

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

**SHIMMICK-NICHOLSON CONSTRUCTION,
A JOINT VENTURE**

Employer

Inspection No.
1021893

**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 petition for reconsideration filed by Shimmick-Nicholson Construction, a Joint Venture (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on January 30, 2015, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in San Francisco, California maintained by Employer. On May 1, 2015, the Division issued two citations to Employer alleging three violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The citations include Citation 1, Item 1, alleging a general violation of section 1512, subdivision (d) [failure to inform employees of emergency procedure], Citation 1, Item 2, alleging a general violation of section 1509, subdivision (a) [failure to identify workplace hazard], and Citation 2, Item 1, alleging a serious violation of section 1541, subdivision (a) [failure to remove a surface encumbrance that is located so as to create a hazard].

Employer filed timely appeals of all citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on September 26, 2016. The Decision dismissed Citation 1, Item 1 but affirmed Citation 1, Item 2 and Citation 2, Item 1, imposing a civil penalty of \$9,450.

Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division did not file an answer to the petition.

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

ISSUE

1. Does the Division's citation meet the relevant due process standards?
2. Did the Division demonstrate by a preponderance of the evidence a violation of section 1509, subdivision (a)?
3. Did the Division demonstrate by a preponderance of the evidence a violation of section 1541, subdivision (a)?

FINDINGS OF FACT

1. Shimmick-Nicholson Construction, a joint venture, was properly cited as the relevant employer.
2. On January 12, 2015, Employer's employee, Brandon Jordan (Jordan), was seriously injured when an excavator pulled a static line, catching Jordan's hand between the line and the wall. Jordan's index finger was amputated as a result of the accident.
3. Employer's supervisor, Antone Ivovic (Ivovic), had identified the static line as a hazard at the jobsite, and discussed the static line with employees as part of a pre-shift meeting.
4. The static line did not constitute a "surface encumbrance" as the Division did not establish that the static line was at the level of the surface.
5. The static line was not shown to constitute a hazard to employees working within the trench.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer petitioned for reconsideration on the basis of Labor Code section 6617, subsections (a), (c), and (e).

Did the Division Demonstrate by a Preponderance of the Evidence a Violation of Section 1509, Subdivision (a)?

Section 1509, subdivision (a) states “Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.” The Division’s alleged violative description alleges the following:

Prior to and during the course of inspection including, but not limited to January 30, 2015 the Employer failed to identify the hazard posed by the static line and provide training in its use.

Employer presents two arguments in its petition for reconsideration: 1) the text of section 1509, subdivision (a) references section 3203(a) and this reference imposes more than a single violation in a single citation, leading to the denial of Employer’s due process rights; 2) the presence of the static line was discussed between the three employees at the site; therefore, the Division did not establish the violation. Each of Employer’s arguments will be addressed respectively.²

Employer’s first argument, that the incorporation within section 1509, subdivision (a) to a reference to section 3203 denies it due process, lacks merit. (*Gaehwiler Construction, Co.*, Cal/OSHA App. 78-651 & 652, 769-774, Grant of Petition for Reconsideration and Decision After Reconsideration (Jan. 07, 1985) [due process rights are not violated so long as an employer is informed of the substance of the violation and is able to prepare a defense].) The Board has previously stated,

Due process is not concerned with technical formalities. It is the substance that determines whether a litigant has been deprived of a substantial right. *Campbell v. Board of Dental Examiners* (1971) 17 Cal.App.3d 872, 877 [95 Cal.Rptr. 351]. (*Bendix Forest Products Corp.*, Cal/OSHA App. 79-1532 Decision After Reconsideration (Mar. 5, 1981).)

