

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

In the Matter of the Appeal of:

DSS COMPANY dba KNIFE RIVER
CONSTRUCTION
P.O. Box 6099
Stockton, CA 95206

Employer

Docket No. 12-R5D1-0337

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by DSS Company dba Knife River Construction (Employer).

JURISDICTION

Commencing on January 6, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On January 18, 2012 the Division issued a citation to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed evidentiary hearing.

On April 5, 2012, the ALJ issued a Decision which granted Employer's appeal as to two of the alleged violations, and which sustained one of them.

Employer timely filed a petition for reconsideration regarding the one violation sustained by the ALJ.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

The Division filed an answer to the petition.

ISSUE

Was the Decision correct in finding Employer committed a General violation of section 1541.1(a)(1)?

**REASON FOR DENIAL
OF
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's petition argues that the ALJ acted in excess of her powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on substantial evidence in the record as a whole and appropriate under the circumstances.

Section 1541.1(a)(1) requires that employees working in trenches five feet or more deep must be protected from the hazard of the trenches caving in unless the soil in which the excavation is made is of a type not present here. Protection may be accomplished by various means such as shoring the trench walls or by sloping or benching (tiering) the walls of the trench in specified ways. It was not disputed that such protections were not used in this case.

Employer was installing a water pipeline in a trench which was five feet or an inch or two deeper in places. After excavating the trench, Employer dumped sand into it. The sand was then manually spread in the bottom of the trench into a layer four to six inches deep to serve as bedding material on which the water pipeline would rest. The sand decreased the depth of the trench to less than five feet in the portions where it had been spread.

The Division's inspector observed an employee of Employer working in the trench. The employee was using a shovel to spread the sand in the trench bottom. The testimony about where in the trench the employee was standing was conflicting. The inspector maintained that the employee was observed standing in a part of the trench he measured to be five feet two inches deep. The employee testified that he was standing in a different portion of the trench on a layer of the sand bedding material where the depth was less than five feet. The ALJ found the employee's testimony to be more credible, and the record does not contain evidence sufficient to overturn that finding. (*Garza v. Workmen's Compensation Appeals Bd.* (1970) 3 Cal. 3d 312 [ALJ credibility findings granted deference in absence of substantial contrary evidence].)

The ALJ held that Employer nonetheless had violated section 1541.1(a)(1) because the employee was working in close proximity to a portion of the trench which was five feet or more deep. The inferences available from the evidence support that holding. First, section 1541.1(a)(1) applies when a trench is five feet deep or deeper. Second, the employee in the trench, although standing on a layer of sand which decreased the trench's depth to less than five feet where he stood, was within a shovel's length's distance from a deeper part of the trench. If that unshored portion of the trench were to collapse, the employee would be exposed to the dangers presented by that hazard, which the safety order is intended to protect against. (*Benicia Foundry and Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) Further, although we have held that a trench which has been partially filled so that its depth is less than five feet is not subject to section 1541.1(a)(1), in that case the entire trench had been so filled, a situation distinct from the current one, where the employee was working in the portion of the trench where the depth increased to five feet or more as the bedding material was not spread there yet. (See *Ranger Pipeline, Inc., Bay Pipeline Inc.*, Cal/OSHA App. 97-1031, Decision After Reconsideration (Feb. 28, 2001) [trench bottom covered with gravel such that depth less than five feet not covered by section 1541.1].)

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JUNE 25, 2013