BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: DICK MILLER, INC. 930 Boardwalk, Suite H San Marcos, CA 92078 Employer	Docket. 13-R3D2-0578 **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 Dick Miller, Inc. (Employer).

JURISDICTION

Commencing on October 30, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On December 13, 2012, the Division issued a citation to Employer alleging a violation of occupational safety and health standards codified in California Code of Regulations, Title 8, section 1541.1(a)(1).[1]

Employer timely appealed.

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

On December 12, 2013, the ALJ issued a Decision (Decision) sustaining the alleged violation and imposing a civil penalty.

Employer timely filed a petition for reconsideration.

The Division did answer the petition.

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

ISSUE

Was Employer proven to have committed the alleged violation?

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 the Decision was issued in excess of the ALJ's authority, the evidence does not justify the findings of fact, and the findings of fact do no 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 a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer's employees were conducting trenching operations in San Diego, California. Employer's foreman, Campos, at the worksite was observed in the trench at issue by the Division's inspector. The inspector measured the depth of the trench to be about nine feet deep at the approximate location where he observed the foreman in the trench. The trench vertical sides was not shored or provided with any other form of cave-in protection.

The trench was part of a larger project to improve storm water drainage in the area where the work was located. Employer provided the Division with a copy of a geotechnical report covering the location of the trench and the rest of the project area. That report stated that the uppermost two to four feet of soils in the project area, including the location of the trench, consisted of fill material overlying harder subsurface soils.

Employer's foreman, Campos, was called as a witness by the Division. During his testimony he stated that the first two feet of soil in which the trench was excavated were fill material. He testified that in his opinion the remainder of the soil was what he variously called hard pan and solid rock.

Section 1541.1(a)(1) states:

(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.

Section 1514.1(a)(1) in plain language requires trenches of five feet or greater depth to have cave-in protection unless the excavation is "*entirely* in stable rock[.]" (Emphasis added.) The uncontroverted evidence is that the excavation in question was not entirely in stable rock. The violation was established.

Employer's petition raises several challenges to the Decision, which we address in turn below.

1. "Was the evidence inadequate to find that the trench was not carved out of stable rock?"

Employer's petition contends, "The evidence of the type of soil in which the excavation was made shows the material appeared to be in stable rock." We construe "material appeared to be in stable rock" to be intended to say "the excavation appeared to be made in stable rock."

We find three flaws with this contention. First, as noted, the evidence supports the finding that the trench was not excavated entirely in stable rock. The Division's inspector testified regarding his observation of the trench, and he took photographs of the trench showing its walls. The geophysical report given to the Division by Employer states that the soils in the area, including a sample taken at or near the location of the trench, consisted of two to four feet of fill material, under which was a stratum of harder soil. And the testimony of Employer's job foreman, even if it were the only evidence of the soils encountered in the excavation, would be dispositive. His testimony definitively shows that the excavation was not entirely in stable rock, and resolves the question against Employer.

Second, as the Decision correctly pointed out, the exception in section 1541.1(a)(1)(A) applies only when the excavation is made entirely in stable rock. Given that the top two feet or more of it were in fill material, that condition was not met and the exception does not apply.

Third, Employer argues that it was the Division's burden to show that the exception did not apply. That is incorrect. Board precedent holds that an employer claiming an exception from a safety order has the burden of showing it applies and is satisfied. (*Tutor-Saliba-Perini*, Cal/OSHA App. 97-2799, Decision After Reconsideration (Mar. 2, 2001).)

Also, Employer argues that the Board decision in *Ghilotti Bros. Construction, Inc.*, Cal/OSHA App. 04-2321, Decision After Reconsideration (July 26, 2011) applies. In *Ghilotti, supra*, the Board found that the excavation was made entirely in stable rock and granted that employer's appeal. Thus, *Ghilotti, supra*, is distinguished on its facts from the excavation at issue, which was not made entirely in stable rock.

2. "Were there evidentiary shortcomings at the hearing which tainted the Decision?"

Employer contends that the geophysical report was hearsay and the photographs taken by the inspector were admitted without adequate foundation. Employer's argument fails for three reasons. First, as noted above, Employer's foreman's testimony that the excavation was not made entirely in solid rock is dispositive. Second, there were no objections to the introduction of the photographs into evidence made at hearing, so their admission was proper and any potential objection was waived. (Evid. Code § 353; *Morehouse v. Taubman Company, Inc.,* (1970) 5 Cal.App.3d 548; 3 Witkin California Evidence, Presentation at Trial § 371; *Rossi Construction Co.*, Cal/OSHA App. 84-486, Decision After Reconsideration (Feb. 7, 1986).) Third, even if it be hearsay, the report was given to the Division by Employer, and is thus an adoptive admission, and further hearsay may be used to corroborate other evidence. (Board regulation § 376.2.)

3. "Does the absence of adequate evidence of employer knowledge preclude a finding of a serious violation?"

The Board has consistently held that the knowledge of a foreman is attributable to the employer. (*Duke Pacific, Inc.*, Cal/OSHA App. 08-574, Decision After Reconsideration (Aug. 30, 2012).) The foreman knew the trench was over five feet deep; that it was by his own admission not entirely in stable rock, knew it was not shored, and entered it anyway. His action was a violation of section 1541.1(a)(1), and is attributed to Employer. (*XL Plastering, Inc.*, Cal/OSHA App. 11-2236, Denial of Petition for Reconsideration (Aug. 8, 2013).)

4. "Does the independent employee action defense apply to preclude the decision?"

The "independent employee action defense" (IEAD) is a Board established affirmative defense. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) *Mercury Service, supra*, stands for the proposition that an employer may not be held to have committed an alleged violation if it can prove all five elements of the defense. The Board has also consistently held that the IEAD is not applicable to a violation caused by an employer's foreman or supervisor. (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013) citing *Davey Tree Surgery Co. v. Occupational Safety and Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1239.)

5. "Does the logical time defense apply to preclude the decision?"

The "logical time defense" is an affirmative defense which provides that the requirements of a safety order will not begin to apply until the necessary and logical time for an employer to address the violation and/or hazard arrives. (*JSA Engineering, Inc.*, Cal/OSHA App. 00-1376, Decision After Reconsideration (Dec. 3, 2002).) Employer argues that because the scope of work did not contemplate entry into the trench the logical time for shoring had not arisen. The logical time for shoring, however, arose when the trench in question reached a depth of five feet or more and the foreman decided to enter it, because entering into the trench would expose him to the hazard of a cave-in. Since the trench was not entirely in stable rock and was unshored, shoring had to be installed before any employee entered it. When the foreman decided to go in the trench, even though the decision was made at the moment to address an unforeseen problem in the trench, the obligation to install shoring arose at that time, and had to be fulfilled before the foreman entered the trench. That he spent only a few minutes in the trench is not relevant. The purpose of the safety order is to protect employees from trench collapse, and the evidence showed that a cave-in can happen at any time and without warning.

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
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