BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
PERRY C. THOMAS CONSTRUCTION, INC.	**1547223**
Employer	**DECISION**

Statement of the Case

Perry C. Thomas Construction, Inc. (Employer) is a California licensed general engineering contractor that provides trenching and asphalt paving services. From August 12, 2021, to February 4, 2022, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Omar Castillo (Castillo) conducted an accident investigation at Employer's worksite located at Fruitland Avenue and South Soto Street in Vernon, California (the site).

On February 4, 2022, the Division issued one citation to Employer, alleging two violations of safety orders found in title 8 of the California Code of Regulations.[1] Employer filed a timely appeal of the citation, challenging the alleged violation and asserting numerous affirmative defenses. During the hearing, Employer withdrew its appeal of Citation 1, Item 1. Citation 1, Item 2, alleges that Employer failed to protect employees from loose rock or soil piled next to an excavation that could pose a hazard by falling or rolling into the excavation. Prior to the hearing, the undersigned Administrative Law Judge (ALJ) granted the Division's motion to amend Citation 1, Item 2, by reclassifying it as Serious and amending the proposed penalty to $10,125. Subsequently, the undersigned ALJ granted Employer's request to expand its appeal to challenge the classification of Citation 1, Item 2.

This appeal was heard by Administrative Law Judge Howard I. Chernin for the California Occupational Safety and Health Appeals Board (Appeals Board) on August 15, 2025, from Los Angeles, California, with all participants appearing remotely via the Zoom video platform. Attorney Matthew McMillan of Donnell, Melgoza and Scates, LLP represented Employer. Lisa Wong, Staff Counsel, represented the Division. The matter was submitted on March 1, 2026.

Issues

1. Did Employer fail to protect employees from loose rock or soil piled next to an excavation that could pose a hazard by falling or rolling into the excavation?

[1] Undesignated references are to sections of California Code of Regulations, title 8.

2. Did Employer establish any of its pleaded affirmative defenses?

3. Was Citation 1, Item 2, properly classified as Serious?

4. Did Employer rebut the presumption that Citation 1, Item 2, was properly classified as Serious?

5. Did the Division propose a reasonable penalty for Citation 1, Item 2?

Findings of Fact

1. On August 12, 2021, Employer was engaged in excavation work at the site in connection with replacement of an underground utility line.

2. Employer was excavating a trench with a powered excavator and had employees working on foot in and around the excavation.

3. Employer excavated material from the trench and deposited it onto a spoils pile less than two feet from the edge of the excavation. The spoils pile was made up of material including concrete, rocks and dirt.

4. An employee was injured when concrete material from the spoils pile fell into the excavation, pinning him.

5. Employer did not use a retaining device or other means to ensure that material from the spoils pile did not fall or roll into the excavation.

6. Employees were working in and around the excavation while this hazard was present.

7. By failing to protect employees from the hazard of materials falling or rolling into the excavation, Employer exposed at least one employee to the realistic possibility of a lower body fracture or laceration that could require inpatient hospitalization for more than 24 hours for treatment.

8. Employer controlled the excavation operation in an unreasonable manner that resulted in Employer not being aware that an employee was in the excavation and exposed to multiple hazards, including the hazard of excavated material falling or rolling into the excavation and injuring its employee.

9. The Division did not provide a sufficient factual basis for its Extent and Size adjustments made to the proposed penalty for Citation 1, Item 2.

Analysis

1. Did Employer fail to protect employees from loose rock or soil piled next to an excavation that could pose a hazard by falling or rolling into the excavation?

Section 1541, subdivision (j)(2) states:

(j) Protection of employees from loose rock or soil.

(2) Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

Citation 1, Item 2, alleges:

Prior to and during the course of the inspection, including, but not limited to, on August 12, 2021, the employer failed to adequately protect employees from loose rock or soil, that could pose a hazard by falling or rolling from an excavation face by keeping such materials or equipment at least 2 feet from the edge of excavations.

