

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

In the Matter of the Appeal of:

AGRI-VALLEY IRRIGATION, INC.
P.O. Box 11881
Fresno, CA 93775-1881

Employer

Dockets. 07-R2D5-3784 through 3786

**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 ordered reconsideration of the Amended Decision of the Administrative Law Judge (ALJ) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on April 17, 2007, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Mendota, California maintained by Agri-Valley Irrigation, Inc. (Employer). On August 21, 2007, the Division issued three citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1 alleged a General violation of section 1541(c)(2) [failure to provide a safe means of access and egress from a trench]. Citation 2 alleged a Serious violation of section 1441.1(a)(1) [failure to provide a cave-in protective system in a trench]. Citation 3 alleged a Serious violation of section 1541(j)(2) [failure to provide retaining devices in a trench where excavated materials (spoils) were on the top edge of the trench].

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. At hearing, Employer withdrew its appeal of Citation 1. Employer moved to expand the

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

scope of its appeal of Citation 2 to include that the safety order was not violated; the motion was granted. Sanctions under board regulation 372.1 were ordered by the ALJ for Employer's failure to provide discovery.² After taking testimony and considering the evidence and arguments of counsel, the ALJ issued an Amended Decision on May 17, 2011. The Decision denied Employer's appeal in part, and affirmed the violations of Citations 2 and 3, while amending the citations to General and assessing a total penalty of \$480.

The Board timely ordered reconsideration of the ALJ's Amended Decision on its own motion. The Division and Employer each filed an answer to the petition.

ISSUE

Does the evidence in the record support the alleged serious classification of Citations 2 and 3?³

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

Employees at the location known as the "Radinoff site" were conducting trenching and pipe-laying activities on April 17, 2007. At the time of the accident which prompted the Division's inspection, two employees, Pedro Santo Diaz (Diaz) and Miguel Diaz Ramirez (Ramirez) were in the trench, which was 24 inches wide, and over 800 feet long, and did not have a protective system in place. Diaz was laying 20 foot sections of pipe in the trench, which necessitated frequent bending to connect new pipe sections to pipe that had already been placed. When the accident occurred, Diaz was attempting to connect pipe with a bar used for that purpose. Dirt began to fall around him, burying Diaz up to his head. He was airlifted to the hospital, where he remained from April 17 through May 18.

The Division's associate safety engineer, Andrea Ford (Ford), conducted an investigation at the Radinoff site on the day of the accident. At the site she met with Employer's President and Owner, Larry Rompal (Rompal). The accident site had been disturbed by first responders who had removed Diaz

² See p. 2, Amended Decision. As a sanction, the ALJ ruled that the Employer was precluded from claiming the exception under section 1541(a)(1)(B) regarding the issue of whether a competent person examined the ground.

³ The Board's Order of Reconsideration stated the issue as "[i]s there substantial evidence in the record to support the alleged serious classification of citations 2 and 3?" The substantial evidence standard is applicable to judicial review of Decisions After Reconsideration, pursuant to a writ of mandate, rather than the standard used in these proceedings.

from the trench. Ford testified that she and Rompal took a measurement of the trench, and found it to be approximately 4 and a half feet deep. She also testified that Rompal informed her that there had not been any soil testing at the site.

Ford described the location of the spoils pile (dirt removed from the trench) as right near the edge of the trench. The pile was also depicted in two photographs. (Ex. 4, 5). A farm road was located on the other side of the spoils pile, and Ford testified to seeing some traffic on the road. She explained that she had concerns about both the location of the spoils pile and the roadway; the spoils from the trench added more weight to the ground, putting more pressure on the wall, and on the other side of the spoils the farm road traffic caused vibrations and was a source of additional weight, putting further stress on the trench walls.

Ford also testified regarding the condition of the soil at the site; it was a windy day, and sandy soil was being blown around in the area of the accident. The trench in the area of the accident appeared to consist of loose, dry sand, as opposed to hardpan. Ford defined hardpan as less hard than rock but much harder than shifting or compressed sand, while hard pack is dirt that is compressed, not loose and runny. Her observation of the immediate area of the accident was that the soil was sandy; the interior walls of the trench were not hardpan or solid rock, but appeared to be hard packed, as the trench walls were not running.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered both Employer and Division's answer to the Board's order of reconsideration.

Citation 2

The Division cited Employer for a violation of section 1541.1(a)(1), which states:

- (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.

