

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

In the Matter of the Appeal of:

GHILOTTI BROS. CONSTRUCTION, INC.
525 Jacoby Street
San Rafael, CA 94901

Employer

Docket Nos. 04-R1D5-2321
and 2322

**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 Ghilotti Bros. Contractors (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

On May 19, 2004, a representative of the Division of Occupational Safety and Health (Division) conducted an investigation at a place of employment maintained by Employer at McGinnis Skateboard Park, San Rafael, California.

On that same day, the Division issued two citations to Employer, each of which alleged a single violation. Citation 1 alleged a regulatory violation of Title 8, Cal. Code Regs. Section 341.1(f)(3)¹ [annual permit holders must notify Division before beginning excavation project]² Citation 2 alleged a Serious violation of 1541.1(a)(1) [failure to shore, slope, or bench the vertical sides of an excavation to prevent cave-in]. Employer filed a timely appeal contesting the existence and proposed penalty for both violations, and also contesting the classification of Citation 2. The matter came on regularly for hearing on August 22, 2006, before an Administrative Law Judge (ALJ) for the Board and was submitted that day.

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

² This section was repealed 9-29-2006, but the requirement for an annual permit holder to notify the Division before commencing work was retained in section 341(c)(2)(B) and (d)(5)(A).

The ALJ rendered a decision on September 27, 2006, denying Employer's appeals. As to Citation 1, the ALJ so ruled because he concluded that the excavation did not fall under any exemption to the permitting requirement of section 341.1(f)(3), and the evidence established that no notice was given by Employer as required by the permit safety order. Further, the ALJ concluded the (inapplicable) permit exemption did not relieve the employer from its obligation to comply with section 1541.1(a)(1), as Employer had argued. The Decision also upheld the existence and classification of the violation in Citation 2 based on the opinion of the Division witness that, despite the likelihood of an accident being low due to the stable nature of the soil, if an accident occurred the resulting injury would likely be a crushing or suffocation injury, which would be serious as that term is defined in Labor Code section 6432.

The Employer timely filed a petition for reconsideration.³ The Division filed an Answer on December 6, 2006. The Board took the matter under submission on December 13, 2006.

EVIDENCE

During its inspection of Employer's worksite, the Division inspector observed an excavation ten feet deep, with a curved bottom that sloped up to vertical sides. It was referred to as the Ameba Pool, and was like a swimming pool except that it was not intended to hold water, but rather to be used for skateboard stunts at the McGinnis Skateboard Park in San Rafael. The Division's witness described the material in which the excavation was made thusly: "It is soil over rock. The bottom is in rock. You can see from excavator tooth marks there [referencing exhibit A, a photograph] that this is not soft soil. It is cemented adobe, and towards the bottom in effect you can see it more in the front, [it is a] very definite fractured brown shale material." The Division witness further testified, "I rated the likelihood as low in the penalty calculations because you have a good solid material here." He concluded, "I would consider it a good hard compact material."

The Employer concurred with the testimony offered by the Division regarding the solid nature of the material. "On this project, we encountered boulders, shaley rocky material that required hoe rams, and used the excavation bucket extensively to be able to notch the material down because it was so substantial to the degree it left teeth marks in the sides of the excavation walls of the dirt, of the material there."

In sum, the material was so solid that the back hoes required to loosen the material left tooth marks in the vertical walls of the excavation. The photographs submitted in to evidence reveal that teeth mark indentations

³ The employer also filed an amended petition for reconsideration on November 1, 2006, prior to the Board taking action on its original filing.

remained intact on all sides of the excavation. No other evidence was offered by either party regarding the soil type. The depth at the deepest part of the excavation was 10 feet. Employer's employee entered the excavation earlier that day.

It was undisputed that the construction of the excavation, and many steps up to completion, are similar to that entailed in pool construction. No permit was obtained, and no shoring, sloping or benching methods listed in the safety order were implemented.

ISSUE

1. Was a violation of section 1541.1(a) established by a preponderance of the evidence?
2. Does the permitting exception for swimming pools in section 341 apply to this excavation?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. Section 1541.1

Section 1541.1(a)(1) is found in the Construction Industry Safety Orders, Article 6, which is entitled "Excavations." Section 1541.1(a) states:

(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

(B) Excavations are less than 5 feet in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The Safety Order requires implementation of "adequate protective system[s]" in accordance with subsections (b) and (c) of section 1541.1, which in turn require compliance with Appendices A [soil classification], B [sloping and benching], C [timber shoring for trenches] or D [aluminum hydraulic shoring for trenches]. Section 1541.1(b) establishes the requirements for protective systems consisting of sloping or benching the excavations, and specifically refers to Appendices A and B. Section 1541.1(c) establishes requirements for

shoring, support, and other protective systems which may be designed using Appendices A, C and D. These are summarized in more detail below.

The Appendices require a wide variety of protective systems. Protective systems that are “adequate” depend on the soil type and environmental conditions of the excavation. (*Novo-Rados Enterprises*, Cal/OSHA App. 75-1170, Decision After Reconsideration (May 29, 1981).)