The Division bears the burden of proving, by a preponderance of the evidence, that a cited safety order was violated. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001).) The Appeals Board applies a reliability-based evidentiary standard in its proceedings, offering more flexibility than the strict mechanical rules of the Evidence Code. The Appeals Board must rely on "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" (§376.2), ensuring it meets the necessary reliability standard. (*Sweetheart Cup Company*, Cal/OSHA App. 95-979, Decision After Reconsideration (Nov. 5, 1999).)

Applicability

Uncontested evidence admitted during the hearing establishes that section 1541, subdivision (j)(2), applies to the work that Employer was performing at the time of the inspection. The record reveals that Employer was engaged in trenching, backfilling and paving operations in connection with underground utility work taking place at the site. Section 1541,

subdivision (j)(2) is a Construction Safety Order that applies to "all open excavations made in the earth's surface…[including] trenches." (§1540, subd. (a).) There is no dispute that Employer created an excavation at the site, as depicted in photographs taken by Castillo. (Exh. 32.) Therefore, the safety order applies.

Violation

To establish a violation, "the Division bears the burden of proving employee exposure to a violative condition addressed by a safety order by a preponderance of the evidence." (*Dynamic Construction Services Inc*., Cal/OSHA App. 1005890, Decision After Reconsideration (Dec. 1, 2016), citing *Benicia Foundry & Iron Works, Inc*., Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).) The Division can meet its burden by showing that "an employee was actually exposed to the zone of danger or hazard created by a violative condition." (*Id*.) Alternatively, the Division can establish exposure:

> by showing the area of the hazard was 'accessible' to employees such that it was reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger.

Dynamic Construction Services Inc., supra, Cal/OSHA App. 1005890, citing *River Ranch Fresh Foods-Salinas, Inc.*, Cal/OSHA App. 01-1977, Decision After Reconsideration (July 21, 2003).

The Division presented evidence supporting the conclusion that an employee was exposed to the hazard of material that could fall or roll into the excavation at the site. Castillo credibly testified that the inspection was prompted by a report of an accident resulting in an injury to an employee that occurred at 9:43 a.m. on August 12, 2021, at the site. (See Exhibits 2 and 3). Also, Perry C. Thomas (Thomas), Employer's Vice President, admitted during his testimony that an employee was injured in the excavation at the site when a concrete block fell onto and pinned him. It is undisputed that the material being excavated at the site included a combination of concrete, dirt, and other material. A concrete block is material, and it is reasonably inferred from these facts that the concrete block that fell on the injured employee had fallen from a spoils pile within two feet of the edge of the excavation, as this is the most plausible explanation for what occurred based on the evidence, and no alternative explanation was offered by either party. The undersigned ALJ further draws a negative inference from these same facts that the material was not protected from falling into the excavation by a retaining device or other methods. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration, (May 26, 2017) [holding that an inference may be drawn from evidence introduced at a hearing].) Had it been so protected, the concrete likely would not have fallen onto and injured the employee in the excavation.

These two inferences are further supported by Castillo's credible testimony that during his investigation, which began approximately three hours after the accident, he observed material piled at the site less than two feet from the edge of the excavation, and which was not held back by a retaining device. Castillo's testimony was corroborated by photographs that he took during his investigation, in particular Exhibits 26, 27 and 28, which depict material piled within two feet of, and appearing to slide into, the open excavation. Furthermore, Exhibit 35, a photograph taken by Castillo, depicts material piled within two feet of the open excavation. Thomas testified that the material depicted in the photographs was concrete aggregate base (CAB) that had been delivered to the site after the accident occurred and after employees had stopped all work in the trench. Thomas's testimony was not corroborated by any other witnesses or documentary evidence establishing the source of the piled material depicted in the photographs. The material observed and photographed by Castillo also bears a striking resemblance to the material being excavated in the video (Exhibit 31) taken on a subsequent site visit by Castillo in September.

