

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

In the Matter of the Appeal of:

**SHIMMICK CONSTRUCTION CO., INC/  
OBAYASHI CORPORATION JV**  
8201 Edgewater Drive  
Oakland, CA 94621

Employer

**DOCKETS 12-R3D1-0781**

**DECISION**

**STATEMENT OF THE CASE**

On August 29, 2011, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer (ASE) Brandon Hart (Hart) conducted an accident inspection at a place of employment maintained by Employer at 3972 Valley View Avenue, Yorba Linda, California (the site). On February 28, 2012<sup>1</sup>, the Division cited Employer for the following alleged violation of the occupational safety and health standards and orders found in California Code of Regulations, Title 8,<sup>2</sup>: Citation 1, Item 1, for willful failure to obtain prior approval of a registered professional engineer before modifying the design of the support system, shield system and other protective system intended to protect employees from cave-ins.

The Employer filed an appeal contesting the violation of the safety order, classification, the reasonableness of the abatement requirements and the reasonableness of the proposed penalties. Employer pleaded affirmative defenses as indicated in Employer's Appeal filed with the Occupational Safety and Health Appeals Board (See Exhibit 1).

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<sup>1</sup> In Employer's post hearing brief, Employer asserted that the Division's Citation 1 was not timely issued because it was issued on February 28, 2012, a date more than six months after the occurrence of the alleged August 27, 2011 violation. Pursuant to Labor Code section 6317, which states "No citation or notice shall be issued by the division for a given violation or violations after six months have elapsed since occurrence of the violation." To the contrary, the Division's inspection dates indicate August 29, 2011 as the beginning of its inspection, which makes the February 28, 2012 issuance of the citation within the six months issuance period.

<sup>2</sup> Unless otherwise specified, all references are to Sections of California Code of Regulations, Title 8.

The matter came on regularly for hearing before Clara Hill-Williams, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on May 14, 2013, September 19 - 20, 2013 and February 11, 2014. Employer was represented by Attorney Ronald Medeiros. The Division was represented by Staff Attorney, Tuyet Tran. The parties presented oral and documentary evidence which is listed in the certification of the record<sup>3</sup>. The ALJ extended the submission date to May 1, 2015.

### **ISSUES**

1. Did the Employer modify a protective system for an excavation site without prior approval of a registered professional engineer (RPE)?
2. Is there sufficient evidence to support a “serious” classification for a violation of section 1541, subdivision (c), if Employer modified a protective system without prior approval of a RPE?
3. Did Employer intentionally or knowingly modify the design plans for the excavation site without prior approval of a RPE?

### **FINDINGS OF FACT**

1. Herman Edward Beyke, a field inspector for the Metropolitan Water District was assigned as an “Engineer Tech III” to ensure contract specifications of Employer’s excavation work site were satisfied<sup>4</sup>. On Friday, August 26, 2011, Beyke observed Employer’s shoring pit (excavation), which conformed to his diagram of the pit. On Monday, August 29<sup>th</sup> Beyke noticed the shoring pit’s physical characteristics were different from what he observed on August 26<sup>th</sup>.
2. The modification Beyke observed on the morning of August 29, 2011 had not received approval from Employer’s RPE, Larry Haase (Haase).
3. Mike Munden, Employer’s project manager testified that the August 27<sup>th</sup> modification was made to make room for the installation of a water pipe on August 29<sup>th</sup>, and acknowledged that he did not contact Haase before making the modification.
4. After the August 27<sup>th</sup> modification, Jared Kellum (Kellum), Employer’s project engineer, contacted Haase, who previously designed Employer’ underground shoring to ensure Haase’s original “load path”<sup>5</sup> was not interrupted by the modification.

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<sup>4</sup> At the Hearing in this matter, Beyke testified that Employer was one of the contractors on a project at a jobsite owned by MWD. After Employer completed laying pipes, Beyke would survey the area and was kept abreast of any modifications made of the excavation by Employer.

<sup>5</sup> At the Hearing Haase defined a “load” as the earth pressure from outside of the shoring. The load keeps the dirt outside so it does not cave into the excavation.