Where, as here, a safety order established alternative means of compliance, the Board has held the Division must show which option the employer selected and that it did not comply with it or any of the alternatives in the safety order. . . . ¶In *Delta Excavating, Inc.*, Cal/OSHA App. 94-2389, Decision After Reconsideration (Aug. 10, 1999), the Board held that the cited safety order gave employers four options by which to comply with the mandate to protect excavations against cave-ins. The safety order language was written in the disjunctive, as here. The Board held that the Division had the burden to prove which option the cited employer chose and that it did not comply with any of the four listed options. Therefore, it was insufficient to merely show that the employer did not comply with just one of those options.

(*E.L. Yeager Construction Co.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).) Sub-section 1541.1(b) has four parts (labeled (1) through (4), and each has sub-parts) addressing different sloping or benching excavation situations and “adequate protective systems” for each. Specifically, part (1) “Allowable configurations and slopes” has two parts. Part (A) states allowable sloping for any excavation is one and one half horizontal to one vertical (34 degrees) unless allowable options, listed in parts (2) – (4) that refer to Appendices A and B, are used. Part (B) of subpart (1) states allowable sloping according to part (1)(A) is required for type C soil, and must be done in compliance with the sloping specifications in Appendix B.

Section 1541.1(c)(1) requires use of support systems in accordance with Appendices A, C and D, unless allowable options (section 1451.1(c)(2) –(4)) are used.⁴

Appendix A applies to both sloping / benching systems and support systems to determine their “adequacy” as required under 1541.1(a). Appendix A “describes a method of classifying soil and rock deposits based on site and environmental conditions, and on the structure and composition for the earth

⁴ As no support system was in place here, the details of this section are not implicated. Suffice it to say, it has similar structure to 1541.1(b), providing for generally acceptable support systems under given circumstances, including references to Appendices A and B, and additional details for alternative methods of compliance in Appendix D.

deposits.” (Appendix A to section 1451.1.) Appendix B applies when sloping or benching is used to protect employees working in excavations from cave-ins.

Scope and Application. This appendix contains specifications for sloping and benching when used as methods of protecting employees working in excavations from cave-ins. The requirements of this appendix apply when the design of sloping and benching protective systems is to be performed in accordance with the requirements set forth in 1541.1(b).

[¶] Definitions

[¶] (c) Requirements.

[¶] (1) Soil classification. Soil and rock deposits shall be classified in accordance with Appendix A to 1541.1. [¶] (2) Maximum allowable slope. The maximum allowable slope for a soil or rock deposit shall be determined from Table B-1 of this appendix.

[¶] (3) Actual slope.

[¶] (A) The actual slope shall not be more than the maximum allowable slope.

[¶] (B) The actual slope shall be less than the maximum allowable slope, when there are signs of distress. If that situation occurs, the slope shall be cut back to an actual slope which is at least ½ horizontal to one vertical (1/2H:1V) less steep than the maximum allowable slope.

(Appendix B to section 1541.1.) Table B-1 “Maximum Allowable Slopes” states, among other things, that when the soil type is stable rock, the maximum allowable slope is “vertical (90°)” for excavations up to 20 feet in depth. “Stable rock” is defined in Appendix A as “[n]atural solid mineral matter that can be excavated with vertical sides and remain intact while exposed.” “Intact” is defined in Webster’s New World Dictionary, Third Ed., as “with nothing missing or injured; kept or left whole; sound; entire; unimpaired.”

Also, Appendix B defines “distress.”

Distress means that the soil is in a condition where a cave-in is imminent or is likely to occur. Distress is evidenced by such phenomena as the development of fissures in the face of or adjacent to an open excavation; the subsidence of the edge of an excavation; the slumping of material from the face or the bulging or heaving of material from the bottom of an excavation; the spalling of material from the face of an excavation; and raveling, i.e., small amounts of material such as pebbles or little clumps of material suddenly separating from the face of an excavation and trickling or rolling down into the excavation.

Read together, section 1541.1(a), section 1541.1(b), Appendix A, Appendix B, and Table B-1 consider vertical walls adequate protection from cave-ins for excavations of less than 20 feet in depth made entirely in stable rock, but if such walls demonstrate signs of distress, then the allowable slope would be less than vertical (90°).

In sum, section 1541.1(a) defines adequate protective systems, and requires employees be protected. To establish a violation, the excavation must be out of compliance with subsections (b) and (c), including the specifications contained in the Appendices which are specifically included in section 1541.1. For un-shored excavations, if the evidence establishes Employer deviated from the requirements of section 1541.1(b) and Appendices A and B, it establishes a violation of section 1541.1(a). (*EOS Construction*, Cal/OSHA App. 94-1122, Decision After Reconsideration (Mar. 4, 1997).) These facts comprise the Division's prima facie case of a violation of section 1541.1(a). (*Howard J. White*, Cal/OSHA App. 78-741, Decision After reconsideration (Jun.16, 1983) [division bears the burden of proof to establish the elements of a violation]; *English v. City of Long Beach* (1950) 35 Cal.2d 155).

