

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

In the Matter of the Appeal  
of:

**SHIMMICK CONSTRUCTION CO., INC.**  
**/OBAYASHI CORP. JV.**

8201 Edgewater Drive, Suite 202  
Oakland, CA 94621

Employer

DOCKETS 11-R3D1-2562  
through 2570

**DECISION**

**Statement of the Case**

Shimmick Construction Co., Inc./Obayashi Corp. JV. ("Employer") is a construction company. Beginning March 23, 2011, the Division of Occupational Safety and Health ("the Division") through Associate Cal/OSHA Engineer Brandon Hart conducted a complaint accident inspection at a place of employment maintained by Employer at 3972 Valley View Blvd., Yorba Linda, California (the site). Employer was conducting modifications to a water facility. On September 21, 2011, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations<sup>1</sup>:

- Citation 1/Item 1 - Failure to implement and maintain an effective Illness and Injury Prevention Plan (IIPP).
- Citation 1/Item 2 - Employer provided a nonwater carriage toilet facility with the handwashing facilities located inside.
- Citation 1/Item 3 - Operated a backhoe without utilizing any warning system.
- Citation 1/Item 4 - Failure to ensure that the railing system including their connections and anchorage was capable of withstanding a force of at least 200 pounds.

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<sup>1</sup> Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

- Citation 1/Item 5 - Failure to mount and identify portable fire extinguishers so that they were readily accessible.
- Citation 1/Item 6 - Failure to ensure that a portable fire extinguisher in service had a current maintenance inspection.
- Citation 2/Item 1 - Failure to ensure that the subsurface installations were protected, supported or removed to safeguard employees near the open excavation.
- Citation 3/Item 1 - Failure to ensure that the excavated trench 1331 was inspected by a competent person.
- Citation 4/Item 1 - Failure to provide guardrails on the walkway/bridge that employees used to cross over trench 1331.
- Citation 5, Item 1 - Failed to ensure the level of excavated material was no greater than 2 feet below the bottom member of the support system.
- Citation 6/Item 1 - Failure to ensure that the mid-rail was halfway between the top rail and the ground level.
- Citation 7/Item 1 - Failure to ensure that facilities for quick drenching or flushing of the eyes and body were provided.
- Citation 8/Item 1 - Willful failure to take safe and acceptable means to prevent damage to a subsurface installation by not using hand tools to excavate within the area of its approximate location.
- Citation 9/Item 1 - Willful failure to ensure that the excavation at trench 1331 was adequately protected against cave-ins.

Employer filed a timely appeal contesting the existence of the alleged violations, the classification of the alleged violations, reasonableness of abatement requirements, and the reasonableness of the proposed penalties. Employer raised numerous affirmative defenses.

This matter was heard by Jacqueline Jones, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at West Covina, California on October 18 and 19, 2012, February 19 and 20, 2013, May 23, 2013, July 25, 2013, September 25 and 26, 2013, and October 22, 2013.<sup>2</sup> Ronald Medeiros, Attorney from the Law Offices of Robert Peterson, represented Employer. Tuyet-Van-Tran, Staff Counsel, represented the Division. The parties presented oral and documentary evidence which is listed in the certification of record and the matter was left open until November 26, 2013, to allow submission of closing briefs. The submission date was later extended to May 31, 2015, by order of the Administrative Law Judge.

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<sup>2</sup> Exhibits received and testifying witnesses are listed on Appendix A. Certification of the record is signed by the ALJ.

During the hearing, the Division moved to amend Citation 2, Item 1, charging a violation of Section 1541 subdivision(b)(4) not 1541 subdivision(b)(D) (4). The Division also moved to amend Citation 8, Item 1, charging a violation of 1541 subdivision(b)(3) not subdivision (b)(1)(d)(3). No objection having been heard from the Employer, the motions were granted.

**Issues:**

1. Was the correct Employer cited?
2. Was the IIPP effective?
3. Was a handwashing station located inside of a nonwater carriage toilet facility?
4. Was mobile equipment operated adjacent to an excavation where the operator did not have a clear and direct view of the edge?
5. Did Employer have a warning system for the mobile equipment?
6. Were the connections used on railings capable of withstanding without failure a force of at least 200 pounds?
7. Did Employer fail to mount and identify portable fire extinguishers so that they were readily accessible?
8. Did Employer fail to ensure that a portable fire extinguisher in service have a current maintenance inspection?
9. Did Employer fail to protect, support or remove subsurface installations near the open excavation?
10. Was Citation 2, Item 1 properly classified as serious?
11. Did Employer know or could the Employer have known about the failure to protect, support or remove subsurface installations near the open excavation?
12. Did Employer fail to ensure that the excavated trench was inspected by a competent person prior to employees descending into the trench?
13. Was Citation 3, Item 1 properly classified as serious?
14. Did Employer know or could the Employer have known about the failure to ensure that the excavated trench was inspected by a competent person prior to employees descending into the trench?
15. Did Employer fail to provide guardrails on the walkway/bridge that employees used to cross over trench 1331?
16. Was Citation 4, Item 1 properly classified as serious?
17. Did Employer know or could the Employer have known about the failure to provide guardrails on the walkway/bridge that employees used to cross over trench 1331?
18. Was Citation 5, Item 1 properly classified as serious?
19. Did Employer fail to ensure the level of excavated material was no greater than 2 feet below the bottom member of the support system?
20. Was Citation 6, Item 1 properly classified as serious?

21. Did Employer fail to ensure that the mid-rail was halfway between the top rail and the ground level?
22. Was Citation 6, Item 1 properly classified as serious?
23. Did Employer fail to ensure that facilities for quick drenching or flushing of the eyes and body were provided to the foreman and employees that recharged the electric forklift?
24. Was Citation 7, Item 1 properly classified as serious?
25. Did Employer willfully fail to take safe and acceptable means to prevent damage to a subsurface installation by not using hand tools to excavate within the area of its “approximate location”?
26. Was Citation 8, Item 1 properly classified as serious?
27. Did Employer willfully fail to ensure that the excavation at trench 1331 was adequately protected against cave-ins?
28. Was Citation 9, Item 1 properly classified as serious?

### **Findings of Fact**

1. The correct Employer, Shimmick Construction Co., Inc./Obayashi Corp. JV was cited.
2. An employer-employee relationship existed between Employer and an employee was exposed to a hazard addressed by at least one of the safety orders alleged.
3. Employer failed to train new employees: Adam Wenzell, Juan Lemus, Christian Rodriguez and Lynn Ackenback.
4. Lynn Ackenback was not trained on the hazards of excavation.
5. The IIPP was not effective.
6. The nonwater carriage toilet facility contained a handwashing station located inside of the toilet facility.
7. Mobile equipment was operated adjacent to an excavation.
8. The operator of the mobile equipment did not have a clear and direct view of the edge of the excavation.
9. No warning system was used here in that the spotter was not continuously present while the backhoe was being operated.
10. Employer did not have a warning system for mobile equipment.
11. The connections used on railings were not capable of withstanding without failure a force of at least 200 pounds.
12. Employer failed to mount and identify portable fire extinguishers so that they were readily accessible.
13. Employer failed to ensure that a portable fire extinguisher in service had a current maintenance inspection.
14. Trench 1331 was an open excavation.
15. Foreman Wenzell was present on March 22, 2011 and knew or could have known that subsurface installations near the open excavation in Trench 1331 were not protected, supported or removed.

16. The Division properly classified Citation 2, Item 1 as Serious because there was a realistic possibility that serious injury or death could result from the failure to protect, support or remove subsurface installations.
17. The proposed penalty as to Citation 2, Item 1 is reasonable.
18. Employer knew or could have known that no competent person inspected Trench 1331 on March 24, 2011.
19. The Division properly classified Citation 3, Item 1 as Serious because there was a realistic possibility that serious injury or death could result from the failure to have a competent person inspecting Trench 1331.
20. The proposed penalty as to Citation 3, Item 1 is reasonable.
21. Employer had a walkway over an excavation that was 13 feet in depth and 4 feet and 48 inches wide with no guardrails over an excavation that employees were required and permitted to cross over.
22. Employer knew or could have known that guardrails on the walkway/bridge were not provided since the walkway was in plain view of supervisors and foremen in the vicinity.
23. The Division properly classified Citation 4, Item 1 as Serious because there was a realistic possibility of serious injury or death from the actual hazard of the violation, a thirteen foot fall.
24. The proposed penalty as to Citation 4, Item 1 is reasonable.
25. Employer knew or could have known that the bottom member of the protective system was more than 2 feet from the bottom of the excavation.
26. The Division properly classified Citation 5, Item 1 as Serious because there was a realistic possibility of serious physical harm or death from trench collapse as a result of unprotected side walls..
27. The proposed penalty as to Citation 5, Item 1 is reasonable.
28. Employer knew or could have known of the existence of improper rails exposing employees to inadequate barrier protection from falls.
29. The Division properly classified Citation 6, Item 1 as Serious because there was a realistic possibility that serious injury or death could result from not having proper railing.
30. The proposed penalty as to Citation 6, Item 1 is reasonable.
31. Facilities for quick drenching or flushing of the eyes were not provided.
32. Employer knew or could have known that facilities for quick drenching or flushing of the eyes were not provided to employees.
33. The Division properly classified Citation 7, Item 1 as Serious because there was a realistic possibility of serious injury or death from the hazard of not having eye wash and shower deluges in the vicinity of charging batteries.
34. Employer willfully failed to take safe and acceptable means to prevent damage to a subsurface installation by not using hand tools to excavate within the area of its approximate location.

35. The Division properly classified Citation 8, Item 1 as Serious because there was a realistic possibility of serious injury or death from the actual hazard of striking the subsurface installation.
36. The Division properly classified Citation 8, Item 1 as Willful in that Foreman Wenzell was aware of the actual location of the active gas line and in spite of that awareness instructed the backhoe operator to dig.
37. The proposed penalty as to Citation 8, Item 1 is reasonable.
38. Employer willfully failed to ensure that the excavation at Trench 1331 was adequately protected against cave-ins.
39. The Division properly classified Citation 9, Item 1 as Serious because there was a realistic possibility of serious injury or death from the failure to protect employees from cave-ins by using an adequate protective system.
40. The Division properly classified Citation 9, Item 1 as Willful in that the Employer had knowledge of the inadequate protection in trench 1331 and did not take adequate steps to correct said hazard.
41. The proposed penalty as to Citation 9, Item 1 is reasonable.