5. Haase was not aware of the modifications made by Employer before Kellum contacted him. August 27, 2011 was the first time Employer made a modification without first notifying him.
6. Employer's August 27<sup>th</sup> modification interrupted Haase's original design of the load path for excavation. Haase re-designed a load path that supported the August 27<sup>th</sup> modification. Haase determined that the modification was acceptable on August 31<sup>st</sup> after several days of analysis due to his work schedule with other clients.
7. During ASE Hart's August 29, 2011 inspection, Beyke gave him the August 27<sup>th</sup> modification design plans (See Exhibit 7) that did not match the design plans Hart received from Employer on June 17, 2011 (See Exhibit 9).
8. When Hart inspected the shoring pit he observed the following modifications: a waler<sup>6</sup> was cut and moved to a different location in the excavation (See Exhibit 4)<sup>7</sup>; two struts located on the east end of the excavation were removed and burn marks were observed where the struts were previously located (See Exhibit 5)<sup>8</sup>.
9. Kellum admitted to Investigator Hart, that the reason the changes were made without the Civil Engineer's approval was because the project was scheduled for a shutdown if the pipe was not installed by a certain date. Thereby, hindering water delivery to customers.
10. During Hart's August 29<sup>th</sup> investigation, Kellum admitted that Haase's approval was required before making a modification.
11. Because Haase could not ensure that the excavation was safe for workers to enter on the morning of August 29<sup>th</sup>, Hart ordered five employees he observed working in the excavation to immediately leave and issued an OPU<sup>9</sup> (See Exhibit 14 and 15).
12. ASE Hart's investigation revealed Employer's design plans showed the depth of the excavation was 26 to 30 feet.

### **ANALYSIS**

#### **1. Did the Employer modify a protective system for an excavation site without prior approval of a registered professional engineer (RPE)?**

Section 1541.1, subdivision (c) Requirements for Protective Systems state:

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<sup>6</sup> Wale, waler, whaler – A horizontal timber or beam used to brace or support an upright member, as sheeting, formwork for concrete, etc. *McGraw-Hill Dictionary of Scientific & Technical Terms*

<sup>7</sup> See Exhibit 4 – At the Hearing Hart highlighted the previous location of the waler in pink with initials BH for Brandon Hart. See Exhibit 9 – Hart highlighted the relocation of the walker in green.

<sup>8</sup> Hart marked the new location of struts in green and the burn mark where the strut was previously located is circled in blue and marked with an "H" (see Exhibit 9) and circled in green on Exhibit 3.

<sup>9</sup> An Order Prohibiting Use.

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

(4) Option (4) - Design by a registered professional engineer.

(A) Support systems, shield systems, and other protective systems not utilizing Option 1, Option 2 or Option 3 above shall be approved by a registered professional engineer.

(B) Designs shall be in written form and shall include the following:

1. A plan indicating the sizes, types, and configurations of the materials to be used in the protective system; and
2. The identity of the registered professional engineer approving the design.

(C) At least one copy of the design shall be maintained at the jobsite during construction of the protective system. After that time, the design may be stored off the jobsite, but a copy of the design shall be made available to the Division upon request.

In citing Employer, the Division specifically alleged:

When inspected on August 29, 2011, employer was found to have willfully modified a registered professional engineer's construction design of the support system, shield system and other protective system intended to protect employees from cave-ins, in the 30 foot deep excavation known as the "144 Shoring Pit" without prior approval of said engineer. Consequently, the employer failed to have a current written design plan approved by a registered professional engineer in their possession and at the jobsite containing the modifications made by the employer. The employer was conscious it was in violation of the standard and continued to allow employees to work in the excavation. The employer was unable to use Option 1, Option 2, or Option 3 of this section, since the depth of the excavation exceeded 20 feet.

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).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Clap. 4th 472, 483, review denied.)

To establish a violation of Section 1541.1, subdivision (c)(4), the Division must show that Employer failed to meet the following requirements: (1) The support systems, shield systems, and other protective systems shall be approved by a registered professional engineer (RPE); (2) The designs shall be in written form and shall include a plan indicating the sizes, types, and configurations of the materials to be used in the protective systems, and the identity of the RPE approving the design; and (3) At least one copy of the design shall be maintained at the jobsite during construction of the protective system and made available to the Division upon request.

The first requirement of the RPE's approval of the support, shield and protective systems is not at issue, since all of employer's managers during Hart's inspection and at the Hearing acknowledged a RPE's approval was required by the safety order.

The second and third requirements required to establish a violation are whether the designs are in written form and include a plan indicating the sizes, types, and configurations of the materials used in the protective design and the identity of the RPE approving the design; and whether there is at least one copy of the design maintained at the jobsite during the construction of the protective system were not met. Here, the modification design plans of the shoring pit given to Hart when he arrived at the job site on August 29<sup>th</sup> were not written with Haase's approval and did not match the design plans Hart received from Employer on June 17, 2011 (See Exhibit 9). Since Employer failed to meet the requirements because the August 29<sup>th</sup> modifications were not approved by Haase, the August 29<sup>th</sup> plans were not in writing identifying Haase<sup>10</sup> as the RPE, and the design plans were not available to Hart at the time he requested the design modification a violation of the safety order is established.

