BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: **GATEWAY PACIFIC CONTRACTORS INC.** **8055 Freeport Boulevard** **Sacramento, CA 95832** Employer.	**DOCKETS 10-R2D3-1502 through 1508** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the Petitions for Reconsideration of both Gateway Pacific Contractors, Inc. (Employer) and the Division Of Occupational Safety and Health (Division) under submission, renders the following decision after reconsideration.

JURISDICTION

Employer engaged in construction and installation of an underground pipeline system near Chico, California, designed to run treated water to the Sacramento River. On November 7, 2009, the Division commenced an accident inspection at Employer's worksite through Associate Safety Engineer John Wendland (Wendland). On April 29, 2010, the Division cited Employer with multiple violations of California Code of Regulations, title 8.[1] Several of the citations were subsequently amended.

Employer appealed the citations and administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. The ALJ issued a Decision affirming several citations, vacating other citations, and vacating some of the associated penalties as duplicative.

Employer filed a Petition for Reconsideration challenging the Decision's affirmance of certain citations and their classifications.[2] The Division filed a

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] The following citations remain at issue, either in whole or in part: Citation 1, Item 4 asserting a general violation of section 1541, subdivision (c)(2) [failure to provide employees in a trench a safe means of

Petition challenging the Decision's duplicative penalty determination as to some of the citations. The Board has taken both Petitions under submission.[3]

Issues

1. Did Employer fail to provide a safe means of egress from a trench excavation so as to require no more than 25 feet of lateral travel for employees?

2. On either November 6 or 9, 2009 (or both), did Employer fail to ensure its employees not work in excavations in which there was accumulated water, or in excavations in which water was accumulating, without taking adequate precautions to protect employees against the hazards posed by water accumulation?

3. On November 9, 2009, did Employer fail to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivisions (b) or (c)?

4. Did the Division establish the violations associated with Citations 4 and 6 were properly classified as serious?

5. Did Employer present evidence sufficient to demonstrate it did not, and could not with the exercise of reasonable diligence, have known of the presence of the violations characterized as serious?

6. Did the Division establish Citations 4 and 6 were properly classified as accident-related?

7. Did the Division establish that Citations 6 and 7 were properly classified as willful?

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egress within 25 feet of lateral travel]; Citation 4, Item 1 asserting a serious accident-related violation of section 1541, subdivision (h)(1) [failure to take adequate precautions to protect employees from the hazard of water accumulation in a trench for incidents on November 6 and 9, 2009]; Citation 6, Item 1 asserting a serious accident-related willful violation of section 1541.1, subdivision (a)(1) [failure to protect employees in an excavation with an adequate protective system for an incident on November 6, 2009]; and, Citation 7, Item 1 asserting a general willful violation of section 1541.1, subdivision (a)(1) [failure to protect employees in an excavation with an adequate protective system for an incident on November 9, 2009]. Employer challenges both the existence of the violations and their classifications for all citations, except for Citation 6. With regard to Citation 6, Employer does not contest the Decision's findings and conclusions upholding a violation of that Citation, nor does it specifically contest the accident-related classification; Employer only challenges the serious and willful classifications. Issues not raised in a petition for reconsideration are deemed waived. (Labor Code section 6618.) In addition, after reviewing the record, we conclude that Decision affirming the violation set forth in Citation 6 was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

[3] Employer contends the Division's Petition was untimely, but its arguments do not account for all holidays.

8. Should the penalty for Citation 7 have been vacated as duplicative of Citation 6?

FINDINGS OF FACT

1. In 2009, Employer was constructing and installing an underground pipeline system near Chico, California (also referred herein to as the "pipeline project"). The pipeline project was designed to run treated water to the Sacramento River.

2. The project required Employer to excavate a trench for installation of pipe. The total length of the project was 2900 feet. The trench depth ranged from approximately 15 feet at the high end to approximately 19 feet as it neared the river. The gradual decline in depth allowed gravity to push the water to the river. No part of the excavation at issue was less than five feet deep, nor was any relevant part of the excavation made in entirely stable rock.

3. The project called for Employer to install approximately 2500 feet of reinforced concrete pipe (RCP) throughout the excavation. The RCP came in segments. The pipe was approximately 24 feet long and measured 84 inches on the inside diameter.

4. Employer submitted an Activity Notification Form to the Division for the project. (Exhibit 4). The form, signed by Employer's Vice President Gary Bechtel, said no soil analysis would be done for this project. It also said Employer would use a trench shield to provide protection for its workers while they were in the excavation.

5. Water accumulated, and was accumulating, throughout the trench. Employer used pumps in an effort to pump the water out, but the pumps were not always entirely adequate.

6. In November 2009, Employer employed Scott Robinson (Robinson) as a foreman. Robinson supervised a crew that worked on the pipeline project. Robinson was responsible for the crew's safety.

7. Employer employed Delano Hall (D. Hall) as the Assistant Superintendent during the period of November 2009.

8. Employer employed Jay Hall (J. Hall) as the Project Manager during the period of November 2009.

9. On November 6, 2009, Felipe Gonzalez (Gonzalez), an employee of Employer, was working in a trench on the pipeline project. Water had accumulated, and was accumulating, in the trench in the area where

Gonzalez was working that day. The soil in the bottom of the trench at that location was classified as Type "C." (*See*, Section 1541.1, Appendix A.)