## **ANALYSIS**

### **1. The citation bears the correct Employer name.**

“Employer” is defined in Labor Code section 3300<sup>3</sup>. The Division, as the party bearing the burden of proof in this civil administrative proceeding, had a responsibility to prove by a preponderance of the evidence that it had cited the proper employer and that an employer-employee relationship exists between the cited entity and an employee exposed to a hazard addressed by the safety order allegedly violated.<sup>4</sup> (*C.C. Myers, Inc.*, Cal/OSHA App. 00-008 Decision After Reconsideration (Apr. 13, 2001).)<sup>5</sup> In *C.C. Myers, Inc.*, the Board held: “Prosecuting the proper entity is an element of a violation that comes within the Division’s burden of proof.” The Board also made the following observations:

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<sup>3</sup> Labor Code Section 6304 adopts, for the California Occupational Safety and Health Act of 1973, the Labor Code Section 3300 definition of “Employer”. Subsection (c) of the definition states that “every person including any public service corporation which has any natural person in service” is an employer. A corporation is a “person” as defined under Section 18 of the Labor Code.

<sup>4</sup> Employer’s attachment to its appeal forms includes a 14 point list of affirmative defenses. Number 10 on the list is “[t]he citation was issued to the wrong employer and/or a non-existing employer.” Employer initially included 15 affirmative defenses. One affirmative defense (Appellant had no actual knowledge, nor with the exercise of reasonable diligence, could have known of the existence of the alleged violation) was withdrawn by the Employer as to Citation 1.

<sup>5</sup> See also *Alfredo Annino/Alfredo Annino Construction, Inc. of Nevada*, Cal/OSHA App. 98-311 et. al., Decision After Reconsideration (Apr. 25, 2001)

The Appeals Board has long recognized the liability of joint ventures, as “employers,” for violations affecting workers in their service (employees). ( See, e.g., *Gentry-Rados, a Joint Venture*, OSHAB 75-190, Decision After Reconsideration (Mar 15, 1976); *Rados-Shea Kordick*, OSHAB 80-1263, Decision After Reconsideration (May 30, 1985).

In order to sustain the citation, the Division must prove that it cited the proper Employer. The citation bears the exact same name as the Employer. No evidence was presented to contradict that the correct employer was cited. The Division must also prove that an employer-employee relationship existed between the cited entity and an employee exposed to a hazard addressed by the safety order allegedly violated. Employer did not contend it had no employees. The record is replete with testimony and evidence that the cited employer had employees. Corporate Safety Director, Ike Riser (Riser) and Civil Superintendent Ruben Saucedo (Saucedo) admitted during the hearing that Shimmick Construction Co. Inc./Obayashi Corp. Joint Venture was the Employer. Employer did not question or dispute the inference that Riser and Saucedo were members of management. Their statements are attributed to Employer (See *Tri-Valley Growers, Inc., Cal/OSHA App. 81-1547, Decision After Reconsideration* (July 25, 1985)). Their statements are admissions (Evidence Code §1221 and statements against interest (Evidence Code §1222(a), which are exceptions to the hearsay rule.

The Division must ordinarily prove that the alleged violation exposed an employee of the cited employer to the hazard. *Easyco*, Cal/OSHA App. 83-387, 388 & 390, Decision After Reconsideration (Oct. 26, 1984).) Here, the record clearly shows that employees were exposed to a hazard addressed by the safety order allegedly violated. One such hazard that Employer exposed its employees to in violation of a safety order was the failure to train employees. An employer that does not train an employee regarding the hazards of a new assignment violates section 1509(a). *A Teichert & Son, Inc.*, Cal/OSHA App. 05-2650, Decision After Reconsideration (Sept. 12, 2012). Here, no training records were provided for employees Adam Wenzell (Wenzell), Juan Lemus (Lemus) or Christian Rodriguez (Rodriguez). Additionally, Lynn Ackenback (Ackenback), backhoe operator testified that he did not receive training from this Employer on excavation hazards. Wenzell testified that he did not receive training from this Employer until March 22, 2011 at the exact time that a gas line was struck.

Therefore, the evidence shows that the proper employer was cited. There was an employer-employee relationship between the cited entity and an employee who was exposed to a hazard addressed by a safety order allegedly

violated. The Division has established that the correct employer was cited and subject to its jurisdiction.

**2. The Division proved by a preponderance of the evidence that Employer failed to implement and maintain an effective Injury and Illness Prevention Program.**

The Division cited Employer under § 1509 subdivision (a), which provides as follows:

“Every employer shall establish, implement and maintain an effective IIPP in accordance with Section 3203 of the General Industrial Safety Orders.”

Section 3203 subdivision (a) provides as follows:

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:

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.

(7) Provide training and instruction.

The citation alleges the following:

The Employer failed to implement and maintain an effective Injury and Illness Prevention Program in that they did not follow their written procedures for training new employees, or identifying and evaluating work place hazards.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) The Division must make some showing that an element of the violation occurred. (*Lockheed California Company*, Cal/OSHA App. 80-889, Decision After Reconsideration (July 30, 1982).

The Division must prove that that the flaws in an IIPP amount to a failure to “establish”, “implement” or “maintain” an “effective” program. A single, isolated failure to “implement” a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (See *GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991).) *David Fischer, dba Fischer Transport*, A Sole Proprietorship, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).)

Section 3203 subdivision (a)(4) does not require Employers to identify a particular hazard, but only to include “procedures for identifying and evaluating work place hazards, including scheduled periodic inspections.”. (*Brunton Enterprises, Inc.*, Cal.OSHA App. 08-3445, Decision After Reconsideration (October 11, 2013).) Here, the Division failed to establish that the Employer failed to include procedures for identifying and evaluating work place hazards.

Section 3203 subdivision (a)(7) requires employers to: (7) Provide training and instruction: (a) When the program is first established; (Exception omitted] (B) To all new employees; (C) To all employees given new job assignments for which training has not been previously 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. The Division must show written procedures for training new employees were not followed. A violation of a provision of §3203 subdivision (a) exists where the IIPP contains language that satisfies the safety order, but where the employer does not perform the actions required by its IIPP. (See *W.F. Scott & Co., Inc.* Cal/OSHA App. 95-2623, Decision After Reconsideration (Oct. 29, 1999); *Tenneco West, Inc.*, Cal/OSHA App. 79-535, Decision After Reconsideration (Jan. 24, 1985).) An employer that does not train an employee regarding the hazards of a new assignment violates section 1509 subdivision (a). *A Teichert & Son, Inc.*, Cal/OSHA App. 05-2650, Decision After Reconsideration (Sept. 12, 2012).

Wenzell told Hart that he had training on trenching two years before while working with a different Employer. Wenzell testified that he was hired by this Employer approximately 8 months before March 22, 2011. Wenzell told Hart that his only training with this Employer was the Cal/OSHA 10 training<sup>6</sup> that he received on March 22, 2011. Excavator operator Lynn Ackenback (Ackenback) testified that he worked for this Employer for 3 years and had

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<sup>6</sup> Cal OSHA 10 is a construction safety course.

training on excavation but had no training on dealing with the hazards of excavation from this Employer.

Wenzell's statements to Hart are not hearsay because Wenzell was a Foreman, and therefore authorized to make statements on Employer's behalf. (*Macco Construction*, Cal/OSHA App 84-1106, Decision After Reconsideration (Aug. 20, 1986).) Employer did not question or dispute the inference that Wenzell was a member of management, although Employer had the motive and opportunity to do so; thus, it is found that Wenzell was a member of management. Since Wenzell was a member of management, his statements are attributed to Employer (See *Tri-Valley Growers, Inc.*, Cal/OSHA App. 81-1547, Decision After Reconsideration (July 25, 1985)). His statements are admissions which are an exception to the hearsay rule.

Evidence Code §1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or belief in its truth. Wenzell's statements are also statements against interest, which are an exception to the hearsay rule. Evidence Code §1222 provides "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement for him concerning the subject matter of the statement."

Here, there were more than an isolated violation. Employer's program was not effective and was not implemented. Hart asked for training records for Wenzell, Lemus, Rodriguez and Ackenback. (Exhibit 29 & 30). Employer did not provide any records evidencing any training for these employees prior to March 22, 2011. As a result, there is no evidence to rebut the sworn testimony of Hart, Wenzell and Ackenback. Here, the evidence shows that Trench Foreman Adam Wenzel (Wenzel), Juan Lemus (Lemus) and Christian Rodriguez (Rodriguez) did not receive training from this Employer. Ackenback did not receive training from this Employer on excavation hazards. Based on the above, a violation of Section 3203 (a)(7) is found.

Hart classified the violation as general. Employer did not contest the violation's classification or the reasonableness of the penalties as to Citation 1, Items 1-6. As noted above an issue not properly raised on appeal is deemed waived. Therefore, the proposed penalty of \$675 is affirmed.

**3. A Nonwater carriage toilet facility was located inside of the toilet facility.**

§1527, subdivision (a)(1) (F)(2) provides as follows:

(a) Washing Facilities

(1) General. Washing facilities shall be provided as follows:

a minimum of one washing station shall be provided for each twenty employees or fraction thereof. Washing stations provided to comply with this requirement shall at all times:

(F) When provided in association with a nonwater carriage toilet facility in accordance with Section 1526(c)<sup>7</sup>, that the water is intended for washing; and

(2) be located outside of the toilet facility and not attached to it.

The alleged violation description (AVD) reads as follows:

On March 24, 2011, the Employer provided employees with a nonwater carriage toilet facility with the handwashing facilities located inside.

The Division may prove a violation of the above safety order by proving:

1) nonwater carriage toilet facilities<sup>8</sup> was located inside of the toilet facility and 2) nonwater carriage toilet facilities was attached to the toilet facility.

Here, the nonwater carriage toilet facility was located inside of the toilet facility and attached to it. The safety order requires that wash stations are to be located outside and not attached to the toilet facility. Where an alleged violation's element must be proved and the employer presents no evidence disproving that element, the Division need only present evidence sufficient to establish that it is more likely than not that the violation existed. (*Petrolite Corporation*, Cal OSHA App. 93-2083, Decision After Reconsideration (March 3, 1998), p. 4). The Division established a violation of §1527(a)(1)(F)(2). The safety order must be interpreted consistently with the California Supreme Court's directive to liberally interpret safety legislation to promote a safe and healthful working environment. (*Broadway Sheet Metal*, Cal/OSHA App, 90-1355, Decision After Reconsideration (Nov. 23, 1992) p. 3, citing to *Carmona v. Division of Industrial Safety* (1975) 13 Cal. 3d 303, 313, and *Lusardi*

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<sup>7</sup> Title 8 California Code of Regulation §1526 (c) provides as follows: Where the provision of water closets is not feasible due to the absence of a sanitary sewer or the lack of an adequate water supply, nonwater carriage disposal facilities shall be provided. Unless prohibited by applicable local regulations, these facilities may include privies (where their use will not contaminate either surface or underground waters), chemical toilets, recirculating toilets, or combustion toilets.