**2. Is there sufficient evidence to support a "serious" classification for a violation of section 1541, subdivision (c), if Employer modified a protective system without prior approval of a RPE?**

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<sup>10</sup> Haase testified that he was working on the written design plans (See Exhibit 12) that included the August 27, 2011 modifications, but had not completed the design plans at the time Hart requested a copy of the morning of August 29, 2011.

Hart classified the violation of section 1541.1, subdivision (c), as serious. The issue in this matter is whether there is sufficient evidence to support a “serious” classification.

The legal standard for a serious violation is expressed in Labor Code section 6432, subdivision (a) which 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 hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

- (1) A serious exposure exceeding an established permissible exposure limit.
- (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

The elements of a serious violation are: (1) a violation exists in a place of employment, (2) a demonstration of realistic possibility of death or serious injury; (3) employee exposure to an actual hazard; and (4) a rebuttable presumption is not established.

The first element of a serious violation requires that “a violation exists in a place of employment”. The Division established that a violation existed at the work site by Hart’s interviews with Haase, Employer’s RPE, who was not aware of the modifications; his interview with Kellum who acknowledged the modification had been made before approval was given by Haase; and Hart’s observation of a waler and struts in different locations from the previous locations depicted in the June 17, 2011 design plans (See Exhibit 9).

The second element requires a demonstration of a “realistic possibility” of serious injury or death. A “realistic possibility” is not defined in the Labor Code or safety orders, but has previously been addressed by the Appeals Board. In *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), the Appeals Board determined that it was unnecessary for the Division to prove actual splashing of caustic chemicals but only a realistic possibility that splashing of chemicals existed. The Appeals Board explained: “[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation)... if such a prediction is clearly within the bounds of human reason, not pure speculation.” Hart testified that a realistic possibility of death or serious injury could occur in an 18 to 20 foot excavation that is unsupported. Hart stated he has investigated an

unsupported excavation accident where two employees were working when the excavation collapsed resulting in fatalities. Hart stated that the facts here posed a realistic possibility that serious injuries could occur because of the size and magnitude of the shoring pit. If the support systems failed any employees working in the shoring pit would be buried under the large amounts of soil, causing asphyxiation. The Division's District Manager, Richard Fazlollahi also testified, stating he has conducted approximately 15 to 20 accident investigations that all involved inadequate or no protection systems, which resulted in broken bones, head trauma and fatalities. Thus, Employer's failure to follow a design plan approved by a RPE could result in causing serious injuries or death.

The third element of a serious violation is serious physical harm as used in section 6432 that could result from the actual hazard created by the violation. The demonstration of a violation by the Division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of among other things: (1) A serious exposure exceeding an established permissible exposure limit or (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

Hart testified as discussed above, that the August 29, 2011 plans for the shoring pit (did not match the earlier June 17, 2011 plans and were not approved by RPE Haase, which exposed employees to a hazard of an unsupported excavation that could result in serious injuries or fatalities from falling objects and collapsing soil. Thus, the fourth element of serious physical harm is established by the existence of Employer's failure to obtain the RPD's approval of the shoring pit modification which exposed Employer's employees to an unsafe work site.

The fourth element of a serious violation, a rebuttable presumption, refers to the "reasonable possibility" language, which had been in use by the Appeals Board. There is a presumption that the Legislature has approved the Board's definition. (See, *Moore v. California State Board of Accountancy* (1992) 2 Cal. 4<sup>th</sup> 999, 1017, 9 Cal. Rptr. 2d 358, 831 P. 2d 798). Here, Employer did not present any evidence to rebut the presumption.

The Division has established that a serious violation occurred because all of the elements are present: (1) a violation existed at Employer's work site; (2) Hart demonstrated a realistic possibility of death or serious injury; (3) the employees were exposed to an actual hazard and (4) a rebuttable presumption has not been established by Employer.

### **3. Did Employer intentionally or knowingly modify the design plans for the excavation site without prior approval of a RPE?**

Section 334, subdivision (e), states a "willful" classification may be established if the evidence shows that: (1) an employer intentionally violated a safety law; or (2) an employer had actual knowledge of an unsafe or hazardous

condition, yet did not attempt to correct it. Both tests require the Division to prove that the employer had a particular state of mind. Under the first requirement, the Division must prove that the employer intentionally violated a worker safety law. (*MCM Construction, Inc.*, Cal/OSHA App. 92-436, DAR (May 23, 1995), citing *Gal Concrete Construction Co.*, Cal./OSHA App. 87-264, DAR (Apr. 7, 1993), p. 5.)