10. While Gonzalez was working, a bench on the trench wall collapsed and caved in on him, partially burying him. Where the cave-in occurred, the trench walls had benches that were approximately six feet tall, or higher. The trench depth at the location of the cave-in on November 6 was approximately 18 feet.

11. Gonzalez was working in the open trench, outside the protection of the trench shield, when the cave-in occurred.[4] Gonzalez suffered a serious injury within the meaning of the Labor Code and applicable regulations.

12. The trench walls at the location of the cave-in on November 6 were more vertical than 1 ½ horizontal to 1 vertical (1 ½ H to 1 V). They were also more vertical than 1 H to 1 V.

13. There had been previous cave-ins during this pipeline project prior to Gonzalez's accident. Management was aware of the previous cave-ins.

14. Following the cave-in on November 6, 2009, the Division through Associate Safety Engineer Wendland commenced an inspection of the worksite. The inspection took place, without limitation, on both November 7 and 9, 2009.

15. During his inspection on the morning of November 9, 2009, Wendland informed Robinson the trench needed to be sloped to 1 ½ H to 1 V, or a proper trench shield needed to be provided and utilized, before work could continue and before anyone got back in the trench. Wendland also showed Employer's employees permissible trenching configurations under title 8, as seen in Exhibit 6. Robinson said he would comply.

16. After Wendland departed on November 9, 2009, Employer laid a new piece of RCP in the trench without sloping the trench to 1 ½ H to 1 V. The new piece of pipe was laid over the area where Gonzalez's accident had occurred. Water had accumulated, and was accumulating, in the trench in the area where the new piece of pipe

[4] There is some dispute in the testimony of witnesses as to whether the trench shield was within or outside the trench at the time of the accident on November 6, 2009. However, the exact location of the shield is irrelevant because it is undisputed that when the cave-in occurred Gonzalez was working outside the protection of the shield, and outside the protection of the previously laid pipe. It is not disputed that the trench shield was moved to the cave-in site after the accident occurred as part of rescue operations.

was installed. The soil in the bottom of the trench where the new piece of pipe was laid was classified as Type "C."

17. Employees were exposed to an improperly configured trench on November 9, 2009. Wendland returned in the afternoon of November 9, 2009 and observed Robinson standing within the trench on top of a piece of pipe, as seen in Ex. 23. The pipe had an approximate interior diameter of 84 inches. Wendland estimated the trench depth where he observed Robinson standing in Ex. 23 to be 16 ½ feet or greater. The trench walls where Robinson was standing were more vertical than 1 ½ H to 1 V. D. Hall was also observed standing on the RCP. The trench shield was not being utilized at the time.

18. There was no stairway, ramp, ladder, or other safe means of egress so as to require no more than 25 feet of lateral travel from where Robinson was standing on the RCP.

DECISION AFTER RECONSIDERATION

The Board has independently reviewed and considered the entire record in this matter, including the arguments presented in the Petitions for Reconsideration and responses thereto. In making this decision, the Board has taken no new evidence.

1. Did Employer fail to provide a safe means of egress from an excavation so as to require no more than 25 feet of lateral travel for employees?

Citation 1, Item 4 alleges a general violation of section 1541, subdivision (c)(2). That section provides the following:

> (c) Access and egress.
> (2) Means of egress from trench excavations.
> A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet or more in depth so as to require no more than 25 feet of lateral travel for employees.
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> In the amended citation, the Division alleges the following:
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> On 11/09/09, at the Outfall Replacement Project (River Road), Chico, CA, on a construction site, the Division observed 2 employees in a trench excavation at a depth of 18 feet, slightly up stream and in close proximity in the same trench excavation where the

cave-in occurred on 11/06/09, with no egress at 25 feet of lateral travel for the employees.

On November 9, 2009, Wendland testified that he returned to the worksite. While there, he saw Employer had laid a new piece of pipe in the trench. He also saw foreman Robinson standing on top of the pipe. Robinson was standing near the bell of the pipe, which Wendland documented in a photograph (Exhibit 23). The pipe was 84 inches (seven feet) on the interior diameter. The evidence demonstrates the trench depth where Robinson was observed standing was 16 ½ feet or greater.[5] Wendland estimated Robinson had to walk approximately 60 feet on top of the pipe to get out of the trench. Wendland did not observe any safe means of egress, such as a ladder, near Robinson so as to require no more than 25 feet of lateral travel. Wendland's testimony is credited and the violation is affirmed. The evidence demonstrates that when Robinson stood atop the pipe, he did not have a stairway, ladder, ramp or other safe means of egress located so as to require no more than 25 feet of lateral travel. We also conclude the top of the pipe did not constitute a safe means of egress, as contemplated by the safety order, as it was not installed or designed to provide a means of egress for employees.