<sup>8</sup> Nonwater carriage toilet facility means a toilet facility not connected to a sewer.

*Construction Co. v. California Occupational Safety & Health Appeals Board* (1991) 1 Cal. App. 4<sup>th</sup> 639, 645.)

There is one exception to Section 1527 subdivision (a)(1) (F). The exception to subdivision (a)(1)(F)(2) reads as follows: Where there are less than 5 employees, and only one toilet facility is provided, the required washing facility may be located inside of the toilet facility. Here, the Parties agreed that Employer had more than 120 employees at this site at the time of inspection. Therefore, the exception does not apply. Hart credibly testified that a nonwater carriage toilet facility was located inside of the toilet facility. Hart provided eyewitness testimony that the nonwater carriage toilet facility was located inside of the toilet and it was attached. Hart's testimony was corroborated by photos (Exhibits 45 & 46). The violation is established.

Hart classified the violation as general. Employer did not contest the violation's classification or the reasonableness of the penalties as to Citation 1, Items 1-6. As noted above an issue not properly raised on appeal is deemed waived. (See §361.3 ["Issues on Appeal"]; *Bourgeois, Inc.*, Cal/OSHA App. 99-1705, Denial of Petition for Reconsideration (Apr. 26, 2000); *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) Therefore, the proposed penalty of \$225 is assessed for Citation 1, Item 2.

**4. The Division has established by a preponderance of the evidence that Employer operated a backhoe adjacent to the 4 foot wide trench measured at a depth of 11 feet deep without utilizing any warning system.**

The Division cited Employer under §1541 subdivision (f), which provides as follows:

“When mobile equipment is operated adjacent to excavation, or when such equipment is required to approach the edge of an excavation, and the operator does not have a clear and direct view of the edge of the excavation, a warning system shall be used such as barricades, hand or mechanical signals or stop logs. If possible the grade should be away from the excavation.”

To uphold the citation, the Division must prove by a preponderance of the evidence the following: 1) that mobile equipment was operated; 2) adjacent to excavation or when such equipment is required to approach the edge of an excavation; 3) the operator did not have a clear and direct view of the edge; and

that 4) no warning system was used such as barricades, hand or mechanical signals or stop logs.

Here, Employee Ackenback testified credibly that on March 22, 2011, while he was operating a backhoe he hit the gas line with a backhoe bucket. Ackenback testified that a back hoe is a rubber tire machine with a front bucket and back hoe on the end of it. Ackenback testified that there were outriggers<sup>9</sup> on the machine but it was still capable of moving side to side. *Webster's New World Dictionary, Third College Edition 1988, p. 870* defines mobile as 1) moving, or capable of moving or being moved from place to place. Ackenback was clearly operating mobile equipment. Ackenback was assigned to shave the walls of the trench. Undoubtedly, Ackenback was operating the mobile equipment adjacent to the excavation in order to do his assigned job.

Here, the operator (Ackenback) did not have a clear and direct view of the edge. Ackenback testified that a laborer acted as a spotter. According to Ackenback a spotter was necessary because you have a blind spot when you get to the edge of the excavation. The spotter's job was to notify Ackenback if he was about to hit the gas line and to watch the bucket in the ground so that the backhoe operator does not hit anything or go into the trench. Ackenback testified that he could not see the gas line, and he did not have a clear and direct view of the edge of the excavation. The spotter would at times go off to the north side of the ditch to get pieces of plywood while Ackenback was digging. No one else watched while he was digging. Ackenback testified that there were no stop logs to make sure that the backhoe did not go into trench.

In this matter, the warning system that Employer used was a spotter who at times was off to the north side getting pieces of plywood while Ackenback was digging. In analogous situations, the Board has held that when a safety order requires employers to provide a specific safety measure or device, the device must perform its designed function – a horn must work, a load indicator device must be connected, etc. (See, e.g., *MCM Construction, Inc.*, Cal/OSHA App. 92-514, Decision After Reconsideration (Aug. 7, 1995); and *Tutor-Saliba-Perini*, Cal/OSHA App. 93-3117, Decision After Reconsideration, (Nov. 25, 1997). Here, the measure or warning system was not effective because the spotter would perform other tasks in lieu of warning the backhoe operator. The Division has presented sufficient evidence to meet its burden of proof here.

Hart classified the violation as general. Employer did not contest the violation's classification or the reasonableness of the penalties as to Citation 1,

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<sup>9</sup> Sometimes called Stabilizers which provide stability, minimize jolting, and reduce strain on the wheels by taking the brunt of the weight when the backhoe is digging.

Items 1-6. An issue not properly raised on appeal is deemed waived. (See §361.3 [“Issues on Appeal”]; *Bourgeois, Inc.*, Cal/OSHA App. 99-1705, Denial of Petition for Reconsideration (Apr. 26, 2000); *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) Therefore, the proposed penalty of \$675 is affirmed.

**5. The railing system including its connections and anchorage was not capable of withstanding a force of at least 200 pounds.**

The Division cited Employer under §1620 subdivision (c), which provides as follows:

“All railings, including their connections and anchorage, shall be capable of withstanding without failure, a force of at least 200 pounds applied to the top rail within 2 inches of the top edge, in any outward or downward direction at any point along the top edge.”

The citation alleges the following:

“On March 24, 2011, the Employer failed to ensure that the railing system including their connections and anchorage was capable of withstanding a force of at least 200 pounds, in that, foreign made connectors used on the railing system were not found to have any written rating from any source.”

Here, the Division must prove the following: (1) all railings, including their connections and anchorage, shall be capable of withstanding without failure, a force of at least 200 pounds (2) applied to the top rail within 2 inches of the top edge and (3) in any outward or downward direction at any point along the top edge.

Hart testified that he observed a railing system designed around a large elevator shaft where employees descended into the excavation with a ladder. Hart observed unrated connectors which could not withstand 200 pounds of force in any direction. Hart testified that the connectors used do not have a rating due to their small size. Hart asked Supervisors Scott Goss (Goss) and Joe Ontiveros (Ontiveros) why the Employer was using Chinese non-rated U-bolt connectors and they told him that Employer was not supposed to be using those type of connectors on the job site and that they would be replaced. These statements by Goss and Ontiveros are authorized admissions. Evidence Code §1222 provides that evidence offered against a party is not made

inadmissible by the hearsay rule if the statement was made by a person authorized by the party to make statements concerning the subject matter of the statement.

As mentioned earlier, where the Division presents evidence, which, if believed would support a finding if unchallenged, the burden of producing evidence shifts to the employer to present convincing evidence to avoid and adverse finding. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004).) Here, The Division has established a violation of §1620 subdivision (c) by a preponderance of the evidence in that the connectors are not capable of withstanding without failure a force of at least 200 pounds applied to the top rail within 2 inches of the top edge in any outward or downward direction.

Employer did not appeal the classification or the reasonableness of the penalty. As discussed above, it is therefore established by law and a penalty of \$675 is deemed reasonable.

**6. Employer's portable fire extinguishers were not mounted and not identified.**

The Division cited Employer for a violation of §6151subdivision (c)(1), which provides as follows:

The employer shall provide portable fire extinguishers and shall mount, locate and identify them so that they are readily accessible to employees without subjecting the employees to possible injury.

The citation alleges the following:

On March 24, 2011, the Division identified five Portable fire extinguishers at the work site, in which, the Employer failed to mount and Identify so that they were readily accessible.

The Division cited Employer for failure to mount and identify five fire extinguishers. The Division must prove the following: (1) portable fire extinguishers were at the work site; (2) portable fire extinguishers were not mounted; and (3) portable fire extinguishers were not identified so that they were readily accessible. Hart also observed five portable fire extinguishers. Three were not properly mounted or identified and one was not properly identified. Hart observed a portable fire extinguisher mounted on a stand but not properly identified (Exhibit 49 through Exhibit 52). The safety order itself

refers to each and every fire extinguisher. The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies. (*California Drive-In Restaurant Association v. Clark* (1943) 22 C.2d 285) Absent ambiguity, the ordinary meaning of the words is used. (*California State Restaurant Association v. Whitlow* (1976) 58 C.A. 3d 340).

The Division has the burden of proof, but where an employer does not offer any evidence, the Division needs to present only enough evidence to establish that an element is more likely than not. (See *Capital Building Maintenance Services, Inc.*, Cal/OSHA App. 97-680, Decision After Reconsideration (Aug. 20, 2001); and *Petrolite Corporation*, Cal/OSHA App. 93-2083, Decision After Reconsideration (Mar. 3, 1998), p. 4) . Here, the Division has established a violation of §6151 subdivision (c). Employer did not appeal the classification or the reasonableness of the penalty. As discussed above, it is therefore established by law and a penalty of \$225 is found reasonable and is assessed.

**7. Employer's portable fire extinguisher had no annual maintenance check.**

The Division cited Employer under §6151 subdivision (e)(3), which provides as follows:

(e) Inspection, Maintenance and Testing. (3) Portable fire extinguishers shall be subjected to an annual maintenance check. Stored pressure extinguishers do not require an internal examination. The employer shall record the annual maintenance date and retain this record for one year after the last entry or the life of the shell, whichever is less. The record shall be available to the Chief upon request.

The citation alleges the following:

On March 24, 2011, the Employer failed to ensure that a portable fire extinguisher in service had a current maintenance inspection. The last time the portable fire extinguisher had an annual maintenance test completed was February 2009.

Hart observed a portable fire extinguisher with an annual service tag of 2007-2008. Hart took a photo of the portable fire extinguisher (Exhibit 53). Supervisor/Safety Manager Ontiveros was present during the inspection and

removed the portable fire extinguisher from service. Ontiveros agreed with Hart that the fire extinguisher was not in compliance. Here, there was no dispute that the fire extinguisher had no annual maintenance check. The Division established a violation of §6151 subdivision (e)(3). Employer did not appeal the classification or the reasonableness of the penalty. As discussed above, it is therefore established by law and a penalty of \$225 is found reasonable and is assessed.

**8. Employer failed to protect or support subsurface installations. The Serious classification and penalty is established. Employer either knew or could have known that the subsurface installations were not protected, supported or removed as they were in plain view.**

The Division cited Employer under §1541subdivision (b)(4) which provides as follows:

(b) Subsurface installations.

(4) While the excavation is open, subsurface installations shall be protected, supported, or removed as necessary to safeguard employees.

The citation alleges the following:

On and about March 22, 2011, the Employer failed to ensure that the subsurface installations were protected, supported or removed to safeguard employees near the open excavation. As such a backhoe operator struck an exposed pressurized 2” natural gas service line. The service line had been detected, marked and exposed for a few days prior to the incident.