Here, the evidence of the type of soil in which the excavation was made shows the material appeared to be cemented adobe. The photographs of the excavation reveal that the teeth marks from the equipment used to make the excavation remained etched in the vertical sides of the excavation wall up to the top of the excavation. The Division witness stated the sides of the excavation, as well as the bottom, were of "good solid material." It was also described as "cemented adobe" soil. There was no testimony that any portions of the vertical walls of the excavation were not intact. There was no other evidence of the soil type to controvert the visual inspection information provided by both the Division witness and Employer. Neither witness related any effort to actually test the soil type. There was no testimony indicating the sides of the vertical cuts sloughed or crumbled, showed signs of distress, as defined in Appendix B, or came apart in any manner. Thus, the record established that no protective system was in place, and that the excavation was 10 feet deep, and that the excavation was made entirely in stable rock.

The record fails to establish the inadequacy of this condition. Both the Appendices to section 1541.1(a), and the exception listed in section 1541.1(a)(1)(A), allow excavations made entirely in stable rock, that are less than 20 feet deep, to have un-shored vertical walls. In order to conclude this excavation was not appropriately constructed of vertical walls, the record must contain some evidence of the soil type, either through testing, visual indications of distress, or, as is frequently the case, testimonial descriptions of potential or actual movement of material. We upheld a violation of section 1541.1(a) based on testimony by witnesses who observed the soil conditions and described them as in poor condition with water collecting at the bottom of

the trench. (*C. Overaa & Co.*, Cal/OSHA App. 01-3560, Decision After Reconsideration (Apr. 1, 2004).) This was sufficient to show un-shored, vertical walls were not adequate protection even though evidence of soil type was not in the record. Since no other shoring or benching method had been implemented, the violation was properly upheld. (*Id.*)

Here, the only reasonable conclusion to draw from the consistent testimony of both the Employer and the Division witness is that this excavation was entirely in stable rock. Rather than being “in poor condition,” the walls were described as made of “good solid material” and “cemented adobe” over “fractured brown shale (a type of rock).” While the safety order requires soil testing in order to determine the appropriate method to protect workers entering an excavation, neither the Employer nor the Division produced evidence of the results of such soil testing. Without any evidence, either from soil testing or a description by a percipient witness, from which to infer the walls of the excavation did not remain intact on the vertical, we must conclude they were, more likely than not, entirely in stable rock. As such, the violation has not been established, and Employers Appeal of Citation 2 must be granted.

2. Section 341.1

The ALJ properly analyzed the permitting exemptions for swimming pools as not applying to any excavations other than for swimming pools, and we affirm the decision as to the violation alleged in Citation 1.

The Citation alleged a violation of section 341.1(f)(3), permit requirements for excavations. The Employer asserted at hearing, and in its petition for reconsideration, that the exception to the permitting requirement for swimming pools, found in section 341(b)(6)⁵ applied because the process of excavating and building the skate park stunt facility was nearly identical to the process for excavating and building swimming pools. The exception states: “Exceptions to permit Requirements. The provisions of section 341 (annual permit and notice to Division required prior to undertaking excavations of 5 feet or deeper into which an employee is required to descend) shall not apply to the following: . . . Construction of swimming pools.”

The Decision reasons that the exception applies only to the construction of swimming pools, not to the construction of swimming pools and like excavations. We agree that if the regulation were intended to include other similar activities it would have said so. Absent ambiguity in a statute, there is no cause to look outside the language of the enactment to determine its meaning. (*Spaich Brothers, Inc. dba California Prune Packing Co.*, Cal/OSHA App. 01-1630, Decision After Reconsideration (Feb. 25, 2005), citing, *Central*

⁵ This exception now appears in 341(e)(6), but still allows for an exception to the permitting requirement for “Excavation for the construction of swimming pools.”

Coast Pipeline Construction Co. Inc., Cal/OSHA App. 76-1342, Decision After Reconsideration (Jul. 16, 1980); *Bryant Rubber Corp.*, Cal/OSHA App. 01-1358, Decision After Reconsideration (Aug. 21, 2003).) “It is one thing to interpret regulatory language; it is another thing entirely to read into a regulation a requirement not in the text. (*Id.* [referencing *E.L. Yeager, infra*]) Likewise, *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, does not authorize us to read into a [regulation] provisions that the [enacting agency] chose to omit.” (*State Roofing Systems Inc.*, Cal/OSHA App. 08-276 Denial of Petition for Reconsideration (Apr. 28, 2010) (bracketed words added).) The Board may not read terms in to or out of the Safety Order. (*E.L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261 Decision After Reconsideration (Nov. 2, 2007).)

Thus, we cannot extend the exception to the permit notice requirements allowed for swimming pools to non-swimming pool structures substantially similar to swimming pools. The Employer’s appeal of Citation 1 is denied, and the penalty proposed is found to be reasonable. (*System 99, A Corporation*, Cal/OSHA App. 78-1259, Decision After Reconsideration (Aug. 30, 1982).

DECISION AFTER RECONSIDERATION

The ALJ’s decision regarding the section 341.1 violation is affirmed and is reinstated, and the decision regarding the section 1541.1 violation is vacated, and the Employer’s Appeal is granted.

ART R. CARTER, Chairman
CANDICE A. TRAEGER, Board Member
ED LOWRY, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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