According to Thomas's testimony, the excavated material and CAB brought to the site to back fill the excavation had different compositions and characteristics, but his testimony is at odds with the photographs and video taken by Castillo, which clearly show material of like composition being excavated and deposited next to the excavation. Thomas's inconsistent testimony is afforded little weight, and in light of the stronger evidence presented by the Division, it is found that the material depicted in the photographs taken by Castillo during his first visit to the site following the accident was a spoils pile made up of material excavated by Employer, and not CAB delivered after employees were no longer working in or near the excavation. Furthermore, this material was left piled within two feet of the edge of the excavation and was not restrained or otherwise prevented from falling or rolling into the excavation while employees were present in and around the excavation.

Taken together, the direct and circumstantial evidence supports the finding that at least one employee was actually exposed to the hazard of material falling or rolling into an excavation and was injured because of the hazard. A preponderance of the evidence presented during the hearing supports a determination that Employer failed to protect an employee from loose rock or soil piled next to an excavation that could pose a hazard by falling or rolling into the excavation. Accordingly, a violation of section 1541, subdivision (j)(2) was proven.

2. Did Employer establish any of its pleaded affirmative defenses?

An employer bears the burden of proving its pleaded affirmative defenses by a preponderance of the evidence. (*RNR Construction, Inc.*, *supra*, Cal/OSHA App. 1092600.) Here, Employer had the opportunity to present evidence to support its pleaded affirmative defenses, but failed to do so.

3. Was Citation 1, Item 2, properly classified as Serious?

Prior to the hearing, the Division successfully moved to amend the classification of Citation 1, Item 2, from General to Serious. Labor Code section 6432, subdivision (a), provides, in relevant part:

> (a) 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 actual hazard may consist of, among other things:
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> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

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" is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, "inpatient hospitalization for purposes other than medical observation." (Lab. Code §6432, subd. (e).)

Labor Code section 6432, subdivision (g), provides:

> A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Castillo testified that he is current on his Division-mandated training. Castillo testified that there is a realistic possibility that an employee exposed to the violation in Citation 1, Item 2, could suffer serious injury. Castillo further testified that the hazard of material piled within two feet of the edge of the excavation and not restrained or otherwise prevented from falling into the

excavation could lead to material falling onto an employee. This could cause serious lower body injuries including a fractured pelvis, fractured femur, fractured ankle, and lacerations, all requiring inpatient hospitalization for treatment. Castillo's testimony is deemed credible and is credited.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 1, Item 2, was properly classified as Serious.

4. Did Employer rebut the presumption that Citation 1, Item 2, was properly classified as Serious?

Labor Code section 6432, subdivision (c), provides 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.

> For an employer to rebut the presumption of a serious violation, it must demonstrate it took "all" the steps a reasonable employer would have taken in like circumstances to prevent the violation, taking into account factors such as training, procedures for controlling or correcting the hazard, and supervision.

(*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018), citing Lab. Code § 6432, subd. (b).)

Employer's only evidence to rebut the Serious classification was testimony from Thomas that he instructed his employees on the morning of the accident to stay out of the excavation until it was shored, and his testimony that he did not realize an employee was in the excavation until he heard a commotion and saw his employee pinned under fallen concrete material. Even if Thomas's testimony is deemed credible, it nonetheless does not demonstrate that Employer took all of the steps a reasonable and responsible employer in like circumstances would take. There was no evidence that employees at the site were supervised, which is particularly troubling in light of the hazards presented. Employer was operating a powered excavator at the site on the date of the accident, as depicted in Exhibits 31 and 33. This is a heavy piece of equipment capable of striking an employee or running an employee over, and it is unreasonable of an employer to operate such equipment without being aware of whether employees are nearby on foot. Employer was using the excavator to remove significant amounts of heavy material from an excavation. Again, it was unreasonable of Employer to conduct this operation without awareness of where its employees were, and particular to the facts at bar, it was unreasonable of Employer to have a spoils pile of excavated material less than two feet from the edge of the excavation without anything to prevent it from falling or rolling into the excavation when employees had access to and were working in the excavation. Employer's mere claim that instructions were given before the accident is insufficient to demonstrate that Employer did everything a

reasonable employer would have done under the circumstances. Based on the evidence presented at the hearing, therefore, it is determined that Employer did not meet its burden of rebutting the presumption that Citation 1, Item 2, was properly classified as Serious.