It is the Division’s burden to prove that 1) the excavation was open, 2) subsurface installations were not protected, supported, or removed as necessary to safeguard employees.

Ackenback testified that he was operating a backhoe in an excavation operation in Trench 1331. Ackenback’s assignment was to shave the walls of the trench. A spotter was working with Ackenback while he was shaving the trench. Clearly, the excavation was open. Ackenback testified that the purpose for shaving the walls was to install plywood boards to support the walls of the trench and prevent the trench from collapsing. Here, there is no dispute that employees were involved in the excavation operation. Ackenback testified that he could not see the edge of the excavation because he had a blindspot. The

excavator operator and the spotter were exposed to the hazard of trench collapse. The excavator operator was exposed to the hazard of falling into the trench. Clearly employees were exposed to excavation operation hazards.

Hart testified that subsurface installations consist of any subgrade utility such as telephone, electrical, natural gas lines, even abandoned lines, sewer lines and water lines. On March 22, 2011, a backhoe operator struck an exposed pressurized 2 inch natural gas service line. Protecting a subsurface installation means to provide some type of shield or barrier to prevent an employee coming into contact with the subsurface installation with either tools, equipment or their person. In order for a subsurface installation to be supported it must be that the weight of the subsurface installation does not fall or give way onto an employee working underneath or near it. Hart observed that 4 of the subsurface installations in Trench 1331 were not protected removed or supported. <sup>10</sup> In Trench 1331, there were multiple subsurface installations as depicted in photos in Exhibits 5, 20 and 22.

On March 22, 2011, The Employer failed to protect, support or remove a 2 inch natural gas line. Hart testified that the natural gas line was not protected. There was no barrier around it to prevent it from being struck by an employee. The gas line was not supported because it was just passing through the excavation from one side to the other. The gas line was not removed. Hart pointed out the gas line as depicted in Exhibit 5. There is no dispute, the natural gas line was struck by the back hoe operator on March 22, 2011. Both the Back hoe operator (Ackenback) and the spotter were near the open excavation at the time that the gas line was struck. The California Evidence Code instructs that in weighing evidence if weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code Section 412) Therefore, the Division has established a violation of §1541.1(b)(4).

### **Classification and Penalty**

The Division classified the violation as serious. Labor Code § 6432 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 harm could result from the actual

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<sup>10</sup> Hart identified five subsurface installations. Four of the subsurface installations were not protected, removed or supported. Hart testified that the eight inch water main line (5<sup>th</sup> subsurface installation) was in the process of being installed and was supported by the bottom of the excavation.

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. To establish a violation as serious, Labor Code §6432(a) provides that there is 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 “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*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).) The evidence must not lead to impossibility, must be within human reason and logic, must not be speculative, and thus based on actual events and circumstances that are proven to exist. (*Oliver Wire & Plating Co., Inc. supra.*)

The violation was failure to protect, support or remove subsurface installations. The hazard created by the violation is that a subsurface installation carrying gas or some other substance could be struck. Here, Ackenback struck a subsurface installation, the gas line.

Based on their education and experience, Both Hart<sup>11</sup> and Fazlollahi<sup>12</sup> testified that there was a realistic possibility that death or serious physical harm could result from the hazard of failing to protect, support or remove subsurface installations. Hart testified that a rupture or collapse of a gas line could occur causing a fire or explosion. He also testified that an unprotected or unsupported water line could cause flooding and drowning. An unprotected or unsupported electrical subsurface installation could cause electrocution. Both Hart and Fazlollahi testified that fire, explosion, flooding, drowning and electrocution could result in hospitalization due to serious injury for more than 24 hours for treatment and/or death. It is found that serious injury or death is not purely speculative and is a realistic possibility in the event of an accident

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<sup>11</sup> Hart has a Bachelor’s degree in Business Administration. He is currently a student in a Master’s program for a degree in Occupational Safety and Health. Hart’s duties as an Associate Safety Engineer include conducting inspections based on complaints and accidents. Hart testified that he has received training in trench and excavation work. All of Hart’s training with the Division is complete. Hart is the trainer for new Division employees on the hazards of trenching and excavation for Region 3.

<sup>12</sup> Richard Fazlollahi (Fazlollahi) is the District Manager for the Cal/OSHA Santa Ana Office and the Supervisor of Hart. Fazlollahi has investigated 16 excavation accidents. His training is current.

caused by the violations. Therefore, the violation was properly classified as serious.

The realistic possibility of a serious injury combined with existence of the actual hazard caused by the failure to protect, support or remove subsurface installations comes within the definition of “serious” set forth in section 6432. Therefore, the Division met its burden to establish a rebuttable presumption that a serious violation exists. The Employer failed to present sufficient evidence to rebut the presumption that the violation was serious. Therefore, the violation was properly classified as a serious violation.

**9. Employer knew about the violation of section 1541 subdivision (b)(4) , or could have known of the violation with the exercise of reasonable diligence.**

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).)

Trench Foreman Wenzell, was present on March 22, 2011. Trench Foreman, Wenzell directed Ackenback to operate the back hoe and shave the walls of Trench 1331. Employer was aware of the failure to protect, remove or support subsurface installations as there were foremen on the jobsite and a daily inspection was conducted on Trench 1331. Knowledge of a supervisor, such as Wenzell will be imputed to the Employer. (*Tri-Valley Growers, Inc.*, Cal/OSHA App. 81-1547, Decision After Reconsideration (Jul. 25, 1985), citing *Greene & Hemly, Inc.*, Cal/OSHA App. 76-435 Decision After Reconsideration (Apr. 7, 1978). Under these circumstances, Employer had a reasonable opportunity to detect the failure to protect, support or remove any subsurface installations. Therefore, Employer’s lack of knowledge defense fails and the serious classification stands.

Hart rated the severity as “high” because of the classification of a serious. All Serious violations begin with a \$18,000 penalty as a base for severity. Hart ranked the extent as high because of the multiple violations of the same safety order and all units out of compliance increasing the penalty to \$22,500. Hart ranked likelihood “medium” because the trench had been open

for some time and a gas line was struck causing no change to the \$22,500 penalty. (Exhibit 44)

Employer was given the maximum reduction available for history based on its record of safety compliance during the three year prior to the issuance of the citation reducing the penalty by ten per cent and resulting in a penalty of \$20,250. The parties stipulated that Employer has over 100 employees at the work site and is therefore not entitled to any reductions based on the size of the employer. On the proposed penalty worksheet, Hart rated Employer's good faith as poor. When cross-examined, Hart explained that Employer's IIPP was deficient in its implementation. Employer received a 50 per cent reduction based on abatement of the violation resulting in a final penalty of \$10,125. Employer did not contest the testimony regarding the penalty, nor did it offer any evidence contrary to that testimony. Employer did not present any evidence with regards to its assertion that the abatement requirements were unreasonable. Thus, the penalty of \$10,125 is deemed reasonable and will be assessed.

**10. No Competent Person inspected trench 1331 on March 24, 2011.**

The Division cited Employer under §1541 subdivision (k)(1), which reads as follows:

(k) Inspection. (1) 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 24, 2011, the Employer failed to ensure that the excavation of trench 1331 was inspected by a competent person prior to employees descending into the excavation at depths up to 13 feet below surface grade. At the time of inspection, the Trench Foreman had not received training by the

Employer or verified for the Employer they were competent and was not capable of identifying existing and predictable hazards nor were they competent in properly classifying soil or following manufacturers' tabulated data to properly install shoring.

Section 1504 subdivision (a) defines a "competent person" as follows:

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 authority to take prompt corrective measure to eliminate them.

The safety order requires (1) daily inspections of excavations, the adjacent areas and protective systems, (2) the inspections shall be by a competent person, (3) inspections shall be prior to the start of work and as needed throughout the shift, (4) inspections shall be made after every rain storm or other hazard increasing occurrence and (5) these inspections are only required when employee exposure can be reasonably anticipated.

Here, the Employer's Construction Checklist for Excavations dated March 24, 2011 (Exhibit 35) was signed by Foreman Javier Ramirez (Ramirez). Ramirez told Hart that he performed an inspection of Trench 1331 on March 24, 2011. Exhibit 35 corroborates Ramirez statement and indicates that the daily inspection was performed at 12:30 p.m.<sup>13</sup>

The Division must establish that there was no competent person charged with "carefully and critically examin(ing) or scrutiniz(ing) the excavation with a specific purpose of detecting the hazardous conditions that the affirmative requirement is intended to guard against." *ARB, Inc.*, Cal/OSHA App. 01-2119, DAR (September 11, 2003), citing *Underground Construction*, 98-4105, DAR (October 30, 2001). However, the Board does not require that inspections be 100% accurate; it only requires that they be reasonably performed to satisfy the requirement of Section 1541 Subdivision (k)(1). The Board in *Underground Construction*, issued an Amended Decision finding that a violation of Section 1541 Subdivision (k) (1) was not established, even though the soil classification was mistaken and the assessment that there was no evidence of a situation

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<sup>13</sup> It is unclear from this record whether the 12:30 p.m. inspection was the prior to the shift inspection.

that could result in a possible cave-in was erroneous. See, *Underground Construction*, 98-4105, Amended DAR (February 22, 2006).<sup>14</sup>

Ramirez, a Foreman told Hart that during the March 24, 2011 inspection he only lifted up plates where the flanges were located, conducted a sniff test, and then sent two employees into the trench. There was no complete inspection of the trench. Additionally, the inspection record for March 24, 2011, shows that Javier Ramirez allegedly measured the shores to be “six feet on center” (Exhibit 35). Hart testified that based on his observations the shores were eight feet apart at some locations. (Exhibit 36-41). This inspection was not reasonably performed.

Here, there was no competent person carefully and critically examining or scrutinizing the excavation with a specific purpose of detecting the many hazardous conditions that the requirement is intended to guard against. Here, there was no person capable of identifying existing and predictable hazards which is the purpose for the inspection. The Trench Foreman, Wenzell testified that he had training for a Competent Person card but he lost the card and was never able to provide it to this Employer or to this ALJ. Javier Ramirez did not inspect the entire trench on March 24, 2011. Hart testified that Ramirez was not aware of tabulated data. When Hart questioned Wenzell about the requirements of the rails of the support system, manufacturer’s tabulated data and subsurface installations Wenzell was not familiar with tabulated data and the regulations pertaining to trenching and excavating. Here, the Employer did not have a competent person who could reasonably perform an inspection of Trench 1331 on March 24, 2011.

**11. Employer knew of the violation of section 1541 subdivision (k)(1), or could have known of the violation with the exercise of reasonable diligence.**

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).)

