Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

[¶] . . . [¶]

- (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
 - (A) When observed or discovered; and,
 - (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

- (7) Provide training and instruction:
 - (A) When the program is first established; Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.
 - (B) To all new employees;

- (C) To all employees given new job assignments for which training has not previously been received;
- (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
- (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
- (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Citation 2 alleges:

On or about March 14, 2013, at 200 Temescal Canyon Rd. the employer's written Injury and Illness Prevention Program was ineffective as the following elements were not implemented.

Reference 3203(a)(6)

The employer did not correct unsafe conditions or work practices in a timely manner, and ensure employees were protected from the hazard of a trench cave-in.

Instance 1: On March 14, 2013 two employees were inside a 14 feet deep trench without adequate shoring, or other protective systems, while checking the depth and a backhoe was excavating soil from the trench that had caved-in from the south wall two hours earlier, and the supervisor was operating a front loader on the top of the north trench wall. The trench was not shored, or protected, and caved-in. The supervisor did not remove the accident victim and his co-worker from the trench.

Reference 3203(a)(7)

The employer did not provide training for employees who were involved in trench operations and exposed to trench and excavation hazards.

Instance 2: Employees were not trained on the Manufacturers Tabulated Data for proper shoring procedures.

Instance 3: Employees were not trained on how to select and construct protective systems in accordance with Division standards.

Instance 4: Employees were not trained on the site specific Injury and Illness Prevention Program.

As a threshold matter, Citation 2 does not allege that Employer's IIPP lacked any required written elements. Citation 2 alleges that Employer's IIPP was not effective because "elements were not implemented."

Additionally, although Citation 2 alleges four violation instances, the Division need only demonstrate that one of the instances is violative of the safety order in order to establish the citation. (*Gateway Pacific Contractors, Inc.*, Cal/OSHA App. 10-1502, Decision After Reconsideration (Oct. 4, 2016).)

Instance 1

Instance 1 alleges a violation of subdivision (a)(6), which requires methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard.

The Appeals Board has established that employers must actually implement their written procedures by taking appropriate action to correct hazards. (*Papich Construction Company Inc.*, Cal/OSH App. 1236440, Decision After Reconsideration (Mar. 26, 2021) (hereafter *Papich*)). An isolated failure to implement a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program.

However, an IIPP is not effectively maintained if there is even one deficiency, if that deficiency is shown to be essential to the overall program. (*Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).) Procedures to ensure compliance with safe and healthy work practices and procedures for correcting unsafe or unhealthy conditions, including imminent hazards, are essential to the overall program. (*Papich, supra*, Cal/OSH App. 1236440.)

Therefore, the Division must show that Los Angeles Engineering did not implement one or more of its IIPP procedures, and the unimplemented procedure(s) is essential to the overall program.

Los Angeles Engineering's IIPP Procedures

The Division did not identify which written IIPP procedures were not implemented. Nevertheless, a review of the record establishes pertinent IIPP procedures.

Los Angeles Engineering represented that its IIPP was separated into five exhibits: A, B, C, D, and E. (Hearing Transcript, Vol. 2 (Jan. 4, 2023) at 274:15-17 (hereafter “Tr”.) Although some pertinent procedures may be contained in Exhibit A (see p. 15 “Correcting Unsafe Conditions and Unsafe Work Practices”), the following procedure is contained in Exhibit D:

Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

(Ex. D at p. 4.)

It is hereby found that this procedure is part of Los Angeles Engineering’s written IIPP methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures.

Bangs was the foreman and the competent person

“[T]he knowledge of a foreman is imputable to the employer.” (*Dick Miller, Inc.*, Cal/OSHA App. 13-0578, Denial of Petition for Reconsideration (Mar. 5, 2014).)

On the day of the accident, the crew at the job site included Bangs, Vargas, Guillen, and Juan Mendez (Mendez).

Chief Operating Officer Aaron O’Brien (O’Brien) testified that Bangs was the foreman and the competent person on the day of the accident. (Tr, Vol. 2 (Jan. 4, 2023) at 250:4-19.) On the basis of this testimony, it is found that Bangs was the foreman and the competent person. As such, Bangs’ knowledge is imputable to Los Angeles Engineering. (*Dick Miller, Inc.*, *supra*, Cal/OSHA App. 13-0578.)

