

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

In the Matter of the Appeal of:

**J. REDFERN INC.
dba GOLDEN STATE LANDSCAPING
P.O. Box 2091
Livermore, CA 94551**

Employer

DOCKET 15-R1D2-2245

DECISION

J. REDFERN INC. dba GOLDEN STATE LANDSCAPING (Employer) is a landscaping and construction contractor which provides services in the commercial and residential construction industry. Beginning February 26, 2015, the Division of Occupational Safety and Health (Division) through Associate Safety Engineer Charles Jackson (Jackson) conducted an inspection at a place of employment maintained by Employer at 99 Vista Montana, San Jose, California (the site). On May 5, 2015, the Division issued two citations for three violations of the California Code of Regulations, title 8, one of which remains at issue: failure to protect each employee working inside an excavation more than five feet in depth with a protective system.¹

Employer filed a timely appeal contesting whether the classification of serious was correct.²

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Oakland, California on September 30, 2015. Shawn Walker, Vice President of Operations (Walker) represented the Employer. Charles Jackson represented the Division. The parties presented oral and documentary evidence and the matter was submitted on September 30, 2015.

¹ Unless otherwise specified, all section references are to the California Code of Regulations, title 8. The Division alleged a serious violation of section 1541.1, subdivision (a)(1) with a proposed penalty of \$3,035. The employer did not appeal Citation 1, Item 1, alleging a violation of Section 341, subsection (d)(5)(A) or Citation 1, Item 2, alleging a violation of Section 1509, subsection (a)(1).

² At the hearing, the employer stipulated that the Division calculated the proposed penalty of Citation 2-1 in accordance with Division policies and procedures, assuming that the citation is determined to be correctly classified as a serious violation.

Issues

- A. Did Employer violate section 1541.1, subdivision (a)(1) by failing to protect each employee working inside an excavation more than five feet in depth with a protective system?
- B. Did the Division establish a rebuttable presumption that the violation is properly classified as a serious violation?
- C. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?

Findings of Fact

- 1. J. Redfern Inc. dba Golden State Landscaping, Employer, is a landscaping and construction contractor which provides services in the commercial and residential construction industry.
- 2. In front of a structural wall, an excavation which measured five feet, one inch or five feet, two inches deep was constructed by Employer.
- 3. The walls of the excavation were made of clay, and were not entirely in stable rock.
- 4. No permit was obtained prior to constructing the excavation and the foreman did not have competent person training.
- 5. No shoring, sloping or benching methods listed in the safety order were implemented.
- 6. The excavation was over five feet in depth, and no benching, sloping, shoring, shielding or other protective systems were in place to protect an employee working in the trench.
- 7. Prior to the inspection, the depth of the excavation was not measured by the foreman.
- 8. The proposed penalty for Citation 2, Item 1 of \$3,035 was calculated in accordance with the Division's policies and procedures.

Analysis

- A. Did Employer violate section 1541.1, subdivision (a)(1) by failing to protect each employee working inside an excavation more than five feet in depth with a protective system?**

The Division cited Employer for a violation of section 1541.1, subdivision (a)(1) of the Construction Industry Safety Orders, which requires:

- (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.

Citation 2, Item 1 alleges as follows:

Prior to and during the course of the inspection, including, but not limited to, on February 26, 2015, the employer failed to protect each employee working inside an excavation more than 5 feet in depth with a protective system in accordance with this section.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

Under this section, the employer was required to use cave-in protection consisting of benching or sloping, or shoring, shielding or other protective systems, in excavations five feet deep or greater which are not made entirely in stable rock. At the time of the inspection, the employer was in the process of creating the foundation for a stairway by digging an excavation. It is undisputed that the excavation measured five feet, one or five feet, two inches deep; the walls were made of clay, which is not entirely in stable rock. No permit was obtained prior to the inspection, and no shoring, sloping or benching methods listed in the safety order were implemented.

The employer did not contest the existence of the violation. When the violations' existence is not at issue, that issue is waived and a violation of section 1541.1, subdivision (a)(1) is found to exist by operation of law. (*Pacific Cast Products, Inc.*, Cal/OSHA App. 99-2855, Denial of Petition for Reconsideration (July 19, 2000); *Closets Unlimited*, Cal/OSHA App. 92-427, Decision After Reconsideration (Nov. 2, 1994); *Lloyd W. Aubry Engineering Co., Inc.*, Cal/OSHA App. 79-251, Decision After Reconsideration (May 28, 1982).)

B. Did the Division establish a rebuttable presumption that the violation is properly classified as a serious violation?

Labor Code § 6432, subdivision (a) states:

(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 harm³ could result from the actual hazard created by the violation. The actual hazard may consist of, among other things: ...

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).)

Associate Safety Engineer Jackson testified that at the time of the inspection, he measured the trench as 53 by 80 inches in length and 61 or 62 inches in depth, or in excess of five feet deep. (Exhibits 4 and 5.) The types of injuries which result if a trench collapses or caves-in include multiple fractures, broken bones, or even death. Jackson’s un rebutted opinion that serious injury or death from a trench cave-in is a realistic possibility is found credible and is accepted. ⁴

³ Labor Code section 6432, subdivision (e) provides as follows:

“Serious physical harm” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following:

- (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.