Supervising Foreman, Jose Ramirez told Hart that Wenzell was not competent to be the Foreman of Trench 1331. Knowledge of a supervisor, such as Jose Ramirez will be imputed to the Employer. (*Tri-Valley Growers, Inc.*,

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<sup>14</sup> *Underground Construction*, 98-4105, DAR (October 30, 2001) was vacated pursuant to Peremptory Writ of Mandate issued on August 3, 2005, by the Superior Court of California, County of Sacramento, Case No. 01-CS01671.

Cal/OSHA App. 81-1547, Decision After Reconsideration (Jul. 25, 1985), citing *Greene & Hemly, Inc.*, Cal/OSHA App. 76-435 Decision After Reconsideration (Apr. 7, 1978). Under these circumstances, Employer had a reasonable opportunity to detect the failure to have competent person conducting daily inspections. Therefore, Employer's lack of knowledge defense fails and the serious classification stands.

### **Classification and Penalty**

Both Hart and Richard Fazlollahi testified that there is a realistic possibility for death or serious physical harm from the actual hazard posed by the violation of not having a competent person conduct daily inspections prior to the start of work. The hazard of not having a competent person conduct daily inspections of Trench 1331 could lead to a collapse of the trench with employees at the bottom resulting in death or serious physical harm. The realistic possibility of a serious injury or death combined with the actual hazard of not having a competent person conducting daily inspections of Trench 1331 comes within the definition of "serious" as set forth in section 6432. Therefore, the Division met its burden to establish a rebuttable presumption that a serious violation exist. The Employer failed to present sufficient evidence to rebut the presumption that the violation was serious. Therefore, the violation was properly classified as a serious violation.

Hart rated the severity as "high" because of the classification of a serious. All Serious violations begin with an \$18,000 penalty as a base for severity. Hart rated extent high bringing the penalty up to \$22,500. Likelihood was medium which resulted in no change to the penalty. The Division applied an adjustment factor of ten per cent for history bringing the penalty down to \$20,250. Application of the mandatory 50 per cent abatement credit yielded a penalty of \$10,125.

The proposed penalty of \$10,125 is found reasonable and is assessed.

### **12. Employer failed to provide guardrails on walkway/bridge that employees used to cross over excavation over 6 feet in depth and wider than 30 inches.**

The Division cited Employer under §1541 subdivision (l)(1), which provides as follows:

"Where employees or equipment are required or permitted to cross over excavations over 6 feet in depth and wider than 30 inches, walkways, or bridges with standard guardrails shall be provided."

For a violation to be found the Division must prove the following: (1) employees or equipment are required or permitted to cross over excavations over 6 feet in depth and wider than 30 inches and (2) walkways or bridges with standard guardrails were not provided. Here Hart testified that the excavation was 13 feet in depth and 4 feet and 48 inches wide at the place where Employer had a walkway. Employer called no percipient witness to refute Harts' testimony regarding Trench 1331 measurements. Hart's testimony in this area is credited. Hart further testified that guardrails were not present and that he witnessed employees cross over it. (See Exhibit 57). The evidence on this record supports a finding that Employer violated §1541 (l)(1).

In this matter, Employer argues that Hart entrapped<sup>15</sup> Ontiveras and Wenzel during the inspection as he walked across the walkway/bridge with them. This argument apparently concedes that there was a walkway/bridge and that employees used it. Labor Code §6314 authorizes Division inspectors, upon properly identifying themselves to have "free access to any place of employment to investigate and inspect during regular working hours, and at other reasonable times when necessary for the protection of safety and health and within reasonable limits and in a reasonable manner. Once lawfully, at the site, the inspecting officer does not have to close his eyes to a hazard in plain view. (*J.W. Bailey Construction*, Cal/OSHA App. 78-1577, Decision After Reconsideration (Sept. 30, 1984).)

### **Classification and Penalty**

#### **13. Employer knew or could have known of the violation of section 1541 subdivision (l)(1) with the exercise of reasonable diligence.**

Employer argues that the Serious classification should be rejected but here Employer had knowledge of the excavations depth and width based on their daily inspections and that the walkway was not protected with standard guardrails because it was in plain view of Supervisors and Foreman in the vicinity. Both Hart and Fazlollahi testified based on their education and experience that there was a realistic possibility of death or serious physical harm that could result from the actual hazard of the violation, a thirteen foot fall. As a result, it is found that serious injury or death is not purely speculative and is a realistic possibility in the event of an accident caused by the violations. Therefore, the Division met its burden to establish a rebuttable

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<sup>15</sup> Employer argues that during Hart's inspection employees including Employer's Safety Manager, Mr. Ontiveras and Mr. Wenzel accompanied Hart as they crossed the walkway/bridge. Employer argues that with respect to alleged exposure by Ontiveras and Wenzel during Hart's inspection, a state officer engages in entrapment when the officer leads others to engage in violative acts.

presumption that a serious violation exists. The Employer failed to present sufficient evidence to rebut the presumption that the violation was serious. Therefore, the violation was properly classified as serious.

Hart started out rating severity high since the violation was Serious and an \$18,000 base penalty. Extent was rated as high because it was the only walkway that was used by the employees one hundred per cent of the time increasing the penalty by twenty-five per cent or \$4,500 to \$22,500. Likelihood was rated as medium because the walkway had been in existence for some time but no falls had occurred resulting in no change to the penalty. Ten per cent credit was given for history resulting in \$20,250. A fifty per cent abatement credit was given resulting in a proposed penalty of \$10,125. Employer did not present any evidence with regards to its assertion that the abatement requirements were unreasonable. As a result, the penalty of \$10,125 is deemed reasonable and will be assessed.

**14. Employer failed to ensure that the bottom member of the protective system was more than 2 feet from the bottom of the excavation.**

The Division cited Employer under §1541.1 subdivision (e)(2)(A), which provides as follows:

- (e) Installation and removal of supports.
- (2) Additional requirements for support systems for trench excavations.
  - (A) Excavation of material to a level no greater than 2 feet below the bottom of the members of a support system shall be permitted, but only if the system is designed to resist the forces calculated for the full depth of the trench, and there are no indications while the trench is open of a possible loss of soil from behind or below the bottom of the support system.

The safety order allows excavation of material to a level no greater than 2 feet below the bottom of the members of a support system only if (1) the system is designed to resist the forces calculated for the full depth of the trench and (2) there are no indications while the trench is open of a possible loss of soil from behind or below the bottom of the support system.

Here, Hart testified that the bottom of the support system should be no greater than 2 feet from the base of the excavation. According to Hart a support system or protective system provides stability and support to prevent collapse or spalling or raveling of the side wall of the excavation. The protective system must be within 2 feet of the bottom of the trench. The protective

system can be plywood sheeting or steel plates or shoring or whatever the Employer chooses to use. Here, the Employer chose to use Aluminum Hydraulic Shoring with 9 feet in length rails also known as speed shoring. This Employer also used something they called spot bracing. This is where you apply plywood sheeting behind one of the rails of the Aluminum Hydraulic Shoring. (See Exhibit 23, Note 4). Hart explained that the plywood becomes a part of the protective system. Hart testified that no matter the method used it must be in accordance with the Manufacturer's Tabulated Data. Hart testified that Employer gave him the Manufacturers Tabulated Data (See Exhibit 23). Note 14 says that for vertical spacing there must be a cylinder within 4 feet of the bottom of the excavation and 2 feet of the top of the excavation. Rails are to be at 2 feet maximum from the bottom.

Here the bottom of the rail was greater than 2 feet from the bottom of the excavation. (See Exhibits 2, 20 and 22). Hart testified that he measured 13 feet in depth at the area where the workers were painting the flange. (See Exhibit 20). Hart testified to Foreman Javier Ramirez' admission on March 28, 2011, that the protective system on March 24, 2011, had not changed. (*Tri-Valley Growers, Inc.*, Cal/OSHA App. 81-1547, Decision After Reconsideration (Apr. 7, 1978).) There was 4 feet in distance between the bottom of the protective system (the rail) and the bottom of the excavation. Hart, concluded that Employer did not have a protective system no greater than 2 feet from the bottom of the trench.

In this matter, Employer's argument that the Division's proof regarding the exact configuration of the shoring system should not be trusted is not convincing because Hart testified that Foreman Javier Ramirez told him that the aluminum hydraulic shores were in the identical position on March 24, 2011 and March 28, 2011. Where an element of an alleged violation

Section 1540 Subdivision (a) defines "aluminum hydraulic shoring" as:

A pre-engineered shoring system comprised of aluminum hydraulic cy-Linders (crossbraces) used in conjunction with vertical rails (uprights) or horizontal rails (walers). Such system is designed specifically to Support the sidewalls of an excavation and prevent cave-ins. Section 1541.1(c)(1) provides that aluminum hydraulic shoring systems must be designed , "in accordance with §1541.1 subdivision (c)(2) [Manufacturer's Tabulated Data], but if Manufacturer's Tabulated Data cannot be utilized, designs shall be in accordance with Appendix D" of §1541.1.

Here, Employer furnished Hart with tabulated data prepared by the manufacturer of the hydraulic aluminum shores Employer was using (Exhibit 23). By giving the Manufacturer's Tabulated Data to the Division during the investigation, Employer's conduct implied that it was proceeding or attempting to proceed in accordance with that data before employees entered the trench. Hart credibly testified that the Manufacturer's Tabulated Data given to the Division during the investigation required that the bottom member of the rail can be no greater than 2 feet from the bottom of the excavation. (Exhibit 23). Accordingly, it is found that Employer failed to comply with its Manufacturer's Tabulated Data.

### **Classification and Penalty**

Hart issued the citation as Serious because there was a realistic possibility of serious physical harm or death from the sidewalls collapsing by not providing adequate support. There was a distance of 6 feet from the bottom to 5 feet up where there was no system in place to protect the employees from cave-in. The hazard is trench collapse as a result of unprotected side walls. Hart testified that there was Employer knowledge because Foreman Wenzell conducted inspections of the trench on multiple days. Javier Ramirez Foreman told Hart that he was standing directly above the flange depicted in Exhibit 22 as workers descended into the trench to paint the flange and that the aluminum hydraulic shores were in the identical position on March 24, 2011 as on March 28, 2011. It is found that Employer had actual knowledge of the fact that the bottom member of the protective system was more than 2 feet from the bottom of the excavation. Therefore, the Division met its burden to establish a rebuttable presumption that a serious violation exists. The Employer failed to present sufficient evidence to rebut the presumption that the violation was serious. The violation was correctly classified as Serious.