Implementation of IIPP Procedures

It is undisputed that Los Angeles Engineering was digging an excavation in order to install a pipeline. Although the excavation was not complete, Los Angeles Engineering had begun installation of a trench shoring system as a protective system for employees who would be inside the excavation. Only a portion of the trench shoring system was installed on the day of the accident. A cave-in occurred in the excavation prior to the crew’s lunch break on the day of the accident. No employees were inside the excavation at the time of the first cave-in. A second cave-in occurred after the crew’s lunch break. Two employees were inside the excavation at the

time of the second cave-in. Vargas suffered fatal injuries. (Ex. U, at p. 1.) Guillen was rescued and airlifted to a hospital where he remained for approximately three days. (*Id.* at p. 3.)

Several factual disputes persisted throughout the hearing and in the post-hearing briefs. The record contains conflicting evidence regarding: whether Bangs inspected the excavation after the first cave-in; whether Bangs took action to correct any hazards after the first cave-in; whether Los Angeles Engineering directed Vargas and Guillen to be inside the excavation after the crew's lunch break; and if so, whether Los Angeles Engineering restricted Vargas and Guillen to a designated area of the excavation.

The Division inspectors interviewed Bangs after the accident. Bangs told the inspectors that, after the first cave-in, he decided to change the protective system. (Ex. 28, p. 1.) Bangs specified that he decided to install a system of sloping. Notably, Bangs told the inspectors that he did not notify any of the crew that he had decided to change the protective system or install a system of sloping. (*Ibid.*) No other evidence corroborates Bangs' statement that he had decided to change the system of protection or to install a system of sloping.

Other statements by Bangs conflict with the statements he gave to the inspectors. Bangs wrote a report regarding the two cave-ins. (Ex. U. pp. 6-7.) In relevant part, Bangs states:

As we continued to excavate further we had a section of the south side of the trench collapsed into the trench at this time it was approx 11:55 AM. So I stoped [*sic*] the crew for lunch and told them we would continue after lunch. After lunch I told Gilbert that we would need to remove the dirt from the trench that had fell in and that I would remove what they dug out and move it to our yard with the loader. As I continued to haul off the dirt no one was in the trench. . . . I was approached by the apprentice Juan telling me that Gilbert needed me to check the grade for him. . . . As I got closer to the trench Gilbert and Arturo were inside the trench where the last pipe was placed inside the shoring. As I proceeded over to the part of the trench that wasn't shored to check the grade with the lazer [*sic*] and rod stick, I felt the ground start to cave in approx. 5' away from the excavation at that time I turned to jump away as I turned I noticed Gilbert had entered into the unshored section of the trench so I yeld [*sic*] to get back. When I jumped back I fell to the ground as soon as I stood up I saw that the trench was filled with dirt and I didn't see Gilbert any more. I saw Arturo off to the side where he was previously standing next to the last piece of pipe with his legs covered with dirt laying down.

Bangs' report does not mention an inspection after the first cave-in. It does not mention a decision to change the protective system. It does not mention sloping. These would be significant

points to omit from the report. By contrast, the report states that Bangs stopped the crew for lunch, planned to “continue after lunch,” and the crew needed to dig out the dirt that had fallen into the trench with the first cave-in. These statements indicate a temporary setback, not a change in the work plan or protective system.

Bangs’ written report receives more weight than the evidence of his statements to the Division inspectors. The report is in Bangs’ own writing. It shows his exact statements. In contrast, the testimony and the notes of the Division inspectors regarding their interview of Bangs do not show Bangs’ exact statements.³

In addition to being Bangs’ own words, the written report is supplemented and explained by other evidence. The report states Bangs told Vargas that the crew needed to remove the dirt that had fallen into the trench during the first cave-in. This is corroborated by Mendez’s statement to the inspectors that Vargas and Guillen were “moving the dirt.”

Based on Bangs’ written report, it is found that Bangs did not inspect the excavation after the first cave-in. It is further found that Bangs did not decide to change the protective system and install a system of sloping.