⁴ Jackson testified that he was current in his Division-mandated training, and has experience conducting accident inspections involving cave-ins. (Exhibit 8.) Jackson’s opinion was also based upon his 21 years of experience working for the Division. He conducted over 1200 inspections, including five accident inspections involving trench cave-ins. All of the cave-in investigations resulted in serious injuries, including one which resulted in a fatality. His opinion was based upon a reasonable evidentiary foundation consisting of his experience and training. Thus, Jackson is competent to give his opinion per Labor Code section 6432, subdivision (g). (*Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After

The realistic possibility of serious physical harm combined with existence of the actual hazard caused by failure to protect employees from cave-ins by providing benching, sloping, shoring, shielding or other protective systems when an excavation is over five feet in depth is well within the definition of “serious” set forth in section 6432. The Division established a rebuttable presumption that the violation was properly classified as a serious.

C. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to Employer to rebut the presumption. Section 6432, subdivision (c), provides as follows:

If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious 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.

To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April. 1, 2003).) Reasonable diligence includes the obligation of foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. (*A. A. Portonova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986).)

Employer argued that the presumption of a serious classification was rebutted because there was a lack of employer knowledge that the excavation was over five feet deep.⁵ However, Employer’s V.P. of Operations, Walker admitted that no one measured the excavation prior to the inspection; he also

Reconsideration (Nov. 29, 1999).)

⁵ Employer’s argument that conditions present at the time of the inspection did not present a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation is rejected. Walker acknowledged that if there was a cave-in due to the failure to comply with the regulation, the result would likely be death or serious physical harm. (*Mountain Cascade, Inc.*, Cal/OSHA App. 98-1129, Decision After Reconsideration (Aug. 29, 2001).)

testified that Employer's foreman, Ramon Herrera had ten years of experience, but had not received training as a "competent person".⁶ Thus, although Employer had the obligation to have its foremen or supervisors oversee the entire work site where safety and health hazards are present, it failed to exercise reasonable diligence by not having a "competent person" on-site and by not measuring the excavation at the site prior to inspection. Employer therefore failed to rebut the presumption of serious violation and the classification stands.⁷

Employer stipulated that the \$3,035 penalty for Citation 2 was calculated in accordance with the Division's policies and procedures. Accordingly, the serious classification of Citation 2 is affirmed and a penalty of \$3,035 is assessed.

Conclusion

Therefore, Employer's appeal is denied. The Division properly classified the violation of section 1541.1, subdivision (a)(1) as serious.

Decision

Citation 2, Item 1 and the proposed \$3,035 penalty are affirmed.

⁶ Section 1504, subdivision (a) provides:

Competent Person. One who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

⁷ Employer maintains that it had done construction work for over twenty years without a serious accident. Absence of previous accidents is not relevant to the issue of the classification of a violation. (*National Cement Co.*, Cal/OSHA App. 91-310, Decision After Reconsideration (Mar. 10, 1993).)

Employer also argues that an exception to section 1541.1, subdivision (a)(1) applies, based on Exhibit B, Excavations, OSHA No. 2226 (2002) (revised), page 2, a federal OSHA brochure which states "for this exemption to apply, all the following conditions must exist." (Emphasis added.) Walker testified that there was no heavy equipment or vehicles vibrating while an employee was in the excavation, which involves one of the elements of the federal standard. The exemption in the federal OSHA brochure does not apply. An employer claiming an exception from a safety order has the burden of showing it applies and is satisfied. (*Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (June 21, 1982); *Tutor-Saliba-Perini*, Cal/OSHA App. 97-2799, Decision After Reconsideration (Mar. 2, 2001).)

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

DATED: October ____, 2015

MD:sp

MARY DRYOVAGE
Administrative Law Judge

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
J. REDFERN INC. dba GOLDEN STATE LANDSCAPING
Docket 15-R1D2-2245**

Date of Hearing: September 30, 2015

Division's Exhibits—Admitted

Exhibit Number	Exhibit Description	
1	Jurisdictional Documents	X
2	Proposed Penalty Worksheet	X
3	I-B-Y, dated April 15, 2015	X
4	Photo of trench at time of inspection	X
5	Photo of trench, showing wall	X
6	Photo of Employer's truck at site of inspection	X
7	Photo of Employer's truck – side showing logo	X
8	Request for Training Exemption, approved 7/24/2015	X

Employer's Exhibits—Admitted

Exhibit Letter	Exhibit Description	
A	Drawing of the cross section of the scope of work attached	X
B	Excavation, U.S. OSHA No. 2226 (2002) (revised)	X

Witnesses Testifying at Hearing

1. Charles Jackson
2. Shawn Walker

CERTIFICATION OF RECORDING

I, Mary Dryovage, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

Signature

Date

SUMMARY TABLE ORDER

In the Matter of the Appeal of:

**J. REDFERN INC. dba GOLDEN STATE LANDSCAPING
DOCKET 15-R1D2-2245**

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

Inspection No. 1042997

Site: 99 Vista Montana, San Jose, CA 95127
Date of Inspection: 02/26/15 - 05/04/15

Date of Citation: 05/05/15

DOCKET	C	I	T	A	T	I	O	N	M	SECTION	T	Y	P	E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL	A	F	V	I	R	A	C	A	T	E	D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING or STATUS CONF.	FINAL PENALTY ASSESSED BY BOARD			
15-R1D2-2245	2	1								1541.1(a)(1)	S				ALJ affirmed violation.	X											\$3,035	\$3,035	\$3,035			
Sub-Total																														\$3,035	\$3,035	\$3,035

Total Amount Due*

\$3,035

Please do not send payments to the Appeals Board.
All Penalty payments must be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142
(415) 703-4291, (415) 703-4308 (payment plans)

*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.

**ALJ:MD
POS: 10/___/15**