2. On either November 6 or 9, 2009 (or both), did Employer fail to ensure its employees not work in excavations in which there was accumulated water, or in excavations in which water was accumulating, without taking adequate precautions to protect employees against the hazards posed by water accumulation?

Citation 4, Item 1 alleges a serious and accident-related violation of section 1541, subdivision (h)(1). That section provides the following:

> (h) Protection from hazards associated with water accumulation.
> (1) Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

[5] Wendland said the new pipe had been laid in the area where the cave-in had occurred and he had previously measured that approximate area as 18 feet deep. Next, Wendland said he estimated the trench depth where he observed the worker in Ex. 23 to be approximately 16 ½ to 17 feet in depth. We conclude that the trench was certainly 16 ½ feet or greater in depth where Robinson was observed on the pipe on the afternoon of November 9. The pipeline project only went from a depth of 15 feet to a depth of approximately 19 feet (or slightly greater) over nearly 2900 feet in distance, demonstrating that any depth change from pipe to pipe would be marginal.

In the amended citation, the Division alleges the following:

The Company violated this standard in the following 2 instances:

> On 11/06/09, at the Outfall Replacement Project (River Road), Chico, CA, on a construction site, an employee was allowed to work in an excavation at a depth of 18 feet, where water was accumulating without the proper precautions necessary to protect the employee from cave-ins, to include a special support or trench shield or use of a safety harness and lifeline. The trench collapsed burying the employee causing a serious injury.
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> On 11/09/09, at the Outfall Replacement Project (River Road), Chico, CA, on a construction site, the Division observed two employees that were allowed to work in the same trench excavation where the cave-in occurred on 11/6/19, slightly upstream and in close proximity, with a depth of 18 feet, where water was accumulating without the proper precautions necessary to protect the employee from cave-ins, to include a special support or trench shield or use of a safety harness and lifeline.

In order to demonstrate a violation of section 1541, subdivision (h)(1) the Division must show (1) employees worked in an excavation in which there was accumulated water, or in an excavation in which water was accumulating, and (2) Employer failed to take adequate precautions to protect employees against the hazards posed by water accumulation.

First, a preponderance of the evidence demonstrates water accumulated, and was accumulating, throughout the trench in areas where employees were working. Robinson said when they started the project they dug a test hole and hit water that was freely seeping at about 15 feet in depth. The trench depth throughout the entire project ranged from approximately 15 to 19 feet. Robinson said after they dug the first 200 feet, they started to regularly experience water seepage within the trench. He indicated half the trench from point A to B had water in it the whole time. Robinson said they engaged in efforts to remove water from trench; they dug wells, put pumps in and discharged water into ponds, but he stated the pumps could not always work fast enough. Employees told Wendland there was always water in the trench. Asuncion Jauregui (Jauregui), the excavator operator, said "whenever we would dig, there would be some water on the surface, but they would use some pumps in order to pump it out." Jauregui stated the deeper they dug the more water would appear. D. Hall admitted the crews frequently hit groundwater. He said water was typically in the trench during the project. He also said there was water in the bottom of the excavation at the levee trench section when excavated. J. Hall said much of the trench was located below the water table.

He said they used pumps in some locations to keep the water table two feet below the excavation. J. Hall also admitted that water would enter the trench, although he indicated the water intrusion near the levee came from the river. Wendland testified Employer's use of submersible pumps demonstrated the water was freely seeping, and his testimony is credited given the other evidence concerning regular and continuous water intrusion, discussed above. Wendland said the trench contained freely seeping groundwater.

The evidence also demonstrates the existence of accumulating and accumulated water in pertinent areas on both November 6 and 9, 2009. On November 6, 2009, prior to the cave-in, Gonzalez testified he observed water on the sides of the trench in areas where he was working. The water was approximately four inches deep. Gonzalez told Wendland the water was up to his ankles. Jauregui said there was water near the front of the trench that day. Wendland also observed accumulated water in the trench on November 7, 2009 near the cave-in site. Next, on the morning of November 9, 2009, Wendland inspected the accident site and personally observed and measured six inches of accumulated water in the trench near the area where the cave-in occurred. Later that day, Wendland saw D. Hall and Robinson standing on top of the pipe that had been laid over the same area. Thus, the first element of the safety order is established as to both instances.

With respect to the second element, i.e. whether Employer failed to take "adequate precautions" to protect against the hazards posed by water accumulation, section 1541, subdivision (h)(1) requires a situation-specific analysis, taking into account all hazards created by water accumulation. The regulation exists to prevent cave-ins—amongst other possible hazards. Section 1541, subdivision (h)(1) states, "The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline." Under these facts we cannot conclude Employer engaged in "adequate precautions" taking into account all potential hazards.

As discussed above, credible testimony demonstrated the existence of freely seeping, accumulating, and accumulated water throughout the trench, including in pertinent areas on both November 6 and 9, 2009. Here, for the incidents on both November 6 and 9, 2009, Employer wholly failed to configure the trench to effectively deal with the existence of that water and failed to use any trench shield to protect its workers.