There is no dispute that the trench did not have a protective system, leaving only the first exception at issue, or whether the excavation was made entirely in stable rock.⁴ (*Dick Miller, Inc.*, Cal/OSHA App. 13-0578, Denial of Petition for Reconsideration (Mar. 5, 2014)). Where an employer is claiming an exception from a safety order, the burden of showing that it applies and has been satisfied is on the employer. (*Tutor-Saliba-Perini*, Cal/OSHA App. 97-2799, Decision After Reconsideration (Mar. 2, 2001)). The ALJ's decision found, and the Board agrees, that the evidence establishes that the excavation was not "made entirely in stable rock." Thus, a violation of the safety order is established.

Testimony by Ford characterized the soil at the site of the collapse as sandy. Diaz, who was injured in the excavation collapse, testified that the soil at the bottom of the trench where the collapse occurred appeared to be sandy. Pete Valdez (Valdez), foreman for Employer, also stated that the soil at the site of the collapse was sandy. The material, whether it was completely sandy, or a mix of sandy soil and more cohesive soil, as posited by Employer, was not stable rock, as defined by section 1541.1(b) [Stable rock: Natural solid mineral matter that can be excavated with vertical sides and remain intact while exposed.]. (See, *Fortuna Iron Works*, Cal/OSHA App. 06-4222, Decision After Reconsideration (Aug. 30, 2012) [preponderance of evidence established the excavation was not in Type A soil]). In testimony, Rompal testified that after the accident, one of his employees explained that the cave-in occurred due to a 3 to 4 foot wide sand strata, which would not have been immediately seen due to the coloration of the soil and sand. Rompal was able to point to the lighter soil which made up the sand strata in Division's exhibit 4.

The evidence establishes a violation of section 1541.1(a)(1). In order for a citation to be upheld as serious, the Division must demonstrate that there was a substantial probability that the violation could result in serious physical harm or death. (Labor Code Section 6432(a)).⁵ The Board has defined serious physical harm to include such serious instances as a permanent loss or disfigurement, or a hospitalization for 24 hours. (*Brunton Enterprises, dba Plas-tal Mfg Co.*, Cal/OSHA App. 09-2239, Decision After Reconsideration (Mar. 26, 2014)). Ford testified that should a cave-in of an excavation occur, the result will usually be a serious injury.

An opinion presented by a witness regarding substantial probability of serious physical harm must be based upon a valid evidentiary foundation, such as personal expertise on the subject, reasonably specific scientific evidence, an experience-based rationale, or generally accepted empirical

⁴ The ALJ precluded Employer from claiming the exception under 1541.1(a)(1)(B), that a competent person had examined the ground and found no indication of a cave-in.

⁵ Labor Code 6432 had been revised, with the revision going into effect on January 1, 2011. We apply the statute as in effect at the time of the citation.

evidence. (*Brunton Enterprises*, supra, citing *Forklift Sales of Sacramento, Inc.*, Cal/OSHA App. 05-3477, Decision After Reconsideration (Jul. 7, 2011)). Ford testified to having approximately 7 years of experience as a safety engineer, and to having received training in trenching and excavation safety from the Division. The basis for her classification of the citation as serious came from inspections she had conducted, knowledge of inspections that other safety engineers in her office had conducted, records available for research purposes, and the weight of soil itself. She further explained that serious injuries such as suffocation, and internal injuries from compression were possible from soil, which typically weighs 100 pounds per cubic foot, and that other injuries were possible from a cave-in, such as ruptured spleens, lung compression, asphyxia, and broken ribs that can lead to punctured lungs. Ford also stated that those workers who survive cave-ins are usually hospitalized for over a week.

Testifying on Division exhibit 6, Ford stated that she had used the State Compensation Insurance Fund (SCIF) document as part of her analysis to classify the citations. Trenching cave-ins result in more than 5,000 serious injuries and 100 deaths in the United States each year. She noted some of the factors listed as hazards by SCIF, which she believed to have relevance to her classification of the violation at the Radinoff site as serious: vibration from construction equipment and trucks, traffic on a road, spoils placed too closely, and the weight of heavy equipment, such as the trencher used at the site. (Ex. 6). While the Division's testimony did not go into great detail about specific instances of similar accidents, Ford's testimony, coupled with the serious nature of Diaz's injury, support a finding that there was a substantial probability that a violation of the safety order could result in serious physical harm or death. (See, *Dennis J. Amoroso Construction Co., Inc.*, Cal/OSHA App. 98-4256, Decision After Reconsideration (Dec. 20, 2001)).