Hart started out rating severity high since the violation was Serious and an \$18,000 base penalty. Extent was rated as high because many instances within this 100 feet long trench where inadequate shoring. All of the units were out of compliance. Likelihood was medium because it had not collapsed, 10 per cent adjustment for history and 50 per cent abatement making it \$10, 125. Employer did not present any evidence with regards to its assertion that the abatement requirements were unreasonable. As a result, the penalty of \$10, 125 is deemed reasonable and will be assessed.

#### **15. Employer failed to ensure that the mid-rail was half-way between the top rail and the ground level.**

The Division cited Employer under §1620 subdivision (a)(1)(2), which provides as follows:

Railings shall be constructed of wood or in an equally substantial manner from other materials and shall consist of the following:

- (1) A top rail not less than 42 inches or more than 45 inches in height measured from the upper surface of the top rail to the floor, platform, runway or ramp.
- (2) A mid-rail shall be halfway between the top rail and the floor, platform, runway or ramp when there is no wall or parapet wall at least 21 inches (53 cm) high.

Here, Hart testified that at the location depicted in Exhibit 12, Employer was not in compliance because there was only one rail and it was being used as a top rail. Two rails are needed because it prevents employees from falling over the top. Hart testified that the fall height at this location is 20 feet. Another witness Leonard Popick, Occupational Health and Safety Specialist for the Metropolitan Water Association testified credibly that he observed Shimmick employees on the deck in the area depicted in Exhibit 12 working on March 22, 2011 and March 23 2011. Hart testified that at the elevator shaft location depicted in Exhibit 60, Employees worked in the area and the guard rail is a steel cable with steel poles. Hart testified that the top rail was 42 inches from the ground which is allowable. Hart testified that the mid-rail was 12 inches from the ground. This is not in compliance with the safety order as the mid-rail is not halfway. Hart testified that the fall height at this location would be 49 feet. According to Hart, the locations depicted in Exhibits 12 and 60 are within 36 feet of each other and are next to a main road and in plain view of foremen and superintendents.

Employer argued lack of employee exposure to a violative condition. However Popick testified credibly that he saw Shimmick employees working in the area depicted in Exhibit 12 where there was only 1 rail and a possible fall height of 20 feet. Hart testified that there was only 1 guardrail instead of 2 at the area depicted in Exhibit 12. Employer presented no evidence to rebut either the photograph evidence or Popick and Hart's testimony regarding the improper railings. Thus, it is found that employees worked at an area with improper railings.

## Classification and Penalty

Hart issued the citation as Serious because there is a realistic possibility that death or serious physical harm could result from the actual hazard posed by this violation. Both Hart and Fazlollahi testified based on their training and experience that there is a realistic possibility that death or physical harm could result from not having proper railing. Hazardous conditions in plain view constitute serious violations, since the employer could detect them by exercising reasonable diligence. (*Fibreboard Box & Millwork Corp.*, Cal/OSHA App. 90-491, Decision After Reconsideration (June 21, 1991).) Employer could have known of missing guardrails through the exercise of reasonable diligence. Therefore, the Division met its burden to establish a rebuttable presumption that a serious violation exists. The Employer failed to present sufficient evidence to rebut the presumption that the violation was serious. Hence, the Division proved the serious classification.

Hart started out rating severity high since the violation was Serious and an \$18,000 base penalty. No changes due to extent because 2 items out of compliance and other guardrails in compliance. Likelihood is medium based on belief that injury would occur as a result of violation. Ten percent credit for history and 50 per cent credit for abatement resulting in penalty of \$8,100. Employer did not present any evidence with regards to its assertion that the abatement requirements were unreasonable. As a result, the penalty of \$8,100 is deemed reasonable and will be assessed.

### **16. Facilities for quick drenching or flushing of the eyes were not provided to employees.**

The Division cited Employer under §5185 subdivision (l)(1)(2), which provides as follows:

Facilities for quick drenching or flushing of the eyes  
And body shall be provided unless the storage batteries  
are:

- (1) equipped with explosion resistant or flame arrestor type vents; or
- (2 ) located in a compartment or other location such as to preclude employee exposure.

The alleged violation description (AVD) reads as follows:

On or about March 24, 2011, the Employer failed to ensure that facilities for quick drenching or flushing of (sic) the eyes and body were provided to the foreman and employees that recharge the electric forklift at the

end of each shift in the new building/facility being constructed. The batteries were not equipped with explosion resistant or flame arrestor type vents nor were they located in a compartment to preclude employee or employer exposure.

In order to sustain the citation, the Division must prove the following:

(1) Facilities for quick drenching or flushing of the eyes were provided. There are 2 exceptions: (a) When the storage batteries have explosion resistant or flame arrestor type vents or (b) when the storage batteries are located in a compartment to preclude employee exposure. Hart testified that whenever Employers are charging or changing storage batteries (lead acid storage batteries) they are required to have an eyewash and shower deluge in the immediate vicinity. Hart observed that the Employer failed to have an eyewash or shower deluge in the immediate vicinity of where employees were charging batteries on a forklift. Hart described the area depicted in Exhibit 66. Hart testified that this depicts the lead acid storage battery under the seat of the forklift. Exhibit 67 is the compartment that contains the batteries under the seat of the forklift. The storage batteries were not equipped with an explosion or flame resistant vent nor were they located in a compartment to preclude employee exposure. As mentioned earlier, where the Division presents evidence, which, if believed would support a finding if unchallenged, the burden of producing evidence shifts to the employer to present convincing evidence to avoid and adverse finding. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004).) Employer had no facilities for quick drenching or flushing of the eyes and body.

Charging was taking place in plain view in a main corridor where employees were working. Employer had knowledge of the lack of an eyewash facility because Angel Anderson a Supervising Foreman was responsible for charging the batteries every night. Ontiveros told Hart that Supervising Foreman Angel Anderson charged the batteries every night. There was no eyewash present in the vicinity of where the battery charging was taking place. The hazard is sulfuric acid could splash on the employee's body or face. The lack of eyewash or shower deluge prohibits the employee from flushing the eyes out and rinsing the sulfuric acid from the skin. The lead acid storage batteries are comprised of lead oxide cells, lead cells and a mixture of sulfuric acid. If sulfuric acid splashes on face it could result in blindness. If sulfuric acid splashes on skin it could result in 2<sup>nd</sup> or 3<sup>rd</sup> degree burns. The eyewash or shower deluge could minimize the extent of the damage caused by a sulfuric acid splash.

The purpose of Section 5185 is to protect against the hazard of burns from corrosive acids in batteries. (See *General Telephone Company of California*, Cal-OSHA App. 82-406, Decision After Reconsideration (Nov. 19, 1982).) For that reason, §5185(l) provides that Employers shall provide facilities for quick drenching or flushing of the eyes and body unless the storage batteries are either equipped with explosion resistant or flame arrestor type vents or located in a compartment or other location to preclude employee exposure. Here, the Division established that Employer failed to provide facilities for quick drenching or flushing of the eyes and body in the vicinity where battery charging was taking place based on the observation of Hart and the statement of Ontiveros that Angel Anderson charged the batteries every night. Ontiveros statement is imputed to the Employer. Where the Division presents evidence, which if unchallenged, the burden of producing evidence shifts to the employer to present convincing evidence to avoid and adverse finding. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (October 7, 2004).) The Division has established a violation of section 5185 subdivision (l) by a preponderance of the evidence.

### **Classification and Penalty**

Hart testified that there is a realistic possibility of death or serious physical harm from the hazard posed by the violation. The hazard of not having eye wash and shower deluges in the vicinity of charging batteries could result in death or serious physical harm to employees.

Hart testified to reviewing 2 other cases where battery acids caused injury. In one case, the employee was charging batteries and an explosion occurred causing a 2nd degree burn. The injury resulted in hospitalization lasting longer than 24 hours for treatment. Another case involved an injury with 5 per cent sulfuric acid where a pipe burst and resulted in an injury to 3 employees and resulting in hospitalization beyond 24 hours for treatment. Hart testified that there is a realistic possibility of Serious injury or death resulting from being splashed by sulfuric acid and not having an eye wash or shower deluge present. Therefore, the Division met its burden to establish a rebuttable presumption that a serious violation exists. The Employer failed to present sufficient evidence to rebut the presumption that the violation was serious. Therefore, the violation was properly classified as a serious violation.

Hart proposed a civil penalty of \$6,075 by starting out at \$18,000 because it was issued as a Serious. Extent was rated as moderate because Hart learned that there was another electric forklift with battery charging station but he did not inspect that one. Hart testified that 50 per cent of items out of compliance and because there were more than 6 but less than 25

employees exposed to harm. Hart rated likelihood low because this was an unlikely occurrence which resulted in gravity penalty to \$13,500. History credit of ten per cent resulted in penalty of \$12,150. Abatement credit of 50 per cent was given resulting in penalty of \$6,075.

The proposed penalty of \$6,075 is found reasonable and is assessed.

**17. Employer willfully failed to take safe and acceptable means to prevent damage to a subsurface installation by not using hand tools to excavate within the area of its “approximate location”.**

The Division cited Employer under §1541 subdivision (b)(3), which provides as follows:

(b) “Subsurface installations.”

(3)When excavation or boring operations approach the approximate location of subsurface installations, the exact Location of the installations shall be determined by safe and Acceptable means that will prevent damage to the subsurface Installation as provided by Government Code Section 4216.4<sup>16</sup>

Citation 8 alleges:

On or about March 22, 2011 and again on April 25, 2011, the Employer willfully failed to take safe and acceptable means to prevent damage to a subsurface installation by not using hand tools to excavate within the area of its “approximated location”. Consequently, a 2 inch natural gas service line was struck and damaged by a backhoe on both dates listed above in the same trench.

Here, the Division must prove the following: (1) an excavation or boring operation approached the approximate location of subsurface installations; (2)

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<sup>16</sup> Government Code section 4216.4(a) states, in relevant part, “[w]hen the excavation is within the approximate location of subsurface installation, the excavator shall determine the exact location of subsurface installations in conflict with the excavation by excavating with hand tools within the area of the approximate location of subsurface installations as provided by the operators in accordance with Section 4216.3 before using any power-operated or power-driven excavating or boring equipment within the approximate location of the subsurface installation, except that power-operated or power-driven excavating or boring equipment may be used for the removal of any existing pavement if there are no subsurface installations contained in the pavement”. “Approximate locations of a subsurface installations” means a strip of land not more than 24 inches on either side of the exterior surface of the subsurface installation. “Approximated location” does not mean depth.

the exact location of installation was not determined by safe and acceptable means. In this case, Employer knew it was in the vicinity of the gas line that was ultimately struck because of the Dig Alert markings. An excavation operation approached the approximate location of a subsurface installation. The issue here is whether Employer took the steps necessary to determine the exact location of the line. Here, Hart testified that Wenzel told him that he directed the backhoe operator to scoop at 2 feet 6 inches in the trench depicted in Exhibits 69 and 70. The bucket of the backhoe was being used to remove soil out of the excavation. Wenzel told Hart that the gas line was uncovered and that Employer knew it was in the vicinity because of the Dig Alert markings. Wenzel told Hart that he believed the gas line was still at 4 feet 6 inches and that is why Wenzel told Schwenning to scoop at 2 feet 6 inches. Wenzel told Hart that he believed that if the bucket dropped 8 inches there would still be 1 foot and 2 inches clearance. Wenzel told Hart that the gas line had unexpectedly risen to 3 feet and this caused the bucket to rupture the subsurface installation. Wenzel told Hart that he was standing over the trench when the back hoe hit the gas line. Hart testified that Exhibit 71, the Incident report from the April 25, 2011, gas line hit corroborates what Wenzel told him about the incident.