The evidence demonstrates Type "C" soil existed at the bottom of the trench by virtue of the water in the area where Gonzalez worked and was injured on November 6, 2009. It also existed where Employer laid new pipe on the afternoon of November 9, 2009. Type "C" soil includes soil with a low

cohesive value (compressive strength of .5 tsf[6] or less) and "[s]ubmerged soil or soil from which water is freely seeping…" (Title 8, Section 1541.1, Appendix A.) Among other evidence demonstrating the existence of Type C soil, Wendland conducted visual assessments of the soil and saw accumulated water, indicating Type "C" soil existed. Wendland also testified he conducted manual tests on November 9 and confirmed Type "C" soil existed at the bottom of the trench where the cave-in occurred.[7] Trenches in Type "C" soil must be configured differently than those in other soil types in order to provide employees "adequate protective system[s]" to prevent cave-ins. (*See*, Section 1541.1.) However, Employer did not configure the trench to provide an "adequate protective system."[8] Rather, Employer configured the trench in a manner that actually exacerbated the hazard created by the water.

In the November 6, 2009 instance, Employer utilized a benching system that did not comply with any option set forth in title 8, including section 1541.1, and certainly did not comply with any option available for Type "C" soil.[9] It also did not comply with its own plans. Wendland and Gonzalez testified that on November 6, 2009, in the location where Gonzalez was working, the trench walls had benches that were at least six feet high. Other witnesses testified the benches were even taller. Benches at such heights are not permitted in any soil type and Wendland observed that such benches are entirely prohibited in Type "C" soil. (*See,* Title 8, Section 1541.1, Appendix B.) Wendland said the use of benches when water is present creates hazards for employees. He said a bench is a like wick, it sucks up water, which makes the bench heavy, causing it to collapse. Wendland observed that pumping of water did not solve the instability issues created by the water due to the use and configuration of the benches. The existence of such benches on November 6, 2009, demonstrates Employer did not engage in "adequate precautions" to address the cave-in risks associated with accumulating and accumulated water, requiring affirmance of the citation as to the first instance. The use of benches actually increased the danger created by the water.

On November 6, 2009, Employer also did not engage in any other efforts to effectively configure the trench for the wet soil, or to adequately deal with the existence of the water. Employer failed to slope the trench appropriately for the soil type that was present. Type "C" soil requires Employer to slope the trench at 1 ½ H to 1 V, particularly when no shield is being utilized. (Sections 1541.1, subdivisions (b)(1) and (2), Appendix B.) Wendland said the depth and width of the trench may be used to determine the existing slope. On the morning of

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[6] Tons per square foot.

[7] Wendland testified there was Type "B" soil higher up on the trench wall and Type "C" on the bottom of the trench. In such layered soil, the regulations require an employer to configure the trench for the Type "C" soil at the bottom of the trench. (Section 1541.1, Appendix B, Figure 1.4)

[8] Employer's Petition does not even challenge the ALJ's determination, with regard to Citation 6, that it did not use an adequate protective system on November 6, 2009, thus waiving the issue. (See, Labor Code section 6618.)

[9] The benches also did not comply with their own plans.

November 9, 2009, Wendland measured the depth of the trench in the approximate area of the cave-in as 18 feet. He stated when a trench is 18 feet deep, not including the width at the bottom of the trench, the trench would need to be 54 feet wide when sloped at 1 ½ H to 1 V, or 27 feet on each side. Further, if one were to assume that the very bottom of the trench was a minimum of 10 feet wide to allow room for an 84 inch RCP, then the trench would need to be 64 feet in total width.[10] However, Wendland's measurements showed the trench was only 43.6 feet wide, demonstrating the absence of proper sloping at 1 ½ H to 1 V—the measurements showed Employer had not even sloped appropriately for Type "B" soil at 1 H to 1 V, particularly considering the benches. Employer also did not use any adequate support system, shield system, or other protective system in accordance with any of the options set forth in section 1541.1, subdivision (c). While Employer provided a trench shield for its employees, it is undisputed that Gonzalez worked outside that shield during the pertinent time periods on November 6, 2009, including when the cave-in occurred. The evidence also shows, as will be discussed in greater detail in subsequent sections, that it was normal and customary for employees to work outside the shield due to the inadequacy of the shield for the project. Gonzalez noted that he regularly had to come out of the shield to complete his work.

Further, although it is unnecessary to address this issue in order to affirm the citation,[11] the evidence also demonstrates Employer failed to take adequate precautions to deal with water accumulation for the November 9, 2009 instance. The facts and evidence supporting this determination are set forth in the next section.

Under these facts, we hold with respect to both instances, Employer failed to take adequate precautions to protect employees against the hazards posed by water accumulation.

Indeed, with respect to the first instance, it is clear Employer itself did not believe pumps alone were an adequate precaution. Employer's Activity Notification Form (Exhibit 4) stated they were going to use a trench shield to protect workers. They opined that the shield was an integral part of their precautions. J. Hall, Project Manager, stated that employees on the pipeline project were supposed to use a trench shield for protection. He said he never heard employees were working in the trench outside the shield. He said that if he had become aware that employees were working outside the shield, he

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[10] The evidence demonstrates that the trench was 10 feet wide or greater. Wendland estimated the bottom of the trench was actually 10 feet wide. Jauregui said the trench was between 10 and 12 feet wide. Wendland said, at the very least, the bottom of the trench had to be a minimum of 8 feet wide, as the pipes were 84 inches on interior diameter.