Bangs’ written report further indicates that he was aware of Vargas and Guillen inside the excavation. The report does not indicate Bangs was surprised to find them inside the excavation or that he directed them to exit the excavation. Thus, it is found that Vargas and Guillen were assigned to work inside the excavation.

One significant portion of the report is not credited. The report states that Bangs initially saw Vargas and Guillen where the last pipe was placed “inside the shoring.” Bangs was walking away from the partial shoring when the cave-in commenced: “I turned to jump away as I turned I noticed Gilbert had entered into the unshored section of the trench so I yield to get back.” It is clear from the photographs that Vargas was well beyond the partial shoring when the cave-in occurred. (Exs. 21, 12, 13.) It is not credible that Vargas traversed this distance without Bangs knowing. Thus, it is found that Vargas and Guillen were not restricted to any portion of the trench. It is further found that simply being between the boards of the partially-installed shoring did not protect employees from a cave-in. (Ex. 13.)

In sum, Bangs was the competent person and foreman. He was aware of a situation that could result in a possible cave-in because he was aware that a cave-in had happened already.

³ Although Bangs’s written report is hearsay evidence, it is sufficient in itself to support a finding of fact. As the foreman, his knowledge and actions are attributable to Los Angeles Engineering. His report of his actions on the day of the accident are statements against party interest admissible under Evidence Code section 1220.

Exposed employees were not removed from the hazardous area. Thus, Los Angeles Engineering did not implement its IIPP procedure.

Essential procedure to the overall IIPP

When Los Angeles Engineering did not implement its IIPP procedure, its employees remained exposed to the hazard of a cave-in. Therefore, the unimplemented procedure relates to correcting unsafe or unhealthy conditions, including imminent hazards. Because the unimplemented procedure relates to correcting unsafe or unhealthy conditions, it is essential to the overall IIPP. (*Papich, supra*, Cal/OSH App. 1236440.)

The evidence establishes that Los Angeles Engineering failed to implement an essential IIPP procedure. Therefore, Los Angeles Engineering did not implement and maintain its IIPP. (*Keith Phillips Painting, supra*, Cal/OSHA App. 92-777.)

Los Angeles Engineering introduced evidence of other efforts to correct hazards at the job site. Exhibits I, J, L, and N, are reports of periodic inspections that took place approximately one year before the accident. The reports evidence inspections performed by a third-party consultant and indicate he corrected hazards that he observed. However, the inspections did not concern work performed by Los Angeles Engineering. The reports reference work performed by subcontractors approximately one year before the accident. (Ex. I, at p. 1; Ex. L, at p. 1; Ex. N, at p. 1.) Despite these reports, it remains that Los Angeles Engineering failed to implement an essential IIPP procedure.

For the reasons set forth above, Los Angeles Engineering violated section 3203, subdivision (a)(6).

Instance 2

Instance 2 alleges a violation of subdivision (a)(7), which requires employers to provide training and instruction. In particular, Instance 2 alleges that employees were not trained on “the Manufacturers Tabulated Data for proper shoring procedures.”

Importantly, the Division did not identify any training procedures from Employer’s written IIPP that were not implemented or maintained.

Porter testified that at least one employee stated that he was not trained in the manufacturer’s tabulated data for the shoring system being installed by Los Angeles Engineering. However, Porter could not remember which employee or employees had not been trained. This is important because the Division did not establish that all crew members must be

trained in the manufacturer's tabulated data for the shoring system being installed. Therefore, one untrained employee is not necessarily a violation.

Porter further testified that the installed portion of the trench shoring had not been installed in accordance with the manufacturer's tabulated data. (Tr., Vol. 1 (Nov. 29, 2022), at 131:23-133:19.) Los Angeles Engineering did not introduce evidence that the installed portion of the trench shoring had been installed in accordance with the manufacturer's tabulated data. Therefore, it is found that the installed portion of the trench shoring was not installed in accordance with the manufacturer's tabulated data. This fact, however, does not establish that Los Angeles Engineering failed to implement any IIPP procedures.

For the above reasons, the Division did not prove Instance 2 of Citation 2.

