

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

In the Matter of the Appeal of:

BURTECH PIPELINE, INC.
102 Second Street
Encinitas, CA 92024

Employer

Dockets. 13-R3D2-0830 and 0831

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above entitled matter.

JURISDICTION

Commencing on November 16, 2012 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On February 26, 2013, the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ Citation 1, Items 1 through 6 alleged four general and two regulatory violations as follows: Item 1, a general violation of section 1509, subdivision (e); Item 2 a general violation of section 1510, subdivision (a); Item 3 a general violation of section 1512, subdivision (e); Item 4 a general violation of section 3395, subdivision (f)(1); Item 5 a regulatory violation of section 3203, subdivision (b)(1); and Item 6, a regulatory violation of section 3203, subdivision (b)(2). Citation 2 alleged a serious violation of section 1541.1, subdivision (a)(1).²

Employer timely appealed.

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

² "Regulatory," "general," and "serious" violations are defined in section 334, subdivisions (a), (b) and (c), respectively.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.

On September 30, 2015 an ALJ of the Board issued a Decision (Decision). The Decision vacated the violations alleged in Citation 1, Items 1, 3, and 6, and affirmed the violations alleged in Items 2, 4, and 5, as well as the violation alleged in Citation 2.

Employer timely filed a petition for reconsideration seeking review of the Decision's holdings on Citation 1, Items 2, 4 and 5, and Citation 2. The Board took Employer's petition under submission on December 23, 2015.

The Division filed an Answer to the petition.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration and the Division's Answer. The Board has taken no new evidence. After our independent review of the record, we affirm the Decision with respect to its rulings on Citation 1, Item 5, reverse the Decision as to Citation 1, Items 2 and 4, and affirm as to Citation 2, as explained in detail below.

FINDINGS OF FACT

Citation 1, Item 2, alleged that Employer failed to produce records that it had trained three of its employees as required by section 1509, subdivision (e).

Citation 1, Item 4 alleged that Employer failed to train its employees as required by section 3395, subdivision (f)(1).

The three employees who had allegedly not been trained were first hired more than one year before the inspection of the subject worksite began on November 16, 2012.

Citation 1, Item 5 alleged that Employer failed to keep records of periodic inspections of the workplace as required by section 3203, subdivision (b)(1).

Citation 2 alleged a violation of section 1541.1, subdivision (a)(1).

The trench in which Employer's employee was observed working on November 16, 2012 was more than 5 feet deep.

The trench had vertical walls; it was not sloped or benched, and there was no evidence that the trench or its shoring system had been designed and approved by a registered professional engineer.

The trench had been dug in previously disturbed soils.

Ramon Higuera (Higuera), the employee observed working in the trench, was not a foreman or a supervisor, and did not have responsibility at the jobsite for safety of other employees.

The initial shoring in the trench consisted, in part, of vertical rails which were more than two feet above the bottom of the trench.

Higuera placed the shoring, or caused it to be placed, before he entered the trench.

Higuera was the only employee to enter the trench.

The Division's inspector had completed and was current on required training related to trenches.

The evidence in the record established that there was a realistic possibility that death or serious injury could result from the improper shoring of the trench.

ISSUES

Was Employer required to retain records showing that it provided its employees with the types of training required by section 1510, subdivision (a), and section 3395, subdivision (f)(1)?

Did Employer violate section 1541.1, subdivision (a)(1)?

FINDINGS AND REASON FOR DECISION AFTER RECONSIDERATION

1. Training Records.

Citation 1, Items 2 and 4 alleged that Employer had not provided three of its employees at the jobsite various types of training because Employer failed to provide records documenting such training. The Decision upheld the violations on the same basis, reasoning that Employer had every incentive to provide records documenting the training.

We note, however, that neither section 1510 nor section 3395 requires that employers retain records of training given to its employees. Thus, to find Employer had not provided training because it did not have records of training is tantamount to reading a new requirement – record retention – into the safety orders. This we may not do. (*Anning-Johnson Company*, Cal/OSHA App. 06-1976, Decision After Reconsideration (Jan. 13, 2012); *E. L. Yeager Construction*

Company, Inc., Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).)