[11] In order to prove a violation, the Division need only demonstrate that one of the instances charged by the citation is violative of the safety order. (*Petersen Builders Inc.*, Cal/OSHA App. 91-057, Decision After Reconsideration, (Jan. 24, 1992), fn. 4.)

"would have shut down the project." D. Hall also said employees should have remained in the shield. However, it is undisputed the trench shield was not in use on either November 6, 2009, when Gonzalez was in the accident, or November 9, 2009. It is not enough for Employer to provide pumps when its own supervisors are not following its other prescribed safety practices.

Finally, separately supporting affirmance of the citations, there is also ample evidence the pumps were not entirely effective or adequate, given the continued presence of water in the trench. As discussed above, employees testified to the continued existence of accumulated water in multiple portions of the trench. Robinson also observed the pumps were not always effective. Employees told Wendland that there was always water in the trench.

3. On November 9, 2009, did Employer fail to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivision (b) or (c)?

Citation 7, Item 1 asserts a violation of section 1541.1, subdivision (a)(1). That section provides the following:

> (a) Protection of employees in excavations.
>
> (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with Section 1541.1(b) or (c) except when:
>
> (A) Excavations are made entirely in stable rock; or
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> (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.[12]

In the amended citation, the Division alleges the following:

> On 11/09/09, at the Outfall Replacement Project (River Road), Chico, CA, on a construction site, the Division observed two (2) employees working in the same trench excavation where the employee was injured in a cave-in on 11/6/09, slightly up stream and in close proximity, with a depth of 18 feet that were not protected from cave-ins by an adequate protective system designed in accordance with Section 1541.1(b) or (c). Employer had a drawn plan that was a combination of sloping/benching above a shield

[12] It is undisputable that no part of the pertinent excavation was made in entirely stable rock, nor was any pertinent part less than five feet deep.

system, which it failed to follow in either aspect. (Ref. §§ 1541.1(b)(1), (b)(2), (b)(3), (b)(4), (c)(2), and (c)(4).) Nor did it use any other protective system. This is a serious willful citation.

When Wendland returned to the worksite on the afternoon of November 9, 2009, he observed Employer had laid a piece of pipe over the area where the cave-in had occurred.[13] That morning, Wendland had personally observed and measured six inches of water in the bottom of the trench near the area where the cave-in occurred. He also completed manual soil classification tests in the area where the cave-in occurred, and found the soil to be type "C" at the bottom of the trench and Type "B" higher on the trench wall, requiring Employer to configure the trench for Type "C" soil. (Title 8, Section 1541.1, Appendix B—1.4.) Wendland's inspection that morning, in conjunction with the evidence discussed in section 2 above, demonstrates the soil in the bottom of the trench was properly classified as Type "C", requiring Employer to slope the trench to 1 ½ H to 1 V. Alternatively, irrespective of the actual soil type, Employer was still required to treat the soil as Type "C" at this location because Employer failed to use any of the other sloping or benching options set forth under sections 1541.1, subdivisions (b)(2)-(b)(4), leaving Employer bound to treat the soil as Type "C" under section 1541.1, subdivision (b)(1).[14] That subdivision provides that "excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), *unless employer uses one of the other options*." (*emphasis added.*)[15] Employer was also not using any option set forth in section 1541.1, subdivision (c).

Although Employer had engaged in some work on the trench, i.e. removing the benches, the evidence demonstrates that on November 9, 2009 Employer failed to configure the trench per Type "C" soil requirements. Again, Wendland said the depth and width of the trench may be used to determine the slope. On the morning of November 9, 2009, Wendland measured the depth of the trench in the area of the cave-in as 18 feet. His measurements also showed the trench was only 43.6 feet wide. When Wendland returned on the afternoon of November 9, 2009, although Employer had conducted some work in the trench, he observed that the trench width had not changed. He observed that the trench depth was at least 16 ½ feet or greater where he observed

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[13] The testimony of Wendland demonstrates that the new pipe had been installed over the area where the cave-in occurred. Wendland said the new stick of pipe was installed where the S is marked on Ex. 11. Wendland said, "All they did was put another stick of pipe right, pretty basically, where the shield is. That's the same location that they were on the 9th as the accident happened on the 6th."

[14] When Wendland observed Employer on the afternoon of November 9, 2009, they had not done any soil test under Appendix A that would have led to a different soil classification, they were not following their plans in Exhibit 5, they did not use tabulated data, and they did not comply with any other engineered plans. It is also evident that they were not attempting to comply with any option in section 1541.1, subdivisions (c) that afternoon because the trench shield had been removed from the trench.

[15] The Activity Notification form (Ex. 4) specifically informed Employer that if it did not conduct a soil test, it would need to slope to 1 ½ H to 1 V.