Instance 3

As with Instance 2, Instance 3 alleges a violation of subdivision (a)(7), which requires employers to provide training and instruction. In particular, Instance 3 alleges that employees "were not trained on how to select and construct protective systems in accordance with Division standards."

Importantly, the Division did not identify any training procedures from Employer's written IIPP that were not implemented or maintained.

Porter testified that he interviewed at least one employee who was not familiar with "Division standards" for selecting and constructing protective systems. Porter clarified that "Division standards" refers to title 8 of the California Code of Regulations. However, Porter could not remember which employee or employees had not been trained. This is important because the Division did not establish that all crew members must be trained in how to select and construct protective systems.

As discussed above, the installed portion of the trench shoring was not installed in accordance with the manufacturer's tabulated data. This fact, however, does not establish that Los Angeles Engineering failed to implement any IIPP procedures.

For the above reasons, the Division did not prove Instance 3 of Citation 2.

Instance 4

As with Instances 2 and 3, Instance 4 alleges a violation of subdivision (a)(7), which requires employers to provide training and instruction. In particular, Instance 4 states that

“[e]mployees were not trained on the site specific Injury and Illness Prevention Program.”

The Division did not identify a “site specific Injury and Illness Prevention Program,” as referenced in the allegation. Porter testified that was not sure if Employer had a “site specific Injury and Illness Prevention Program.”

Los Angeles Engineering has a “Site Specific Safety Plan.” (Ex. E.) Nevertheless, the Division did not identify a procedure to train crew members on it and did not identify any employees who were not trained on it. Thus, the Division did not prove Instance 4 of Citation 2.

In sum, the Division established Instance 1, but not Instances 2, 3, or 4. Proving one of the alleged instances is sufficient to support the citation. (*Gateway Pacific Contractors, Inc.*, *supra*, Cal/OSHA App. 10-1502.) Accordingly, Citation 2 is affirmed.

3. Did Employer fail to perform required inspections of excavations and protective systems?

At the time of the inspection, section 1541, subdivision (k)(1), provided inspection requirements related to excavations. It states:

Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the start of work and as needed throughout the shift. Inspections shall also be made after every rain storm or other hazard increasing occurrence. These inspections are only required when employee exposure can be reasonably anticipated.

Citation 3 alleges:

On or about March 14, 2013, at 200 Temescal Canyon Rd. the employer did not adequately inspect, and remove employees from a 14 feet deep un-shored trench for evidence of a situation that could result in additional cave-ins, after the south wall had caved-in, just two hours before the north wall caved-in, completely burying an employee resulting in a fatality.

The cited safety order requires inspections prior to the start of work, as needed throughout the shift, after every rain storm, and after other hazard increasing occurrences.

Therefore, in order to support the citation, the Division must establish that Los Angeles Engineering failed to conduct an inspection at one of these required times.

Inspection required after first cave-in

The cited safety order requires an inspection “as needed throughout the shift” and with every “hazard increasing occurrence.”

Here, Los Angeles Engineering was aware that a cave-in occurred prior to the lunch break. Los Angeles Engineering was aware of employee exposure because Bangs was aware of employees inside the excavation after the lunch break. Because of the demonstrated hazard and the employee exposure, an inspection was needed.

Additionally, the Division contends that the first cave-in was a “hazard increasing occurrence,” necessitating a further inspection under the cited safety order. Los Angeles Engineering does not dispute that an inspection was required after the first cave-in.

Accordingly, the cited safety order required Los Angeles Engineering to conduct an inspection between the time of the first cave-in and employees returning to work inside the excavation.

Lack of inspection after the first cave-in

As discussed above, Los Angeles Engineering did not inspect the excavation between the time of the first cave-in and employees returning to work inside the excavation.

In sum, the evidence establishes that an inspection was needed but not performed. Accordingly, Los Angeles Engineering violated section 1541, subdivision (k)(1).

4. Did Employer protect each employee in an excavation from cave-ins?

At the time of the inspection, section 1541.1, subdivision (a), required employers to protect employees in excavations: “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).”