Employer presented evidence through an expert, David Warren Smith (Smith), who testified that a serious injury given an accident in an excavation or trench with a cave-in is likely to be 20-25%. Smith discussed several trenching accidents that he was either aware of or had firsthand involvement in as a safety expert, several of which had resulted in injuries, but did not describe whether those injuries had resulted in hospitalization or permanent disfigurement. He was also unable to provide a basis for his estimation that serious harm would result only 20-25% of the time, beyond his testimony that serious accidents are relatively rare generally. While this may be true, the substantial probability standard asks what the probability of serious physical harm will be assuming an accident occurs as a result of the violation at issue. (Section 6432(c)). The expert testimony was insufficient to rebut the Division's evidence regarding substantial probability of serious physical harm or death.

Employer argued that it lacked knowledge of the violative condition. (Section 6432(b)). Lack of knowledge is the employer's burden to show, by establishing that the violation occurred at a time and under circumstances

which did not provide employer with a reasonable opportunity to detect the violation. (*Bryant Rubber Corp.*, Cal/OSHA App. 01-1358, Decision After Reconsideration (Aug. 21, 2003).) In this instance, Employer's foreman Valdez was present at the site at the time of the cave-in. A foreman's knowledge of a violative condition will be imputed to the employer. (*PCL Civil Constructors, Inc.*, Cal/OSHA App. 93-2373, Decision After Reconsideration (Mar. 4, 1999)). Knowledge will be found to exist where an employer either knows, or could have known, with the exercise of reasonable diligence, of the violative condition. (*PCL Civil Constructors*, supra). Valdez, busy putting mounds of dirt over the newly connected pipe, as well as supervising the trencher, did not see the large sand strata that collapsed a short time after the trench was dug. As Rompel testified, the trencher itself had only progressed 20 or 30 feet ahead of the area of the cave-in when the accident occurred. Had Valdez exercised reasonable diligence in examining the newly trenched areas for hazards, he would likely have been aware of the violative condition--namely, that the trench was not in stable rock, but was in a mix of compressed soil and sand, some of which was extremely unstable due to the sand strata. (See, *Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (Apr. 1, 2003) [Employer must establish that the violation occurred at a time and under circumstances which could not provide a reasonable opportunity to detect it].) The foreman's lack of knowledge is imputed to Employer, and a serious violation is found.

To establish an injury as accident-related, the Division must establish by a preponderance of the evidence a causal nexus between the violation and the serious injury. (*Pierce Enterprises*, supra, citing *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) The testimony of Ford and the injured employee provide evidence that Employer's failure to provide adequate cave-in protection as required by the standard lead to Diaz's serious injury. Ford testified to providing Employer with a 10% penalty reduction based on size, the only reduction Employer was qualified to receive, as the citation is classified as serious.

The Division established a serious, accident-related violation. A civil penalty of \$16,200 is assessed for Citation 2.

Citation 3

Citation 3 alleges a serious violation of section 1541(j)(2), which requires protection of employees from excavated materials that could pose a potential hazard through falling or rolling into the excavation. According to the safety order, "[p]rotection shall be provided by placing and keeping such materials at least 2 feet from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials from falling or rolling into excavations." As discussed in the ALJ's decision, the Employer withdrew all defenses to Citation

3 except for the issue of classification; the violation is established by operation of law. (See Section 361.3).

Section 1541(j)(2) has a clear purpose of protecting employees from the hazard of materials (such as spoils from trenching) falling into an open excavation where employees are working. This is a separate hazard from failure to properly protect employees from excavation cave-in, as described in Citation 2. (*California Pipeline Company*, Cal/OSHA App. 93-032, Decision After Reconsideration (Sep. 2, 1998)). The Division's inspector testified that she came to the conclusion that substantial probability of death or serious physical harm could result from a violation of Citation 3 because workers who are exposed to materials falling into a trench can be suffocated, when an "avalanche effect" occurs. She stated that the avalanche effect can lead to the chest being compressed, especially if the workers are bending over. Even a smaller spoils fall into a trench may lead to lack of circulation in the covered limbs, which has a risk of serious injury or death.

Employer's expert, Smith, confined his testimony to general trench accidents, and did not provide any testimony on the probability of serious physical harm or death should spoils enter a trench due to a violation of section 1541(j)(2). Ford's testimony, that spoils entering an excavation can cause serious injury or death to exposed employees, was unrebutted. (See, *James M. Blessing*, Cal/OSHA App. 93-2101 Decision After Reconsideration (Jun. 10, 1997) [Spoilage falling into excavation may cause serious injury or death]). Where a Division witness has testified based on her experience in the safety field, and that evidence is neither impeached nor called into question through other evidence in the record, the Division will be found to have met its burden of proof to show the serious classification of a citation. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012), citing *Forklift Sales of Sacramento, Inc.*, Cal/OSHA App. 05-3477, Decision After Reconsideration (Jul. 7, 2011)).

A serious violation of section 1541(j)(2) is established and a \$2925 civil penalty is ordered.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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