Robinson standing on the pipe in Ex. 23. This demonstrated the continued absence of appropriate sloping for Type "C" soil. Wendland estimated the trench walls were approximately sloped to 3/4 H to 1 V. Wendland's estimates are credited. Robinson's testimony also corroborates Wendland's conclusions as to the improper sloping. Robinson admitted during his testimony that workers got back into the trench to lay more pipe before making all Wendland's changes. He said they laid a new piece of pipe before sloping the trench back to 1 ½ H to 1 V. It is also undisputed that the trench shield was outside the trench at this time and that Employer failed to follow any engineered plans. Thus, Employer failed to utilize an adequate protective system designed in accordance with section 1541.1, subdivision (b) or (c).

Wendland also observed workers exposed to the violation. Wendland saw Robinson and D. Hall on top of the pipe in the trench, which meant that they were working within the trench. Employee exposure may be established by a showing of "actual" exposure, or by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable by operational necessity or otherwise that employees have been, are, or will be in the zone of danger. (*Benicia Foundry & Iron Works, Inc.,* Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).) The Board concludes that both Robinson and D. Hall while standing atop the piece of pipe were actually exposed and were also within the zone of danger.[16]

4. Did the Division establish the violations associated with Citation 4 and 6 were serious?

This matter falls under the pre-2011 version of Labor Code section 6432. To prove the serious classification under the pre-2011 standard, the Division must prove a substantial probability that death or serious physical injury could result from a violation of the safety order. (Former Labor Code section 6432(a); Cal. Code Regs., title 8, section 334, subdivision (c)(1).) "Substantial probability" refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation. (Labor Code section 6432, subdivision (c); section 334, subdivision (c)(3).) The Division must prove by credible evidence that a serious physical injury is more likely than not to occur as a result of the accident. (*See, Benicia Foundry & Iron Works, Inc.,* Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003), *citing Abatti Farms/Produce,* Cal/OSHA App. 81-0256, Decision After Reconsideration (Oct. 4, 1985) [other citations omitted].)

[16] Separately, supporting a finding of exposure we also observe that there is evidence that employees were actually working at the bottom of the trench to help install the new piece of pipe on November 9, 2009.

Here, the evidence supports the serious classification for Citation 4, Instance 1 and Citation 6. With regard to Citation 4, Instance 1, the evidence demonstrates employees were working within a trench with accumulated and accumulating water. Employer failed to take adequate precautions to protect workers within the trench. An adequately-sized trench shield was not being used to protect workers and the trench had not been appropriately configured, particularly taking into account the accumulated water and soil type. Wendland testified the section is designed to prevent cave-ins and burial of employees. Wendland said when a cave-in occurs an employee can be seriously injured by being buried and by the weight of the collapsed materials. Wendland said that serious injury was more likely than not under the circumstances present on November 6, 2009. He also said there was a substantial probability of serious injury or death if an accident occurred. Wendland said he had investigated at least four other cave-ins, which all resulted in serious injuries to affected employees. It was also stipulated that Gonzalez suffered a serious injury within the meaning of the Labor Code due to the cave-in on November 6, 2009. The evidence demonstrates Gonzalez suffered serious physical harm. Thus, the Division established the serious classification by a preponderance of the evidence.

With regard to Citation 6, essentially the same factors and conclusions set forth above, as testified to by Wendland, also support the serious classification. Wendland said the circumstances present on November 6, 2009, when Gonzalez was working, created a substantial probability of serious injury. He noted that death or serious injury were more likely than not under those circumstances. Wendland investigated four similar cave-in accidents that resulted in serious injury. It was also stipulated that Gonzalez suffered a serious injury within the meaning of the Labor Code due to the cave-in on November 6, 2009. The serious classifications were properly found.

5. Did Employer present evidence sufficient to demonstrate that it did not, and could not with the exercise of reasonable diligence, have known of the presence of the violations characterized as serious?

We also conclude Employer did not establish any defense to the serious classification. Labor Code section 6432, subdivision (b), under the pre-2011 standard, included an affirmative defense to serious classifications. It stated, "[A] serious violation shall not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Here, Employer did not demonstrate it did not, and could not, with the exercise of reasonable diligence, have known of the violations which existed in Citations 4 and 6.

The evidence, including Exhibit 4 and the testimony of Robinson, D. Hall and J. Hall, demonstrates Employer opted to use a trench shield to keep

employees safe from the hazard of cave-ins. However, Employer's supervisory personnel were aware that the trench shield they provided was unsatisfactory for the work performed. Robinson, the foreman, testified he was responsible for the safety of his crew on the site. Robinson said the shield they were provided was ineffective and unsafe. He said employees could not fully grade within the protection of the shield. The employees needed to grade for approximately 24 feet of pipe, but the shield only provided approximately 16 feet of protection. He said employees would come out of the shield to grade the last eight feet, or more. Robinson acknowledged it was "normal procedure" to remove the shield when employees checked the grade, or to grade outside the shield. He said workers were in the trench outside the protection of the shield every day.[17] Gonzalez was working outside the shield on the day of the accident. Gonzalez indicated he regularly worked outside the shield.