Citation 4 alleges:

On or about March 14, 2013, at 200 Temescal Canyon Rd. the employer did not protect employees from cave-ins in a 14 feet deep trench by sloping, benching, support or shield systems installed in accordance with the Manufacturer’s

Tabulated Data, or by any other protective system. On March 14, 2013 an employee sustained fatal injuries while working inside the 14 deep [sic] trench which caved-in and completely buried him. This same trench had caved-in two hours before this fatal cave-in and the supervisor did not remove employees from the trench and ensure that adequate protective systems were utilized to prevent the fatal cave-in.

As discussed above, Vargas and Guillen were working inside the excavation at the time of the second cave-in. The shoring system had not been installed. Vargas suffered fatal injuries. (Ex. U at p. 1.) Guillen was rescued and airlifted to a hospital where he remained for approximately three days. (*Id.* at p. 3.) Los Angeles Engineering does not argue that Vargas and Guillen were protected from cave-ins by an adequate protective system (although it does raise a series of affirmative defenses).

Notably, the circumstance of each employee independently establishes the cited violation. Vargas was in an excavation and not protected from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivisions (b) or (c). Similarly, Guillen was in an excavation and not protected from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivisions (b) or (c).

Accordingly, Los Angeles Engineering violated section 1541.1, subdivision (a), and Citation 4 is affirmed.

5. Had the logical time arrived for protecting employees from cave-ins?

The Logical Time defense is an affirmative defense created by the Appeals Board. (*Bay Cities Paving & Grading, Inc.*, Cal/OSHA App. 12-1665, Denial of Petition for Reconsideration (May 16, 2014).) The defense provides that “[t]he 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.” As with other affirmative defenses, an employer bears the burden of proving the Logical Time defense. (*Ibid.*)

Los Angeles Engineering asserts the Logical Time defense to Citation 4. Citation 4 pertains to section 1541, subdivision (a): “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).”

Los Angeles Engineering contends that the time for compliance with section 1541.1 had not arrived because it had not finished digging the trench. Los Angeles Engineering highlights the testimony of Porter:

Q. And there is a process—there is a logical time to proceed. You have to dig the trench, then you have to protect the trench, and then you can work in the trench; right?

A. Right.

Q. You can't protect it before you dig it, and you've got to get it dug before you can put things in it to protect it; right?

A. Right.

(Tr, Vol. 1 (Nov. 29, 2022) at 160:3-11.)

Porter's testimony describes the work process, but it does not indicate that employees must be in the excavation before the protective system is complete. To the contrary, the testimony affirms that protecting the trench precedes employees working in the trench: "[Y]ou have to protect the trench, and then you can work in the trench; right? A. Right." In the present matter, the critical consideration is that the hazard addressed by the safety order was present. Employees were in the trench and exposed to cave-ins. Thus, the necessary and logical time to protect the employees had arrived. Indeed, Los Angeles Engineering had begun installation of a protective system. This indicates that Los Angeles Engineering was aware that the logical time had arrived for protecting the employees. If Los Angeles Engineering could not complete the protective system until after it finished the digging process, then it needed to keep employees out of the excavation.

Moreover, the criminal proceeding against Los Angeles Engineering is significant on this issue. Los Angeles Engineering pled guilty to, and was convicted of, a felony violation of Labor Code section 6425, subdivision (a), which pertains to willful violations of an occupational safety order where the violation causes the death of an employee.⁴ (Ex. 31 at pp. 1, 3.) The Superior Court advised Los Angeles Engineering of: the charges against it; the elements of the offense in the Complaint; possible defenses to the charges; and the possible consequences of a guilty plea, including the maximum penalty, administrative sanctions, possible legal effects, and maximum penalties of subsequent convictions. (Ex. 31 at p. 3.) Additionally, Los Angeles Engineering was represented by counsel. (*Ibid.*) Thus, the evidence indicates Los Angeles Engineering understood the charges, its defenses, and the consequences of its plea. It is also significant that the criminal proceeding and the guilty plea were closer in time to the events that are the subject of the present appeal. None of the eyewitnesses to the trench collapse testified in the present appeal. Presumably, witnesses were more likely to be available to testify in the criminal proceeding and witnesses would have more complete memories than they do now. Therefore, the guilty plea

⁴ After the conviction and after Los Angeles Engineering paid restitution to the victim's family, the Superior Court amended the Complaint to allege a misdemeanor violation instead of a felony violation. (Ex. U at p. 9.)

receives great weight as an admission that potential defenses to the existence of the violation lack merit.

