

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

In the Matter of the Appeal of:
**TUTOR PERINI CORPORATION
530 BUSH STREET
SAN FRANCISCO, CA 94108**

Employer

Inspection No.
1088791
**DECISION AFTER
RECONSIDERATION**

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

JURISDICTION

Tutor Perini Corporation (Employer) is a construction contractor engaged in excavation work for a public transit project in San Francisco, California. On July 27, 2015, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Geraldine Tolentino (Tolentino), conducted an accident investigation at a place of employment at the Union Market station at the intersection of Stockton and O'Farrell streets in San Francisco (the site). On January 25, 2016, the Division cited Employer for two violations of California Code of Regulations, title 8.¹

Citation 1 contains three items: Item 1 is a Regulatory violation related to lack of a permit, Item 2 is a General alleged IIPP violation, and Item 3 is a General violation related to having a safe means of egress from an excavation. Citation 1 is not at issue; Employer's petition for reconsideration solely concerns Citation 2, which alleges a Serious violation of section 1541, subdivision (j)(2) [Employees shall be protected from excavated materials and equipment].

Employer filed timely appeals of the Citations, contesting the existence and classifications of the alleged violations, and asserting various affirmative defenses.² The matter came before J. Kevin Elmendorf, Administrative Law Judge (ALJ), for the Board, at Oakland, California, on June 19, 2018 and January 10, 2019. On March 15, 2019 the ALJ issued a Decision upholding Citation 1, items 1 and 2, and vacating Citation 1, item 3, and upholding Citation 2.

On April 15, 2019, the Employer filed a petition for reconsideration with the Board. The Board took the petition for reconsideration under submission on May 29, 2019.

¹ Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

² Affirmative defenses that were not supported through specific evidence at hearing are deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did the Division establish by a preponderance of the evidence a violation of section 1541, subdivision (j)(2)?
2. If so, did the ALJ properly analyze the Serious classification of the violation?

FINDINGS OF FACT

1. On July 27, 2016, Cal/OSHA Associate Safety Engineer Tolentino commenced a complaint investigation at a place of employment maintained by Employer at Union Market Station, at the intersection of O'Farrell and Stockton streets, in San Francisco, California.
2. The start date for the subject project was December 12, 2014.
3. Employer's Pre-Task Safety Plan on the day of the inspection did not include cave-ins or the risks of spoils and/or equipment falling into the trench on top of workers.
4. On the day of the inspection, Employer's excavator operator did not keep the excavator more than two feet from the edge of the trench.
5. At the time of the inspection, two workers were working in the excavation, below the level of the excavator.

DISCUSSION

- 1. Did the Division establish by a preponderance of the evidence a violation of section 1541, subdivision (j)(2)?**

Employer's petition for reconsideration concerns Citation 2. The Citation alleges a Serious violation of section 1541, subdivision (j)(2). That section provides as follows:

(j) Protection of employees from loose rock or soil.

[...]

(2) Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The Division's Citation contains the following alleged violative description:

Prior to and during the course of the inspection, including, but not limited to, on July 27, 2015, at a worksite located at the intersection of O'Farrell and Stockton Streets in San Francisco, Employer Tutor Perini Corp., who was responsible for occupational safety and health at the work site, failed to adequately protect its own employee, who was operating an excavator at the edge of the excavation, and an employee of Becho, Inc., who was working inside the excavation, from excavated materials and equipment (the excavator, itself) that could pose a hazard by falling or rolling into the excavation.

Employer's petition for reconsideration makes several arguments attempting to reframe the ALJ's Decision, which upholds the Citation. Employer argues that there was not a spoils pile at the edge of the excavation, but materials were immediately placed into a dump truck, that the excavator was being used properly and as designed and was not in any danger of rolling or falling into the excavation, and that the Division erred by not citing section 1541, subdivision (j)(1), rather than subdivision (j)(2).