5. Did the Division propose a reasonable penalty for Citation 1, Item 2?

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. (*Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) It is the Division's burden to provide the factual basis for its penalty calculations, and the ALJ has discretion to provide "maximum credits for criteria which did not have an adequate factual basis in the record." (*Armour Steel Co., Inc.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014), citing *Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004).)

The Division presented its C-10 Proposed Penalty Worksheet (Exhibit 14) and Castillo's testimony to meet its evidentiary burden.

The Base Penalty for a Serious classification citation is $18,000 and is subject to further adjustment based on the factors of Extent and Likelihood, resulting in a Gravity-based penalty. (§336, subd. (c).) Castillo testified that he rated Extent as High because all of the employees at the site were expected to enter the trench. Castillo's testimony does not establish "the degree to which [the] safety order [was] violated" (§335, subd. (a)(ii)(2)). The undersigned ALJ therefore exercises his discretion to rate Extent as Low and apply a 25 percent downward adjustment. (§336, subd. (c)(1).)

Likelihood is "the probability that injury, illness or disease will occur as a result of the violation," and is based on number of exposed employees and the extent to which the violation has in the past resulted in injury at that employer or in its industry. (§335, subd. (a)(1)(3).) Castillo credibly testified based on his knowledge and experience that he rated Likelihood as High because of the high probability that an injury would result from the hazard. Castillo's testimony on this factor is consistent with the other evidence presented during the hearing and is credited.

Based on the above, Low Extent results in a 25 percent downward adjustment of the Base Penalty, whereas High Likelihood results in a 25 percent upward adjustment pursuant to section 335, subdivision (b). These adjustments cancel out, and result in a Gravity-based penalty of $18,000.

The penalty is further subject to adjustment based on Size, Good Faith, and History. (§336, subds. (d)(1)-(3).) Castillo assessed Employer's Good Faith as Fair pursuant to section 335, subdivision (c), testifying that Employer had a safety program and demonstrated a willingness to comply with safety regulations, but did not keep required inspection records. Castillo's testimony and other evidence presented during the hearing support a determination that Employer's Good Faith was properly assessed as Fair, which results in a 15 percent downward penalty adjustment pursuant to section 336, subdivision (d)(2). Castillo did not testify how he determined the number of employees for the Size adjustment. The Division therefore did not meet its burden as to this factor, and the maximum 40 percent adjustment will be applied pursuant to section 336, subdivision (d)(1). Castillo applied a 10 percent History adjustment, the maximum allowed pursuant to section 336, subdivision (d)(3). Applying a 15 percent Good Faith, 40 percent Size and 10 percent History adjustment results in a 65 percent, or $11,700, downward adjustment, and a resulting $6,300 Adjusted Penalty.

Finally, Castillo testified that Employer was entitled to a 50 percent abatement credit pursuant to section 336, subdivision (e). Applying the abatement credit to the Adjusted Penalty results in a final penalty of $3,150, which will be assessed for Citation 1, Item 2.

Conclusions

The Division established by a preponderance of the evidence that Employer committed a violation of section 1541, subdivision (j)(2), and Employer did not establish any of its pleaded affirmative defenses.

The violation is properly classified as Serious, and Employer did not meet its burden of rebutting the Serious classification. The Division incorrectly calculated the penalty for Citation 1, Item 2, which is correctly set at $3,150.

Orders

Citation 1, Item 1, is affirmed consistent with Employer's withdrawal of its appeal, and its associated penalty is assessed as set forth in the attached Summary Table.

Citation 1, Item 2, is affirmed as amended, and a penalty of $3,150 is assessed for the violation as set forth in the attached Summary Table.

/s/ Howard I. Chernin

Dated: 03/20/2026

Howard I. Chernin
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.**

If no petition is filed, the penalty amount set forth in the Summary Table is due and payable 30 days after the Order or Decision is issued. If the Appeals Board approved a payment plan, all payments are due in accordance with the dates indicated in the Summary Table. If a Petition for Reconsideration is filed, no payment should be made until the final outcome of the appeal.