We note that section 3203, subdivision (b)(2) requires training records to be retained for one year. Even if we assume, without so holding, that such requirement applies to all training given to employees (when the specific regulation or training requirement itself does not specify a record retention period), Employer would still not be obligated to provide training records for training given more than a year before the inspection took place. And, since the allegedly untrained employees had been hired more than two years before the inspection, we cannot hold Employer to have been in violation of the training requirement on this record.

There are additional reasons for our holding above.

First, section 1510, subdivision (a) provides, “When workers are first employed they shall be given instructions regarding the hazards and safety precautions applicable to the type of work in question and directed to read the Code of Safe Practices.” The three employees who were allegedly not trained were hired no more recently than 2010, and one of them no later than 2000.

Second, section 1510, subdivision (a) does not mandate training on an employer’s Code of Safe Practices (CSP), but rather requires that employers direct employees to read that Code. To require Employer prove it had given training on the CSP would again introduce a requirement into the safety order.

2. Inspection Records.

Section 3203, subdivision (a)(4) requires employers to inspect the workplace periodically to “identify and evaluate hazards []” which may be present. Section 3203, subdivision (b)(1) requires employers to retain records of those inspections for one year. The work involved in this matter was part of a larger project which had been ongoing for some time, and was in progress during the inspection which resulted in the citations at issue. Employer was therefore required to have records of the inspections it had conducted to identify and evaluate hazards involved in the work. It produced no such records. Since the record retention period had not yet lapsed, we affirm the ALJ’s Decision holding that Employer violated section 3203, subdivision (b)(1), as alleged in Citation 1, Item 5.

3. Trench Protection.

Citation 2 alleges a serious violation of Section 1541.1, subdivision (a)(1), which provides:

(a) Protection of employees in excavations.

(1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with Section 1541.1(b) or (c) except when:

(A) Excavations are made entirely in stable rock; or

(B) Excavations are less than 5 feet in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

(2) Protective systems shall have the capacity to resist without failure all loads that are intended or could reasonably be expected to be applied or transmitted to the system.

The evidence shows that the excavation was not “made entirely in stable rock” and was more than 5 feet deep. Further, the undisputed evidence was that the trench had been dug to gain access to a previously installed underground pipe; installation of that pipe necessarily disturbed the soils above and around it, which by definition meant the soil was no longer Type A soil. (See section 1541.1, Appendix A [soils previously disturbed cannot be Type A].) Therefore, a protective system “designed in accordance with Section 1541.1(b) or (c)” was required.

Section 1541.1, subdivision (b) lists requirements for benching or sloping the sides or walls of an excavation when one of those options is selected as the protective system to be utilized in a trench. The evidence is undisputed that the trench here had vertical walls. Since the trench was not benched or sloped those options for protection of workers are not at issue.

Section 1541.1(c) applies when one is using support systems to provide protection from cave-ins. Specifically, Employer opted to use aluminum hydraulic supports, which are the subject of section 1541.1, subdivision (c)(2), which states:

(c) Design of support systems, shield systems, and other protective systems. Designs of support systems, shield systems, and other protective systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of Section 1541.1(c)(1); or, in the alternative, Section 1541.1(c)(2); or, in the alternative, Section 1541.1(c)(3); or, in the alternative, Section 1541.1(c)(4) as follows:

(1) Option (1) - Designs using Appendices A, C and D. Designs for timber shoring in trenches shall be determined in accordance with the conditions and requirements set forth in Appendices A and C to this article. Designs for aluminum hydraulic shoring shall be in accordance with Section 1541.1(c)(2), but if manufacturer's tabulated data cannot be utilized, designs shall be in accordance with Appendix D.

(2) Option (2) - Designs Using Manufacturer's Tabulated Data.

(A) Design of support systems, shield systems, or other protective systems that are drawn from manufacturer's tabulated data shall be in accordance with all specifications, recommendations, and limitations issued or made by the manufacturer.