In sum, Los Angeles Engineering did not establish the Logical Time defense with respect to Citation 4.

6. Did independent employee action cause the failure to protect employees from cave-ins?

Los Angeles Engineering asserts the Independent Employee Action defense (IEAD) to Citation 4 (failure to protect employees in excavations from cave-ins). The IEAD relieves an employer of responsibility for a violation. There are five elements to this affirmative defense, all of which must be proven by an employer in order for the defense to succeed: 1) the employee was experienced in the job being performed; 2) the employer has a well-devised safety program that includes training in matters of safety respective to their particular job assignments; 3) the employer effectively enforces the safety program; 4) the employer has a policy of sanctions which it enforces against those employees who violate its safety program; and 5) the employee caused a safety infraction which he knew was contra to the employer's safety requirements. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

In the context of the IEAD, it is important that two employees were in the trench because the circumstances of each employee independently establishes the violation in Citation 4. Where there are two actors who are involved in the violation of a safety order, an employer must prove all elements as to both employees. (*Paramount Farms, King Facility*, Cal/OSHA App. 09-864, Decision After Reconsideration (Mar. 27, 2014).) Los Angeles Engineering addresses the IEAD elements only in regard to Vargas. Los Angeles Engineering does not address Guillen's experience or whether Guillen caused a safety infraction that he knew was contra to its safety requirements. Thus, even if Los Angeles Engineering were to establish the IEAD with respect to Vargas, Los Angeles Engineering would remain responsible for the violation with respect to Guillen.

With respect to the fourth element of the IEAD, although Los Angeles Engineering argues Vargas and Guillen caused the violation, it did not provide evidence that it sanctioned either employee for their alleged safety violations. Therefore, Los Angeles Engineering did not establish that it has a policy of sanctions which it enforces against employees who violate its safety program.

With respect to the fifth element of the IEAD, Bangs' written report establishes that Bangs directed Vargas to dig the fallen dirt out of the excavation. Thus, the evidence indicates

that Vargas was performing his assigned duties and not violating Employer's safety rules.

Moreover, the criminal proceeding against Los Angeles Engineering is significant on this issue. As discussed above, Los Angeles Engineering pled guilty to and was convicted of a felony violation of Labor Code section 6425, subdivision (a), which pertains to willful violations of an occupational safety order where the violation causes the death of an employee. (Ex. 31 at pp. 1, 3.) Therefore, the guilty plea receives great weight as an admission that potential defenses to the existence of the violation lack merit.

In sum, Los Angeles Engineering did not establish the IEAD with respect to Citation 4.

7. Did the Division establish a rebuttable presumption of a Serious violation for Citation 2, Citation 3, or Citation 4?

At the time of the cave-in, Labor Code section 6432, subdivision (a), defined a Serious violation as follows:

There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

"Serious physical harm" was defined as any injury or illness occurring in the place of employment that results in:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code § 6432, subd. (e).)

A. Citation 2

Los Angeles Engineering appealed the classification of Citation 2, which issued as a Serious violation. The violation here is that Los Angeles Engineering failed to implement and maintain its IIPP procedures for correcting unsafe conditions. Specifically, Los Angeles Engineering did not determine appropriate corrective action after a cave-in occurred, and it allowed employees to reenter the excavation before the imminent hazard of cave-ins was corrected (see discussion of Instance 1 of Citation 2).

The actual hazard created by the violation is a cave-in. There was a realistic possibility that death or serious physical harm could result from a cave-in. In fact, a cave-in occurred and resulted in both a death and a hospitalization.

Accordingly, the Division established a rebuttable presumption that Citation 2 is a Serious violation.

B. Citation 3

Los Angeles Engineering appealed the classification of Citation 3, which issued as a Serious violation. The violation here is the failure to perform inspections of the excavation and the protective system as needed throughout the shift.