The record shows that Employer did not excavate with hand tools to determine the gas line's exact location when the backhoe approached the line. The safety order's strict liability standard is written such that the exact location shall be determined by safe and acceptable means such as hand-tools, picks, shovels, etc. The Division established a Serious violation of §1541(b)(3) in that Employer while excavating approached the approximate location of the subsurface installation, a gas pipe line without determining the exact location of said pipe line by safe and acceptable means. Here, Employer used a backhoe, a power driven piece of equipment to determine the location of the pipe line. Wenzel told Hart that he believed the gas line was still at 4 feet 6 inches. Unbeknownst to Wenzel, the gas line actually rose to 3 feet and it was struck. The exact location of the gas line had not been determined by a safe and acceptable means. Hand tools should have been used.

### **Classification and Penalty**

Hart testified that his experience included researching and reviewing other gas rupture cases. Both of the gas rupture cases that Hart reviewed resulted in Serious injuries. Hart's experience with excavations includes more than a dozen cases involving subsurface installations. According to Hart there is a realistic possibility of Serious physical harm or death from the actual hazard. There is a realistic possibility that the injured would have 2nd and 3rd degree burns and hospitalization over 24 hours for more than mere

observation. This gas line is 40 pounds per square inch (psi) and could ignite and cause a significant fire. Both Hart and Fazlollahi testified that there is a realistic possibility for death or serious physical harm from the actual hazard posed by the violation of striking the subsurface installation. Therefore, the Division met its burden to establish a rebuttable presumption that a serious violation exists. The Employer failed to present sufficient evidence to rebut the presumption that the violation was serious. Therefore the Division established a violation of Section 1541(b)(3).

Employer asserted an Affirmative Defense of Lack of Employer knowledge. Hart testified that the Employer had knowledge of the violation because the subsurface installation had been exposed the day prior in plain view of Wenzel. According to Hart, Wenzel conducted a daily checklist of the excavation prior to each work day. Hart testified that the actual hazard of the violation was in not knowing the exact location of the subsurface installation and having power driven machinery operated which could cause the machinery to hit the gas line and cause an explosion. Here, according to Hart's testimony the gas line was active and Employer was aware that it was active. This same gas line (in the same excavation 150 feet to the south) had been struck a month earlier (March 22, 2011). Hart testified that Employer was aware of the active gas line because when it was hit on March 22, 2011, it caused a hissing sound and Employer had to turn the gas line off. On March 22, 2011 Employer evacuated and called the Fire and Police department after the gas line was hit.

Employer had knowledge of the violation since Wenzell was acting as a spotter for the back hoe operator at the time of the gas line hit. Knowledge of a Supervisor, such as Wenzell will be imputed to the employer. (Tri-Valley Growers, Inc. , Cal/OSHA app. 81-1547, Decision After Reconsideration (July 25, 1985), citing Greene & Hemly Inc., Cal/OSHA App. 76-435 Decision After Reconsideration (Apr. 7, 1978).)

Labor Code §6429(a) provides the authority for assessment of civil penalties for willful violations of not more than \$70,000 and reads in pertinent part, "Any employer who willfully ... violates any occupational safety or health standard, order, or special order ... may be assessed a civil penalty of not more than seventy thousand dollars (\$70,000) ... for each willful violation." Pursuant to authority provided by Labor Code section 55, the Director has promulgated regulations that define willful. A willful violation is defined in section 334 (e) 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.

The Board in interpreting the first test of section 334(e) has consistently not required a showing of actual intent and knowledge to do harm to support classifying a violation as willful. ( *See, e.g., PCL Civil Constructors, Inc.*, OSHAB 93-2373, Decision After Reconsideration (Mar. 4, 1999); *MCM Construction, Inc.*, OSHAB 92-436. Decision After Reconsideration (May 23, 1995).) The appropriate standard of intent to support classifying a violation as willful requires the Division to prove by a preponderance of the evidence that the employer committed a voluntary and volitional, as opposed to inadvertent, act, or, in other words, that the act itself was the desired consequence of the actor's intent, and that the employer was conscious that its act violated a safety order. (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Board*, (2000) 80 Cal. App. 4<sup>th</sup> 1023, 1037.)

The evidence supports the conclusion that Employer committed willful violations under the first test of section 334(e). The indications of a potential hit on the underground installation were numerous. Wenzell and Schweening had competent person training on trenching and excavating on April 6, 2011 and April 9, 2011. Wenzell was aware of the location of the active gas line because of the Dig Alert markings informing Employer of the gas line location. In spite of the location of the gas line and the possibility that this line might rise up, Wenzell instructed the backhoe operator to scoop at 2 feet 6 inches. This evidence is imputed to the Employer. Thus, the Division has proved the violation was willful under section 334's first test.

Under section 334(e)'s second test, an employer commits a willful violation when it is aware of a hazardous condition but fails to make reasonable efforts to remove the condition. (*Owens-Brockway Plastic Containers*, OSHAB 93-1629, Decision After Reconsideration (Sep. 25, 1997).) Hart testified that he cited the Employer for a Willful Serious because Employer had knowledge that the exact location of gas line was not known and assumed that the gas line was at a certain level and failed to follow the safety Order. Hart said that after the March 22, 2011 gas line incident he personally went over the safety orders in Section 1541 and 1541.1 with Wenzell and Joe Ontiveros. Hart testified that at some time after the March 22, 2011 incident but before the April 25, 2011 incident Riser told him that all employees would be trained on trenching and excavation. The Employer gave Hart paperwork (Exhibit 73) showing that Wenzell and Schweening had trenching and excavation

Competent Person training on April 6, 2011 and April 9, 2011. Wenzell had knowledge of the hazardous condition and failed to protect employees or mitigate the hazard. Hart testified that abatement would consist of following the safety order and using hand tools to find the exact location when in the approximate location of subsurface installations.

Wenzell was aware of the active gas line and ordered Schweening to scoop at 2 feet 6 inches. Wenzell could have ordered the use of hand tools but did not. Thus, the Division has proved the violation was Willful under section 334's second test.

Hart rated the severity as "high" because of the classification of Serious and penalty started at \$18,000. Extent was rated as high because subsurface installations located in the trench had not been uncovered so all units were out of compliance. The likelihood was rated as medium. The gravity based penalty was \$22, 500 it was Willful and multiplied by five. Hart did not give credit for history, Good faith, size or abatement because it was willful and they are not subject to credit. The cap of the penalty is \$70,000.

The proposed penalty of \$70,000 is found reasonable and is assessed.

**18. Employer willfully failed to ensure that the excavation at trench 1331 was adequately protected against cave-ins.**

The Division cited Employer under 1541.1 subdivision (a)(1) which provides as follows:

- (a) Protections 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.

The citation alleges the following:

"On or about March 24, 2011, the Employer willfully failed to ensure that the excavation at trench 1331 was adequately protected against cave-ins in accordance with Section 1541.1 subdivision (b) or (c) employees were instructed by a Foreman to descend

into the excavation that was approximately 13 feet in depth while in violation of this standard.”

The Division must prove the following: (1) that each employee in an excavation was protected from cave-ins by an adequate protective system designed in accordance with Section 1541.1 subdivision (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.

Javier Ramirez told Hart that on March 24, 2011 he inspected Trench 1331 prior to employees descending into the trench to paint the flanges. Additionally, the Employer provided a photograph (Exhibit 43) which established that employees worked in trench 331 at the 11 feet depth installing a pipe line. Thus, an employee was in an excavation required to be protected from cave-ins. Additionally, Saucedo told Hart that the excavation was 11 feet in depth.

Here, Hart testified that he cited the Employer because the aluminum hydraulic shoring in Trench number 1331 was not spaced correctly per the Manufacturer’s Tabulated Data. Employers are supposed to follow the instructions per the Manufacturer’s Tabulated Data (See Exhibit 23). On March 24, 2011, Hart asked Saucedo how the spacing was determined. Saucedo said that the shores were placed horizontally 6 feet apart. Javier Ramirez also told Hart that the shoring was placed 6 feet apart. On March 24, 2011, Hart asked Saucedo and Ned Myers for the Manufacturer’s Tabulated Data. They did not have it. Myers provided the Manufacturer’s Tabulated Data to Hart later. Saucedo told Hart that the excavation was 11 feet in depth. Employer provided a photograph (Exhibit 43) showing employees working in the trench at the 11 feet depth installing a water pipe line. Hart measured the width at 4 feet and determined that the horizontal spacing should be no greater than 5 feet for Type C soil. If the depth was 13 feet and width 4 feet then the horizontal spacing should be no greater than 4 feet for Type C soil, per the Manufacturer’s Tabulated Data. Hart measured the trench at 13 feet in depth and was told that workers descended into the trench and painted the flange here. The shores were 8 feet between 2 shores. According to Hart, they should have been 4 feet apart. (Exhibit 11). Employees descended into the excavation to paint the flange on March 24, 2011. Hart concluded that employees were not adequately protected from cave-ins.

Hart testified that Employer failed to follow the Manufacturer’s Tabulated Data in that plywood sheeting must be behind the rails throughout the entire excavation when the excavation is greater than 8 feet in depth. Hart testified

that Employer did not have plywood sheeting throughout the entire excavation. The Division has established that employees were in an excavation and thus Employer was required to provide protection from cave-ins as specified. Subsections (1)(A) and (1) (B) are exceptions which Employer would have to establish, but here, in any case, the Division refuted both potential exceptions by evidence that the soil was Type B or C, not stable rock, and that the excavation was five feet or deeper.