(B) Deviation from the specifications, recommendations, and limitations issued or made by the manufacturer shall only be allowed after the manufacturer issues specific written approval.

(C) Manufacturer's specifications, recommendations, and limitations, and manufacturer's approval to deviate from the specifications, recommendations, and limitations shall be in written form at the jobsite during construction of the protective system. After that time this data may be stored off the jobsite, but a copy shall be made available to the Division upon request.

If manufacturers specifications cannot be used, trenches subject to section 1541.1, subdivision (c)(2) are required to comply with the requirements of Appendix D.³ Employer does not contend that the aluminum hydraulic shoring was used according to manufacturer's specifications, or that any variance from those specifications received written approval from the manufacturer. Hence, we turn to Appendix D to ascertain the specific requirements that had to be met by the shoring.

The evidence established that the vertical rails used to support the hydraulic supports did not extend to within two feet of the bottom of the trench. This was a violation of the requirements of Appendix D, as shown in Figure 1 of the Appendix. And, since there is no question that one of Employer's employees was in the improperly shored trench, a violation is established, contrary to Employer's arguments in its petition for reconsideration.

³ Employer argues in its petition for reconsideration that the Division had to prove that Employer had complied with none of the options for protective systems in the safety order. Given the evidence showing that Employer had elected a specific option, we infer that it elected not to utilize any of the other options set forth in section 1541.1.

As noted above, the record establishes that Employer opted to use aluminum hydraulic shoring in its attempt to comply with section 1541.1. The evidence showed that Employer installed such shoring equipment in the trench, and further shows that the walls of the trench were vertical. Thus, contrary to Employer's argument, the record does establish which option it selected in order to secure the trench from the risk of collapse, and that it did not comply with the requirements of the selected option.

Having found that the evidence shows Employer was in violation of section 1541.1, subdivision (a)(1), we must next consider whether the Division's "serious" classification was appropriate.

Labor Code section 6432, subdivision (a) provides as pertinent here that a serious violation exists if the Division demonstrates that there is a realistic possibility that death or serious physical harm could result from the hazard caused by the violation. Here the preponderance of the evidence showed that death or serious physical harm was a "realistic possibility" in the event of a cave-in or collapse of the trench in which Higuera was working. The evidence also established that Employer's foreman was present at the project on the day Higuera entered the trench, albeit not at the trench's exact location, and that the trench had been dug the day before the inspection. Under those circumstances Employer had ample opportunity to know that the trench was not properly shored and take steps to keep its employees out of the trench until the violative condition was corrected. The violation was proved to be serious. We affirm the Decision as to Citation 2, Item 1.

We are not persuaded by Employer's arguments to the contrary.

Employer argues that the Division inspector did not have sufficient and recent enough experience to assess the safety and compliance status of the trench and supports at issue. To the contrary, Labor Code section 6432, subdivision (g) provides (in pertinent part) that if the inspector's Division-mandated training is current, she is "deemed competent to offer testimony to establish each element of a serious violation[.]" Since the evidence was that the inspector was current on her Division-mandated training, her testimony was adequate to satisfy the Division's burden of proof on the issue.

Employer further argues that the Division inspector did not testify to any experience with trenches of the same dimensions as the one at issue. Were we to impose such an evidentiary requirement on the Division it would lead to absurd results, which outcome is disfavored. (See *National Steel and Shipbuilding Company (NASSCO)*, Cal/OSHA App. 10-3793, Denial of Petition for Reconsideration (Sep. 20, 2012), citing *Barnes v. Chamberlain* (1983) 147 Cal. App. 3d 762.) For example, if an inspector were unable to testify that she had previously inspected or studied a trench with the exact dimensions of the one in question in a matter, Employer would have us give her testimony

regarding the risks of improper shoring little or no weight. To the contrary, we do not view trenches to be idiosyncratic to such degree, absent evidence that a particular trench was somehow unique, and there is no such evidence here. Since section 1541.1, subdivision (a)(1)(B) requires that trenches five feet or more deep be protected from cave-ins and the trench here exceeded that depth, we will not require the Division here to have proved that its inspector had previous knowledge of a trench of the same dimensions.