Robinson also testified that the shield was ineffective because he could not leave it in the trench when digging or when laying a new piece of pipe. Employees could not install a 24 foot pipe within a 16 foot shield, particularly due to the crossbars on the shield. This led to further employee exposure outside the shield. Wendland and Robinson said workers needed to be in the trench when pipe was installed. The workers helped guide the pipe into the trench. Wendland said when the shield is too small, employees cannot use the shield when installing pipe. Robinson testified that they needed a 28 foot shield for the current project. Wendland's testimony corroborated Robinson's testimony regarding the inadequacies of the instant shield.

Robinson said D. Hall saw, and heard about, the issues with the shield every day. Robinson said he complained to D. Hall that they needed a bigger shield every day, but D. Hall responded: "We're using what we got." Robinson and D. Hall's knowledge with regard to the deficiencies in the shield is imputed to the Employer, which defeats the lack of employer knowledge defense. As discussed in the Decision, the Appeals Board has consistently held employers accountable for the acts and knowledge of their foremen. In *Greene and Hemly, Inc.*, Cal/OSHA App. 76-435, Decision After Reconsideration (April 7, 1978), the Board held a foreman's knowledge of a violative condition could be imputed to his employer even though upper management had no actual knowledge. As astutely observed in the Decision,

> In Citations 4 and 6, Robinson had actual knowledge that his workers were exposed to the hazards associated with cave-ins due to the fact that the trench shield was too small to protect the workers. Employer failed to exercise reasonable diligence when Robinson

[17] To the extent that Employer argues within its Petition that Robinson had no expectation that employees would work outside the shield, we find such arguments to be directly contradicted by Robinson's testimony to the effect that it was routine for employees to work outside the shield. Further, contrary to the assertions in Employer's petition, we find no evidence sufficient to discredit Robinson's testimony.

> allowed workers, including himself, to enter the trench, fully knowing that the trench shield would not afford workers the needed protection. Robinson's failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. [citations omitted].

6. Did the Division establish that Citations 4 and 6 were properly characterized as accident-related?

To prove the accident-related classification, the Division must show a causal nexus between the Employer's violation of a safety standard and an employee's serious injury. (*MCM Construction,* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb 22, 2016); *HHS Construction,* Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb 26, 2015).) The Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Ibid.*)

With regard to Citation 4, Instance 1, the Division met its burden to demonstrate a causal nexus between the violation of section 1541, subdivision (h)(1) and the serious injury sustained by Gonzalez. We concur with the Decision's finding that if Employer had provided and properly utilized a trench shield of adequate size, or if Employer had adequately configured and sloped the walls of the trench, Gonzalez would not have been partially buried by dirt when the excavation wall collapsed. Separately supporting this classification, we additionally note that it was a bench that collapsed onto Gonzalez. Benches were not permitted in the Type "C" soil present here. The benches Employer utilized were not even appropriate for Type "A" or "B" soil due to their height. Wendland said the use of an improper bench when there was water intrusion caused the trench wall to collapse. The benches were particularly inappropriate given the water content in the trench, as discussed above.

With regard to Citation 6, the record again supports a finding that if Employer had provided and properly utilized a trench shield of adequate size, or if Employer had adequately sloped and configured the walls of the trench, Gonzalez would not have been partially buried by dirt when the excavation wall collapsed, and he would have not suffered a serious injury.

7. Did the Division establish that Citations 6 and 7 were properly characterized as willful?

Within its Petition, Employer challenges the Decision's affirmance of the willful classification for the both Citations 6 and 7. The Board concludes the

willful classification is appropriate for both citations. Section 334(e) defines a willful violation as follows:

> Willful Violation -is 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.

"Under Section 334, the Division may establish the willfulness of a violation by showing by a preponderance of the evidence 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." (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.,* (2000) 80 Cal.App.4th 1023, 1034-1035, *citing, National Cement Co.,* Cal/OSHA 91-310, Decision After Reconsideration (Mar. 10, 1993); *see also, Tutor-Saliba-Perini,* Cal/OSHA App. 94-2279 et. al., Decision After Reconsideration (Aug. 20, 2001).)

Ample credible evidence supports the Decision's affirmance of Citation 6 as willful under the second test, discussed above. Employer had elected to use a trench shield to protect its workers, but Robinson, the foreman, knew that the trench shield was too small and that workers were repeatedly required to work outside the shield where they were exposed to unprotected trench walls. Robinson said the shield they were provided was not safe. Robinson said he repeatedly asked for a larger trench shield from upper management, but his requests were denied. Robinson, and other supervisorial personnel, continued to allow employees to enter the trench where they were not protected by an adequate trench shield and where they were exposed to improperly configured trench walls. Employer made no reasonable attempts to correct these unsafe conditions, supporting the willful classification.