Hart testified that his experience included assisting on an investigation on a trench collapse case and researching and reviewing other excavation cases where the trench collapsed. The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*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).) The evidence must not lead to impossibility, must be within human reason and logic, must not be speculative, and thus based on actual events and circumstances that are proven to exist. (*Oliver Wire & Plating Co., Inc. supra.*) Hart testified that the actual hazard posed of shores not adequately spaced and inadequate plywood sheeting is that a cave-in could occur. The excavation could collapse. The sidewalls of excavation could spall and ravel and slough off if it is not protected. According to Hart there is a realistic possibility of Serious harm or death from the actual hazard.

The evidence establishes a violation of section 1541.1 (a)(1) in that Employer failed to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with Section 1541.1(b) or (c).<sup>17</sup> The evidence shows that the trench was 11 feet in depth in some locations and 13 feet in depth at other locations within the trench. Hart testified that the soil in the trench was type C. The Manufacturer’s Tabulated Data (Exhibit 23) required the shores in type C soil to be 4 feet apart where the excavation was 13 feet and 5 feet apart where the excavation was 11 feet deep. Additionally plywood sheeting must be installed after a depth of 8 feet. Hart testified that plywood sheeting was not installed in the trench. Here, Saucedo and Javier Ramirez told Hart that the shores were placed 6 feet apart. Knowledge of a Supervisor such as Saucedo and Ramirez will be imputed to the employer. (*Tri-Valley Growers, Inc.*, Cal/OSHA App. 81-1547, Decision After Reconsideration (July 25, 1985), citing *Greene & Hemly Inc.*, Cal/OSHA App. 76-435 Decision After Reconsideration (Apr. 7, 1978).) Hart measured the shores to be 6 feet apart at the 11 feet depth and 8 feet apart at the 13 feet depth. Both Hart and Fazlollahi testified that there is a realistic possibility for

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<sup>17</sup> The excavation was not entirely in stable rock. The excavation was not less than 5 feet in depth. The exceptions do not apply here.

death or serious physical harm from the actual hazard posed by the violation of failing to protect employees from cave-ins by an adequate protective system. Therefore, the Division met its burden to establish a rebuttable presumption that a serious violation exists. The Employer failed to present sufficient evidence to rebut the presumption. Employer violated section 1541.1(a).

As stated above, a willful violation is defined in section 334 (e) 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.

The Employer was cited for a Willful Serious because the Employer had knowledge of the inadequate protection in trench 1331. The shores in trench 1331 were 6 feet apart. Plywood sheeting was not included throughout the trench. Wenzel told Hart that he inspected the trench prior to each work shift. The inadequate shoring was in plain view. Employer was aware of the inadequate shoring. The hazard was unsupported sidewalls of an excavation that was 13 feet in depth. The March 22, 2011 checklist (Exhibit 34) identified that there were bulging walls, utilities in trench, vibration from nearby traffic and trench is wet and needs extra shoring. There was real actual knowledge that the trench was a hazard. Both Saucedo and Wenzel told Hart that the shores were 6 feet apart. Employer gave Hart a document (Exhibit 35) which indicates that the shores were 6 feet apart on March 24, 2011. Jose Ramirez told Hart that Wenzel was not experienced enough to be the Foreman on trench 1331. Hart also testified that Javier Ramirez did not inspect the entire trench on March 24, 2011.

Here, Employer was aware of a dangerous condition and did not take reasonable steps to address it. Wenzel completed a Construction Checklist on March 22, 2011 which stated, "Trench is very wet. Needs extra shoring. Going to put plywood behind shores. Area farthest east closest to duct is okay to go in. The rest west needs to be fixed". Wenzel made a determination on March 22, 2011 that plywood sheeting should be added to the trench and that was never done. (Exhibit 34). There was no complete inspection of the trench on March 24, 2011. Plywood sheet was not added to the trench prior to March 24,

2011. Employer's knowledge is imputed through Wenzell. Here, Wenzell knew that an unsafe condition existed and made no reasonable effort to eliminate the condition. Employer permitted employees to enter the trench on March 24, 2011, to paint the flanges. Therefore, Employer's conduct is found to constitute a willful violation of the safety order.

Hart testified that the penalty started at \$18,000 because of the Serious violation and as a result severity is high. Extent was rated as high due to more than 50 per cent of units out of compliance and resulting in an increase to \$22,500. Hart found likelihood to be medium resulting in no change. Because the violation is willful, the gravity based penalty was multiplied by five. No credit was given for Good faith, or abatement or history. No adjustment for size because Employer had more than 100 employees. The penalty was capped at \$70,000. The penalty is found to be reasonable and is assessed.

### **Conclusion**

All citations and items are affirmed.

### **Order**

It is hereby ordered that the citations are established, modified, or withdrawn as indicated above and set forth in the attached Summary Table.

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

Dated: June 30, 2015

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**JACQUELINE JONES**  
Administrative Law Judge

JJ:ao

## APPENDIX A

### SUMMARY OF EVIDENTIARY RECORD SHIMMICK CONSTRUCTION/OBAYASHI CORP. Docket 11-R3D1-2562/2570

**Dates of Hearing:** October 18 & 19, 2012, February 19 & 20, 2013, May 23, 2013, July 25, 2013, September 25 & 26, 2013 and October 22, 2013

#### Division Exhibits – Admitted

<b>Exhibit Number</b>	<b>Exhibit Description</b>
1	Jurisdictional Documents
2	Photo – Trench line
3	Photo of 228 Excavator
4	Photo of Equipment
5	Picture of gas line
6	Field memorandum drafted by
7	Letter from Employer -Protest
8	Photo close up of Exhibit 5
9	Photo of gas line
10	Close-up photos
11	Area in trench- adj to
12	Picture of deck
13	Color 1667-665 PH5
14	Color 1667-FM 665 PH4
15	Color 1667-FM665 PH2
16	Color 1667 FM 665 PH1
17	Print out from 3-23-11 Contractor state license
18	Business cards from Employer
19	Contractors State License Board
20	Photo
21	Photo
22	Photo
23	2 pages of tabulated data
24	1 Page – Use forbidden
25	2 page form
26	1 page – tag do not enter
27	Photo 1 page 04/25/2011
28	6 page worksheet for job hazard
29	1 page 3/24/11
30	1 page 3/28/11
31	1 page 4/25/11

32 1 page 3/17/11  
33 3-18-11  
34 3-22-11  
35 3-24-11  
36 Photo ruler #1  
37 Photo ruler with tape measure or  
38 Photo close up of tape measure  
39 Photo of plywood tape measure  
40 Photo of tape measure on right  
41 Photo close up of tape measure  
42 Photo of tape measure man's feet  
43 Photo of 3 employees and trench  
44 C-10 proposed penalty worksheet  
45 Photo of portable toilet  
46 Photo of soap dispenser  
47 Photo of cable connectors  
48 Photo 2 cables connected with 3 in red  
49 Fire extinguisher on rest stand  
50 Fire extinguisher on stairs  
51 Fire extinguisher next to tru  
52 Fire extinguisher next to line  
53 Neck collar of a portable fire extinguisher  
54 2 page IBY  
55 2 page certified returned mail envelope  
56 3 page doc. CCR 1541(c)(1)  
57 Walking with person  
58 3 pages – 1541(i)(1)  
59 3 pages 1541.1(e)(2)(A)  
60 Photo measuring tape  
61 Photo close up of measuring tape  
62 Photo of measuring tape 12 inches  
63 Photo of tape measure  
64 Photo of trench with measuring tape  
65 3 pages 1BY-1620(a)(1)(2)  
66 Photo of storage battery  
67 Photo with yellow  
68 1BY – CCRT85185  
69 Photo of dirt-right yellow  
70 Photo of tape measure with yellow-blue plastic  
71 1 Page – Shimmick Incident Report  
72 2 page – 04-26-2011 – 1541(b)  
73 1 page document Dan Wallace  
74 2 page doc, 04-26-11  
75 Field memorandum 1 page No. 651

**Employer Exhibits**

**Exhibit  
Letter**

**Exhibit Description**

- A 5 page letter to Mr. Hart
- B 4 pages letter of transmittal
- C April 29, 2011, 4page tabulated data
- D 5 page document Construction Checklist for Excavators

**Witnesses Testifying at Hearing**

1. Lynn Ackenback
2. Mehdi Jalali
3. Leonard Popick
4. Brandon Hart
5. Ruben Saucedo
6. Adam Wenzel
7. Ike Riser
8. Richard Fazlollahi

**CERTIFICATION OF RECORDING**

*I, Jacqueline Jones, 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 DECISION

In the Matter of the Appeal of:

**SHIMMICK CONSTRUCTION CO., INC./OBAYASHI CORP. JV**  
**Dockets 11-R3D1-2562 through 2570**

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

IMIS No. 313169724

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL	AFVAC IRATE MEDD	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING or STATUS CONF.	<b>FINAL PENALTY ASSESSED BY BOARD</b>
11-R3D1-2562	1	1	1509(a)	G	ALJ affirmed violation	X	\$675	\$675	<b>\$675</b>
		2	1527(a)	G	ALJ affirmed violation	X	225	225	<b>225</b>
		3	1541(f)	G	ALJ affirmed violation	X	675	675	<b>675</b>
		4	1620(c)	G	ALJ affirmed violation	X	675	675	<b>675</b>
		5	6151(c)(1)	G	ALJ affirmed violation	X	225	225	<b>225</b>
		6	6151(e)(3)	G	ALJ affirmed violation	X	225	225	<b>225</b>
11-R3D1-2563	2		1541(b)	S	ALJ affirmed violation	X	10,125	10,125	<b>10,125</b>
11-R3D1-2564	3		1541(k)	S	ALJ affirmed violation	X	10,125	10,125	<b>10,125</b>
11-R3D1-2565	4		1541(1)	S	ALJ affirmed violation	X	10,125	10,125	<b>10,125</b>
11-R3D1-2566	5		1541.1(e)(1)	S	ALJ affirmed violation	X	10,125	10,125	<b>10,125</b>
11-R3D1-2567	6		1620(a)	S	ALJ affirmed violation	X	8,100	8,100	<b>8,100</b>
11-R3D1-2568	7		5185(1)	S	ALJ affirmed violation	X	6,075	6,075	<b>6,075</b>
11-R3D1-2569	8		1541(b)	S	ALJ affirmed violation	X	70,000	70,000	<b>70,000</b>
11-R3D1-2570	9		1541.1(a)	S	ALJ affirmed violation	X	70,000	70,000	<b>70,000</b>
<b>Sub-Total</b>							\$197,375	\$197,375	<b>\$197,375</b>

**Total Amount Due\***

(INCLUDES APPEALED CITATIONS ONLY)

**\$197,375**

NOTE: Please do not mail 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

\*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: JJ/ao  
POS: 06/30/2015