The Division has the burden of proving each element of its case by a preponderance of the evidence; this includes proving that the cited safety order applies to the facts of the alleged violation. (*Cambro Manufacturing Co.*, Cal/OSHA App. 84-925, Decision After Reconsideration (Dec. 31, 1986).) The Board agrees that the Division did not establish that there were materials piled up within two feet from the edge of the excavation, causing a possible hazard of falling or rolling into the excavation. The photographs do not show spoils piles at the excavation edge. Nor did Associate Safety Engineer Tolentino directly observe what the excavator did with the dirt after it was loaded into the excavator. She testified that she learned via employee interviews that the dirt was loaded into the back of a truck. The Board is in agreement with Employer as to the issue of a spoils pile, but the analysis does not end there.

The Division's case rests primarily on the placement of equipment (the excavator) at the edge of the excavation, and the possibility of the equipment falling or rolling into the excavation, rather than the issue of the spoils pile. The safety order requires that "Employees shall be protected from excavated *or other materials or equipment that could pose a hazard* by falling or rolling into excavations." (Italics added.) Photographs by the Division's associate safety engineer show the excavator's track hanging partially over the edge of the excavation. The Division has met its burden of proof by showing through photographic evidence, as well as the testimony of its associate safety engineer, that the excavator was less two feet from the edge of the excavation, and no retaining device was in use.

The Board is not persuaded by Employer's suggestion that there is no hazard posed by having the excavator less than two feet from the edge of the excavation. Employer attempted to rebut the Division's prima facie case through testimony from its employees, who argued that the excavator's placement was safe, and its position on the edge of the excavation did not pose a hazard. Tom Blair (Blair), Employer's foreman for the operating engineers, testified that the excavator at issue was sitting on solid, compacted ground, and was designed to be able to work

with a portion of the track hanging over the edge of the excavation, as is shown in the Division's photographs. John Hill, Employer's superintendent, cited the manual in support of this proposition, which suggests that the machine can excavate in a range that includes maneuvering several feet beneath the machine. However, a footnote in the excavator manual notes that "lifting capacities are based on the machine standing on a firm, uniform supporting surface," which would indicate that having the tracks partially off the surface is not proper use. (Ex. C, p. 7.)

Tolentino testified that there were employees within the excavation, as shown in her photographs and videos, and in her view, the soil that the excavator was sitting on appeared to be loose, while part of the excavator's track was unsupported, hanging off the excavation in the air. The safety regulation requires that the equipment remain at least two feet from the edge of the excavation, where there is any possibility of the equipment falling or rolling into the excavation. The ALJ credited Tolentino's testimony and relied on her photographs to find that workers were exposed to the hazard of the equipment falling into the trench. The Board is in agreement with his conclusion.

Employer contends that if the Division was concerned about loose material falling from the face of the excavation (rather than from piles within two feet of the excavation), the Division should have cited section 1541, subdivision (j)(1), rather than (j)(2), as subdivision (j)(1) addresses the hazard of material falling from an excavation face. The Board does not agree. This is consistent with Board Decisions After Reconsideration, which have stated, "Section 1541(j)(2) has a clear purpose of protecting employees from the hazard of materials (such as spoils from trenching) falling into an open excavation where employees are working. This is a separate hazard from failure to properly protect employees from excavation cave-in[.]" (*Agri-Valley Irrigation, Inc.*, Cal/OSHA App. 07-3784, Decision After Reconsideration (Jun. 18, 2014)

The Division has established a violation of the safety regulation.

2. Did the ALJ properly analyze the Serious classification of the violation?

Under Labor Code, section 6432, subdivision (a), to create a rebuttable presumption that a "serious violation" exists in a place of employment, the Division must demonstrate that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

Tolentino testified that there was a realistic possibility of serious physical harm from the actual hazard created by the violation. Her credible testimony establishes that the actual hazard was equipment placed two feet or less from the trench edge sliding or toppling over and falling onto workers below.

The Division having met its initial burden of proving a rebuttable presumption of a Serious violation, the employer has the opportunity to rebut that presumption by showing that it did not, and could not, with the exercise of reasonable diligence, have known of the presence of the violation. (Lab. Code, §6432, subd. (c); *Levy Premium Foodservice Limited Partnership dba Levy Restaurants*, Cal/OSHA App. 12-2714, Denial of Petition for Reconsideration (Aug. 25, 2014).) The Labor Code provides two separate elements that must be met in order to rebut the presumption:

- (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).³
- (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Employers own site-specific Illness and Injury Prevention Program (IIPP) for the SFMTA Central Subway Project includes the rule that “Excavating equipment shall not be operated near tops of cuts, banks, and cliffs if workers are working below.” Superintendent Hill testified that operators judge whether they are too close to an edge based on whether they are starting to list or lean. Such a practice is both at odds with the plain language of the regulation and Employer’s site specific IIPP. Moreover, Employer’s excavation and trenching manual also requires that employees be protected from the risk of material or equipment falling in the trench by keeping the material or equipment two feet from the trench edge. (Ex. D, Part 210, Excavations and Trenching.) A reasonable and responsible employer would, at minimum, be expected to enforce its own rules in like circumstances, rather than having one set of written rules on paper, while allowing an entirely different practice to play out on the jobsite. Employer has failed to rebut the presumption of a serious violation.

³ The 6432, subdivision (b) list includes:

- A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
- (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
- (C) Supervision of employees exposed or potentially exposed to the hazard.
- (D) Procedures for communicating to employees about the employer’s health and safety rules and programs.
- (E) Information that the employer wishes to provide, at any time before Citations are issued, including, any of the following:
 - (i) The employer’s explanation of the circumstances surrounding the alleged violative events.
 - (ii) Why the employer believes a serious violation does not exist.
 - (iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).
 - (iv) Any other information that the employer wishes to provide.

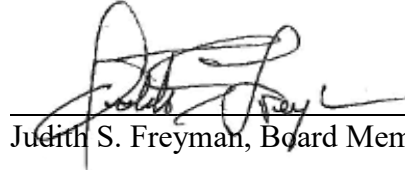
DECISION

The upholds a violation of section 1541, subdivision (j)(2) and its serious classification.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chairman



Judith S. Freyman, Board Member



Marvin Kropke, Board Member

FILED ON: **04/08/2020**



SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Inspection Number: 1088791

In the Matter of the Appeal of: Tutor Perini Corporation

Site address: Stockton and O'Farrell, San Francisco, CA 94105

Citation Issuance Date: 01/25/2016

Citation	Item	Section	Class. Type*	Citation/Item Resolution	Affirm or Vacate	Final Class. Type*	DOSH Proposed Penalty in Citation	FINAL PENALTY ASSESSED
1	1	341(c)(1)(A)	R	Affirmed by ALJ Decision. Not at issue.	A	R	\$1,125.00	\$1,125.00
1	2	1509(a)	G	Affirmed by ALJ Decision. Not at issue.	A	G	\$675.00	\$675.00
1	3	1541(c)(2)	G	Vacated by ALJ Decision. Not at issue.	V		\$675.00	\$0.00
2	1	1541(j)(2)	S	Affirmed by Decision After Reconsideration	A	S	\$8,100.00	\$8,100.00
Sub-Total							\$10,575.00	\$9,900.00
Total Amount Due**								\$9,900.00

*See Abbreviation Key

**You may owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call 415-703-4310 or email accountingcalosha@dir.ca.gov if you have any questions.

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PENALTY PAYMENT INFORMATION

Please make your cashier's check, money order, or company check payable to: **Department of Industrial Relations**
 Write the **Inspection Number** on your payment.

If sending via US Mail:
 CAL-OSHA Penalties
 PO Box 516547
 Los Angeles, CA 90051-0595

If sending via Overnight Delivery:
 US Bank Wholesale Lockbox
 c/o 516547 CAL-OSHA Penalties
 16420 Valley View Ave.
 La Mirada, CA 90638-5821

Credit card payments can also be made on-line at www.dir.ca.gov/dosh/calosha_paymentoption.html

DO NOT send payments to the California Occupational Safety and Health Appeals Board.

*Classification Type (Class.) Abbreviation Key:

Abbreviation	Classification Type	Abbreviation	Classification Type	Abbreviation	Classification Type
FTA	Failure to Abate	RR	Repeat Regulatory	WR	Willful Regulatory
G	General	RS	Repeat Serious	WRG	Willful Repeat General
IM	Information Memorandum	S	Serious	WRR	Willful Repeat Regulatory
NL	Notice in Lieu of Citation	SA	Special Action	WRS	Willful Repeat Serious
R	Regulatory	SO	Special Order	WS	Willful Serious
RG	Repeat General	WG	Willful General		