The actual hazard created by the violation is a cave-in. There was a realistic possibility that death or serious physical harm could result from a cave-in. In fact, a cave-in occurred and resulted in both a death and a hospitalization.

Accordingly, the Division established a rebuttable presumption that Citation 3 is a Serious violation.

C. Citation 4

Los Angeles Engineering appealed the classification of Citation 4, which issued as a Serious violation. The violation here is the failure to protect each employee in an excavation from cave-ins by an adequate protective system.

The actual hazard created by the violation is a cave-in. There was a realistic possibility that death or serious physical harm could result from a cave-in. In fact, a cave-in occurred and resulted in both a death and a hospitalization.

Accordingly, the Division established a rebuttable presumption that Citation 4 is a Serious violation.

8. Did Employer rebut the presumptions of Serious violations for Citation 2, Citation 3, or Citation 4?

At the time of the cave-in, Labor Code section 6432, subdivision (c), provided that an employer may rebut the presumption that a serious violation exists by “demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.” In order to satisfactorily rebut the presumption, the employer must demonstrate both:

- (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]
- (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer’s health and safety rules and programs.

A. Citation 2

First, Los Angeles Engineering must demonstrate it took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation. The violation here is that Los Angeles Engineering failed to implement its IIPP procedure to remove exposed employees from the hazardous area until the necessary precautions have been taken to ensure their safety.

The evidence does not indicate that Los Angeles Engineering considered or attempted implementation of its IIPP after the cave-in occurred. According to Bangs, he merely stopped the crew for lunch and then instructed the crew to remove the fallen dirt from the excavation.

O'Brien testified that, at the time of the second cave-in, Vargas and Guillen were supposed to be inside the excavation. This is consistent with Bangs' written report that he saw them in the excavation. It is also consistent with the statements made by witness Mendez. Mendez told Chu that his role was to assist Vargas and Guillen, who were working in the excavation. (Ex. 26.)

The parties did not introduce evidence that Bangs was trained on the elements of the IIPP and its implementation. Although Los Angeles Engineering asserts in its brief that Bangs was experienced and renowned, this does not establish that he was trained or able to implement the IIPP.

Second, Los Angeles Engineering must demonstrate it took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered. The parties did not introduce evidence that Los Angeles Engineering disciplined Bangs, Vargas, or Guillen for not implementing its IIPP, or that Los Angeles Engineering trained Bangs and other employees on its procedures for correcting unsafe conditions.

In sum, Los Angeles Engineering did not establish either of the two elements required to rebut the presumption that Instance 1 of Citation 2 is a Serious violation. Accordingly, Citation 2 is properly classified as a Serious violation.

B. Citation 3

Bangs was aware that cave-ins could occur because he was aware of the first cave-in. He was aware that the protective system was not fully installed. He was aware that employees would be in the excavation because he directed employees to dig out fallen dirt. Despite this knowledge, Bangs did not inspect the excavation for signs of possible cave-ins or failure of the protective system. Because Bangs' knowledge and actions are attributable to Los Angeles Engineering (as discussed above), it is established that Los Angeles Engineering did not take all the steps a reasonable and responsible employer in like circumstances should be expected to take to anticipate and prevent the violation. Thus, Los Angeles Engineering did not rebut the presumption that Citation 3 is a Serious violation.

Accordingly, Citation 3 is properly classified as a Serious violation.

C. Citation 4

Bangs was aware that cave-ins could occur because he was aware of the first cave-in. He was aware that the protective system was not fully installed. Thus, Bangs was aware that employees would be in the excavation without protection from cave-ins by an adequate protective system. A reasonable and responsible employer would not have allowed Vargas and Guillen to enter the excavation in those conditions. Thus, Los Angeles Engineering did not rebut the presumption that Citation 4 is a Serious violation.

Accordingly, Citation 4 is properly classified as a Serious violation.

9. Was the failure to protect employees from cave-ins a cause of a serious injury?

The Division characterized Citation 4 as Accident-Related. A violation is Accident-Related if an employee suffers death or a “serious injury” and a causal nexus exists between the violation and the death or serious injury. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018); see § 336, subd. (c)(2).)