Similarly, Employer argues that the inspector's testimony that if the bottom four feet of the trench (which were unshored) were to cave in the soils on top would also collapse is not supported by any other testimony or evidence. We believe her testimony on that topic is reasonable. We think it reasonable to conclude that unsupported masses of earth will fall unless adequately supported. In short, we are not convinced by the arguments Employer advances in its petition for reconsideration that Citation 2 should not be sustained.

Lastly, Employer argues in its petition that the penalties proposed by the Division and approved in the Decision require further adjustment. We disagree. The penalty for Citation 1, Item 5 was correctly calculated, as we credit the testimony of the Division's inspector regarding Employer's number of employees, and the other adjustments made. The penalty for Citation 2 was also correctly calculated for size, extent and likelihood. The Division's inspector testified that no adjustment for good faith and history was given because Employer did not have an "operative" injury and illness prevention program or IIPP.⁴ (Section 336, subd. (c)(8); see Lab. Code section 6401.7.) Employer's IIPP was extant and in effect, and the inspections required were carried out, but records of them were not kept. We hold, therefore, that Employer's failure to maintain records of the scheduled and periodic inspections (Citation 1, Item 5, sustained above) does not mean its IIPP was not "operative." Accordingly, the based penalty of \$18,000 for Citation 2 must be adjusted downward by 25 per cent or \$3,600, to \$14,400. That latter figure is then reduced by 50 per cent as credit for Employer's abatement of the hazard, leaving a final penalty of \$7,200.00. The Summary Table accompanying this Decision After Reconsideration provides a list of all alleged and affirmed violations, and the final penalties imposed.

DECISION

The ALJ's Decision is affirmed in part and reversed in part, as follows: Employer's appeal of Citation 1, Item 2 and Item 4 is granted and no penalty is assessed; Employer's appeal of Citation 1, Item 5 is denied and the Decision

⁴ Webster's defines "operative," as pertinent here, as "1 capable of, characterized by, or in operation 2 accomplishing what is desired; effective." (Webster's New World Dict. (3d college ed. 1991) p. 949.)

affirmed; Employer's appeal of Citation 2 is denied and the Decision affirmed, except as to the penalty recalculation explained above.

ED LOWRY, Member
JUDITH R. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAR 28, 2016

SUMMARY TABLE DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

BURTECH PIPELINE, INC.
Dockets. 2013-R3D2-0830 and 0831

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

IMIS No. 315346858

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD
13-R3D2-0830	1	1	1509(e)	G	[Failure to conduct toolbox safety meetings every 10 days.] ALJ vacated citation.		x	\$280	\$0	\$0
	1	2	1510(a)	G	Appeal granted and no penalty assessed.		x	\$185	\$185	\$0
	1	3	1512(e)	G	[Failure to post emergency phone numbers at jobsite.] ALJ vacated citation.		x	\$185	\$0	\$0
	1	4	3395(f)(1)	G	Appeal granted and no penalty assessed.		x	\$280	\$280	\$0
	1	5	3203(b)(1)	Reg	[Failure to maintain records of scheduled and periodic inspections.] ALJ sustained citation.	x		\$375	\$375	\$375
	1	6	3203(b)(2)	Reg	[Failure to have records of training on IIPP and records did not include name of training provider.] ALJ vacated citation.		x	\$375	\$0	\$0
13-R3D2-0831	2	1	1541.1(a)(1)	S	Failure to shore 8 foot deep trench properly, which was in type B soil.] ALJ sustained citation. Board recalculated penalty amount.	x		\$9,000	\$9,000	\$7,200
Sub-Total								\$10,680	\$9,840	\$7,575

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$7,575

NOTE: Payment of final penalty amount should be made to:
Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.
Please call (415) 703-4291 if you have any questions.

POS: 3/28/2016