Where possible, the Board will interpret regulations in a manner that renders the language valid and constitutional. (*Martin J. Solis dba Solis Farm Labor*, Cal/OSHA App. 08-3414, Decision After Reconsideration (Dec. 30, 2013), citing *General Telephone Company of California*, Cal/OSHA App. 82-406, Decision After Reconsideration (Nov. 19, 1982).) Here, the cited regulation sets forth the requirement that section 3203 must be complied with. The citation and notification of penalty documents issued by the Division include a verbatim recitation of

² Employer also contends the Division did not cite the correct entity: “... the three employees who testified were all employees of Shimmick; not the joint venture.” The Division carries the burden of proof in demonstrating that it cited the proper entity. (*Alfredo Annino/Alfredo Annino Construction, Inc. of Nevada*, Cal/OSHA App. 98-311, Decision After Reconsideration (Apr. 25, 2001).) Testimony from the injured employee and Associate Safety Engineer Channing Sheets establishes that the injured employee was an employee of Shimmick-Nicholson Joint Venture, and was injured on a Shimmick-Nicholson Joint Venture worksite. Employer’s own counsel referred to the site as the joint venture. Therefore, the Board denies Employer’s argument.

section 1509, subsection (a), as well as the relevant alleged violated subsections of section 3203. The citation also provides an alleged violative description which provides the factual context for the alleged violation. This information constitutes adequate notice of the allegations. (*HB Parkco Construction, Inc.*, Cal/OSHA App. 07-1731, Decision After Reconsideration (Mar. 26, 2012); *Kenko, Inc.*, Cal/OSHA App. 92-473-474, Decision After Reconsideration (Dec. 06, 1994).) Employer's due process rights were not violated.

Employer also contends that its supervisor on site had discussed the potential hazards of the static line with the employees on site, in conformance with the safety regulation. Employer's supervisor at the time of the accident, Iovic, testified he inspected the site and was aware of the presence of, and had identified the hazards associated with, the static line. Iovic further testified that as part of the pre-work meeting, he discussed the presence of the static line with his employees, including the injured employee, and had also included the static line hazard in the pre-task plan. (See also, Ex. 5B [Division Field Documentation Worksheets].)

The Board credits the unrebutted testimony of Iovic on these points, and finds that Employer did identify the hazard posed by the static line, and provided instruction to employees regarding the static line. (See *HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015); *Trademark Construction, Co. Inc.*, Cal/OSHA App. 12-0096 Decision After Reconsideration (Aug. 29, 2014); *ABM Facility Services, Inc. dba ABM Building Value*, Cal/OSHA App. 12-3496, Decision After Reconsideration (Dec. 24, 2015).) Citation 1, Item 2 is vacated.

Did the Division demonstrate by a preponderance of the evidence a violation of section 1541, subdivision (a)?

Citation 2 alleges a violation of section 1541, subdivision (a), a Construction Safety Order which regulates excavations. The section states:

Surface encumbrances. All surface encumbrances that are located so as to create a hazard to employees shall be removed or supported, as necessary, to safeguard employees.

The citation's alleged violative description reads as follows:

Prior to and during the course of inspection including, but not limited to January 30, 2015 the Employer failed to remove the static line which represented an encumbrance hazard. The Employee's hand was seriously injured when the excavator came in contact with the static line causing it to be pulled against the wall. As a result, the Employee's hand was pinched between the static line and the wall.

Injured employee Brandon Jordan (Jordan) was working on a waler³ at the time of the accident, and was injured when his hand was caught between a static line and a wall. The safety order requires a showing that: (1) a surface encumbrance existed, (2) that surface encumbrance created

³ A waler is defined as "A horizontal brace to hold timbers in place against the sides of an excavation; timbers used in form construction to which the ties are fastened, or against which the end braces are butted; timbers used for holding forms in line." (*Construction Dictionary*, 8th Edition (1991) p. 585.)

a hazard to employees, and (3) that the employer failed to either remove or support the encumbrance if required for the protection of employees.