Alternatively, there are other facts that separately support a willful classification for Citation 6, which were not specifically mentioned within the Decision. First, Robinson, D. Hall, and J. Hall knew water intrusion and freely seeping water existed throughout much of the trench. They also knew of prior cave-ins in the same trench, indicating they had knowledge of unsafe conditions in the trench. They also had plans calling for a different trench configuration, which they did not follow. (Ex. 5)[18] They also knew the shield was ineffective and unsafe. The water intrusion, the prior cave-ins, the plans

[18] J. Hall observed that the schematic in the upper right hand corner of Exhibit 5 should have been used from station 500 to 560, which would include the area where the accident occurred.

calling for a different trench configuration, and the ineffectiveness of the shield all provided Employer notice that unsafe or hazardous conditions existed, and yet Employer made no reasonable efforts to eliminate these conditions. Second, Robinson was standing on the bell portion on the end of the last piece of pipe, near to where Gonzalez worked in the trench prior to his accident. Robinson also knew it was normal for employees to work in the trench outside the shield. Robinson testified that when he was standing on the bell he believed that Gonzalez was exposed to an unsafe condition, yet he did not tell him to get out of the trench. This shows knowledge of an unsafe condition, without any adequate attempt to correct it.

Next, ample evidence supports the classification of Citation 7 as willful for the same reasons set forth with regard to Citation 6. As said in the Decision, "Robinson and upper management knew that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition."

There are also some alternative facts that separately support the willful classification for Citation 7 that were not specifically mentioned within the Decision. Prior to Wendland's departure on the morning of November 9, he specifically informed Robinson that Employer needed to slope the trench walls to 1 ½ H to 1 V, work within an appropriate shield, and/or properly follow their designated plan. He also showed J. Hall, Robinson, and others a document containing various excerpts from Title 8 (Ex. 6), and he discussed the soil type in the trench. He told Robinson not to allow anyone into the trench until it had been fixed. Robinson said he would comply. Employer then deliberately disregarded Wendland's instructions and continued work without properly configuring the trench or providing an appropriate shield. When Wendland returned on the afternoon of November 9, he observed both D. Hall and Robinson in the trench on top of the pipe. Robinson testified that D. Hall had decided to continue working without properly configuring the trench, even though Robinson had told D. Hall about Wendland's instructions. This conduct demonstrates a willful violation. (Section 334(e); s*ee also, Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.,* (2000) 80 Cal.App.4th 1023.)

Finally, there was further alternative evidence jointly supporting the willful classification for both Citations 6 and 7, which was not mentioned by the ALJ. There was testimony regarding an earlier cave-in at one of Employer's worksites in 2003, which led to the death of an employee. In that earlier matter, Employer was cited with many of the same violations as cited here. While we make no factual findings as to that earlier matter, we do observe that J. Hall was the Project Manager then, as he is now. Through the earlier citations, which were viewed by J. Hall, Employer was specifically placed on notice of Title 8 requirements pertaining to proper trench configurations, and particularly those set forth in section 1541.1. (Ex. 8.) Despite such notice, Employer clearly and repeatedly failed to follow the requirements set forth in

section 1541.1 and its subparts, as described herein. This demonstrates that Employer intentionally violated the law.

8. Should the penalty for Citation 7 have been vacated as duplicative of Citation 6?

The Decision vacated the penalty for Citation 7, finding it duplicative of the penalty set forth in Citation 6. Generally, only one penalty may be assessed against an employer for multiple violations concerning a single hazard. (*Strong Tie Structures,* Cal./OSHA App. 75-856, Decision After Reconsideration (Sept. 16, 1976).) The Board has long recognized it is proper to assess one penalty for multiple violations involving the same hazard where a single means of abatement is needed. (See *A & C Landscaping, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010).) The Board has held penalties which tend to be duplicative or cumulative, and are not needed to effectuate abatement, inconsistent with the spirit and intent of the Act. (*See, A & C Landscaping Inc. aka A & C Construction, Inc.*, Cal./OSHA App. 04-4795, Decision After Reconsideration (June 24, 2010).)

There are exceptions to the general rule. The Board has repeatedly refused to eliminate civil penalties under *Strong Tie Structures* where the hazards involved different pieces of equipment in different locations, even where the generic hazard the employees were exposed to was the same. (*Ontario Residential Manor,* Cal./OSHA App. 96-1260, Decision After Reconsideration (June 30, 2000).) The Board has also refused to eliminate the civil penalties where the citations were based on a separate set of facts, involving separate activities by separate employees in violation of separate safety orders. (*Golden State Erectors*, Cal/OSHA App. 85-0026, Decision After Reconsideration (Feb 25, 1987).) The Board has declined to apply the penalty reduction where the substance of each citation is sufficiently distinct from the others. (*Ibid.*) Here, Citations 6 and 7, involving different violations on different dates, are sufficiently factually distinct so as to fall under the latter line of authority, prevailing against vacating the penalty. The substance of each citation is sufficiently distinct from one another. Thus, the penalty for Citation 7 is reinstated as general willful. We do not reconsider the Decision's determination to vacate the serious classification for Citation 7 since it is not raised by the parties.

We further conclude the gravity based penalty for Citation 7 should be calculated at $3,000 under the facts discussed herein, rating severity, extent, and likelihood as high, with no further adjustments being warranted. (Section 336, subdivisions (b) and (d).) That number is then multiplied by 5 to account for the willful violation, resulting in a penalty of $15,000. (Section 336, subdivision (h).)

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: October 4, 2016