The Division asserted that Employer intentionally violated the safety order. According to Hart's testimony, Mike Monden, Employer's project manager said the modifications made on Saturday, August 27, 2011, were necessary to allow the installation of a water pipe the following Monday, August 29, 2011. Kellum, Employer's project engineer also acknowledged that he was aware of the modification and knew that a design plan approval was required but instead allowed the modification to proceed. Kellum stated he felt "their backs were against the wall because the excavation project would have been shut down if the water pipe was not installed, which would have hindered water delivery to customers"<sup>11</sup>. Hart further testified that Kellum's knowledge of the modifications with the exposure of a possible unsafe or hazardous condition existed when Kellum called Haase to create a design plan for the modification made on August 27th. Haase's testimony was consistent with Hart's account of Kellum's statements to him during his investigation on August 29, 2011. Pursuant to the Board's holding in *MCM Construction, Inc.*, *supra*, in weighing the testimonies of Hart and Haase, the evidence shows Employer intentionally violated a worker safety law.

### **Penalty Calculations**

Hart calculated the penalties pursuant to the Division's policies and procedures and the California Code of Regulations as indicated on the Penalty Worksheet (See Exhibit 23). In calculating the penalties for Employer's willful violation Hart classified the severity as high. Hart rated the extent as medium because he identified two excavation sites that required design plans, with only one of the units being out of compliance. "Likelihood" is the probability that injury, illness or disease will occur as a result of the violation and is based on the number of employees exposed to the hazard created by the violation and the extent to which the violation has in the past resulted in injury, illness or disease to employees. Hart rated likelihood low reducing the penalty by 25 percent resulting in a gravity based penalty of \$13,500. Since the classification is willful, the violation is not subject to reduction, other than the size pursuant to part (1) of subdivision (d) of section 336, where the violation is determined by the Division to have caused death or serious injury, illness or exposure within the meaning of Labor Code section 6302, *supra*.<sup>12</sup> When a

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<sup>11</sup>Statement of Project Manager Munden and Project Engineer are party admissions. Pursuant to Evidence Code section 1220, evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity.

<sup>12</sup> Employer had over 100 employees and was not entitled to size credit.

willful violation is established the penalty is multiplied by five resulting in a penalty of \$67,500.

### **Conclusion**

In conclusion, the Division established a willful classification of section 1541.1, subdivision (c) on August 29, 2011. The Division established that Employer willfully failed to obtain a RPE's approval of the construction design modification of a support system, shield system and other protective system for an excavation site. Thus, the assessed penalty is \$67,500.

### **Decision**

It is hereby ordered that the citations are established, as indicated above and as 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: May 28, 2015

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**CLARA HILL-WILLIAMS**  
Administrative Law Judge

CHW: ao

## APPENDIX A

### SUMMARY OF EVIDENTIARY RECORD

#### SHIMMICK CONSTRUCTION CO., INC/OBAYASHI CORPORATION JV Dockets 13-R3D1-0781

**Date of Hearing:** May 14, 2013, September 19, 2013  
and February 11, 2014

#### Division's Exhibits

<b>Exhibit Number</b>	<b>Exhibit Description</b>	<b>Admitted</b>
1	Jurisdictional Documents	X
2	Photo – Excavation – 3 white trucks/ground level	X
3	Photo – yellow lines with steel	X
4	Photo – inside excavation – lift 2	X
5	Photo – left 1 beam right	X
6	Photo – end of beam	X
7	Plans – two page diagram	X
8	Photo – men in orange safety vests	X
9	Diagram – letter of transmittal	X
10	Log sheet of revisions	X
11	Clearance check and plans 12/12/11	X
12	Project 147 Plans 8/29/11	X
13	Project 147 Plans 8/30/11	X
14	Photo	X
15	Photo	X
16	Photo	X
17	Photo	X
18	Photo	X
19	Business Cards	X
20	California Secretary of State Business Entity	X
21	Contractor's State License	X
22	1BY – 9/2/11	X
23	C-10 2/27/12	X

**Employer's Exhibits**

<b>Exhibit Letter</b>	<b>Exhibit Description</b>	<b>Admitted</b>
A	Wood Crest Engineering Letter 9/11/11	X
B	C-10 dated 10/4/11	X

**Witnesses Testifying at Hearing**

1. Herman Edward Beyke
2. Lawrence Haase
3. Brandon Hart
4. Richard Fazlollahi

**CERTIFICATION OF RECORDING**

*I, Clara Hill-Williams, 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 A JV LL**  
**Dockets 13-R3D1-0781**

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

IMIS No. 315525790

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E		A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R3D1-0781	1	1	1541.1(c)	WS	Citation affirmed and penalty assessed	X		\$67,500	\$67,500	<b>\$67,500</b>
<b>Sub-Total</b>								\$67,500	\$67,500	<b>\$67,500</b>

**Total Amount Due\***

**\$67,500**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board. **All penalty payments must be made to:**

Accounting Office (OSH)  
Department of Industrial Relations  
P.O. Box 420603  
San Francisco, CA 94142

\*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: CHW/ao  
POS: 05/28/2015