Employer asserts that the static line cannot properly be deemed a surface encumbrance located to create a hazard, as contemplated by section 1541, subdivision (a). The term “encumbrance” in the regulation is not defined; where a term is undefined by the regulations, the Board will presume the “plain and commonsense” meaning of the word should be applied. (*De Vries v. Regents of University of California* (2016) 6 Cal.App.5th 574, 590-591.)⁴ “In divining a term's “ordinary meaning,” courts regularly turn to general and legal dictionaries.” (*De Vries v. Regents of University of California* (2016) 6 Cal.App.5th 574, 591.) The American Heritage Dictionary defines “encumber” as: “1. To weigh down unduly; lay too much upon. 2. To hinder, impede, or clutter, as with useless articles or unwanted additions.” Encumbrance is defined as: “One that encumbers; a burden, impediment, or obstacle.” (*American Heritage Dictionary* (1980) p. 430-431.) The Board considers these definitions in its interpretation of the regulation, while also taking into account regulation as a whole, and with the intention of giving appropriate significance to all words and phrases therein. (*Northrop Corporation*, Cal/OSHA App. 84-874, Decision After Reconsideration (Oct. 30, 1987), citing *Moyer vs. Workmens Comp. Appeals Board* (1973) 84 Cal.App.3d 1612, 1616.) This definition, read in context of the safety order as a whole, supports the conclusion that the ordinary meaning of the term “surface encumbrance” connotes an impediment of some kind.

Employer points out that the static line was not at the surface of the excavation, and therefore cannot be called a surface encumbrance, if in fact it was an encumbrance at all. “The Division has the burden of proving each element of its case, including the applicability of the safety order cited, by a preponderance of the evidence.” (*Teichert Aggregates*, Cal/OSHA App. 04-2982 Decision After Reconsideration (Jan. 21, 2011).) Photographs in the record, as well as testimony from Ivovic, cut against the Division’s argument that the static line was a surface encumbrance. Rather, the static line is located at a midway point within the trench, and not at the excavation’s top, or the street-level surface above the large excavation where employees were at work. Nor was the static line on the bottom surface of the trench. (See, Exhibit 8.) On this basis alone, the citation fails.

Moreover, the Division has not met its burden to demonstrate that the static line constituted a hazard to workers in the trench, requiring support or removal. The Division has failed to describe how the location of the static line created a hazard for workers located in the trench, or why it required removal or support to ensure the safety of employees. In *Oltmans Construction Company*, Cal/OSHA App. 84-715, Decision After Reconsideration (Jan. 17, 1986), the Board considered whether power poles in the vicinity of an excavation constituted a surface encumbrance hazard under section 1541. In that Decision After Reconsideration, the Board found that the Division had shown that the poles “were located so as to create a hazard to an employee in the vicinity of the excavation because of their proximity to the bank and their being in disturbed ground.” The Division has not provided similar evidence in this instance upon which the Board could conclude that a hazard existed to employees working in or near the excavation.

⁴ The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of administrative regulations. (*Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d, 1510, 1517.)

This conclusion is also supported by a review of federal OSHA cases. The federal OSHA regulations contain a similar excavation-related regulation requiring the removal of surface encumbrances that pose a hazard to employees.⁵ (29 C.F.R. section 1926.651, subdivision (b).) In *Freund & Company*, OSHRC Docket No. 89-0640 (Mar. 14, 1990), the Secretary of Labor (Secretary) cited an employer for failing to remove an electrical box situated near an excavation. Based upon the on testimony and photos presented by the parties, the Commission ALJ vacated the citation, finding that the Secretary had failed to present evidence regarding the potential dislodgment of the surface encumbrance. Here, the Division has similarly failed to demonstrate that the static line is a “surface encumbrance[] that [is] located so as to create a hazard to employees”. (Section 1541, subdivision (b).) While an employee was seriously injured when his hand was caught between the static line and the wall, the Division has not demonstrated the applicability of the cited safety order to the accident and injury. (*Dish Network California Service Corporation*, Cal/OSHA App. 12-0455, Decision After Reconsideration (Aug. 28, 2014).)

Citation 2 is vacated.

CONCLUSION

The Division has failed to establish a violation of the safety order by a preponderance of the evidence in Citation 2, Item 1 and Citation 2. The Board vacates the citations and associated penalties.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Art R. Carter, Chairman



Ed Lowry, Board Member



Judith S. Freyman, Board Member

FILED ON: 07/24/2017



⁵ While not bound by the decisions of the Federal OSHA Commission, the Board occasionally turns to those decisions for guidance in the interpretation of the Cal/OSH Act. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).)