A. Serious injury

At the time of the cave-in, a “serious injury” was defined as any injury or illness occurring in a place of employment that results in:

- (1) inpatient hospitalization for a period in excess of 24 hours for other than medical observation;
- (2) the loss of any member of the body; or
- (3) any serious degree of permanent disfigurement.

(§ 330, subd. (h).)

Here, Vargas suffered fatal injuries and Guillen was hospitalized for three days. Thus, the injury to Vargas and the injury to Guillen each independently meet the death or serious injury element.

B. Causal nexus

The Division must make a showing that the violation more likely than not was a cause of the injury. The Division need not show that the violation was the only cause of the injury. (*United Parcel Service*, *supra*, Cal/OSHA App. 1158285.)

Here, the violation is that employees were in an excavation and not protected from cave-ins by an adequate protective system. An adequate protective system would have prevented the cave-in and the injuries to Vargas and Guillen. Thus, the Division established a causal nexus between the violation and the injuries to Vargas and Guillen.

In sum, the evidence establishes the Accident-Related characterization.

10. Was the failure to protect employees from cave-ins properly classified as Willful?

The Division classified Citation 4 as a “willful” violation. Section 334, subdivision (e), defines a “willful” violation as:

[A] violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

First, the evidence must establish that the violation was intentional and knowing as contrasted with inadvertent. As discussed above, Los Angeles Engineering intended employees to be inside the excavation. Los Angeles Engineering knew that the protective system was only partially installed. It was not inadvertent that employees were inside the excavation or that the partially-installed protective system did not protect each employee from a cave-in. Thus, the violation was intentional and knowing, as contrasted with inadvertent.

Second, the evidence must establish either: (1) that Los Angeles Engineering was conscious of the fact that what it was doing constitutes a violation of a safety law, or (2) that Los Angeles Engineering was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition. Here, Los Angeles Engineering was aware that a hazardous condition existed because it knew that a cave-in occurred before lunch, that the protective system was only partially installed, and that employees were inside the excavation after lunch. Despite this awareness, Los Angeles Engineering did not make any effort to eliminate the hazardous condition. Rather, it proceeded to remove the dirt that had fallen into the trench as a result of the first cave-in. Thus, Los Angeles Engineering was aware that a hazardous condition existed and made no reasonable effort to eliminate the hazardous condition.

Accordingly, Citation 4 is properly classified as willful.

11. Were the proposed penalties calculated in accordance with the penalty-setting regulations?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc., supra*, Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The Division submitted its Proposed Penalty Worksheet showing the penalty calculations. (Ex. 2.) Porter testified to the calculation of the penalties. Los Angeles Engineering did not present evidence or argument that the penalties were improperly calculated.

Accordingly, the proposed penalties for Citation 2, Citation 3, and Citation 4, are reasonable.

Conclusions

The evidence does not support a finding that Employer violated section 3395, subdivision (f)(1), for failure to provide heat illness training.

The evidence supports a finding that Employer violated section 3203, subdivision (a), for failure to implement its IIPP. The violation was properly classified as Serious. The proposed penalty is reasonable.

The evidence supports a finding that Employer violated section 1541, subdivision (k)(1), for failure to inspect excavations and protective systems. The violation was properly classified as Serious. The proposed penalty is reasonable.

The evidence supports a finding that Employer violated section 1541.1, subdivision (a), for failure to protect each employee in an excavation from cave-ins. The violation was properly classified as Serious, Accident-Related, and Willful. The proposed penalty is reasonable.

Order

It is hereby ordered that Citation 1, Item 1, is vacated.

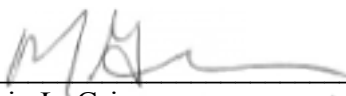
It is hereby ordered that Citation 2, Item 1, is affirmed and the penalty of \$5,850 is sustained.

It is hereby ordered that Citation 3, Item 1, is affirmed and the penalty of \$24,300 is sustained.

It is hereby ordered that Citation 4, Item 1, is affirmed and the penalty of \$70,000 is sustained.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: 04/25/2024



Mario L. Grimm
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**