BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: SHIMMICK CONSTRUCTION CO., INC./OBAYASHI CORPORATION JV 8201 Edgewater Drive Oakland, CA 94612 Employer	Docket No(s). 12-R3D1-0781 **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 Shimmick Construction Co., Inc./Obayashi Corporation JV (Employer).

JURISDICTION

Commencing on August 29, 2011 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On February 28, 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 contested evidentiary hearing.

On May 28, 2015, the ALJ issued a Decision (Decision) which upheld the citation and imposed civil penalties.

Employer timely filed a petition for reconsideration.

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

The Division answered the petition.

ISSUES

Was the citation issued within the time permitted by Labor Code section 6317?

Does the record support a finding that the alleged violation occurred?

Was the "willful/serious" classification of the violation correct?

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 contends the ALJ issued the Decision in excess of her authority, 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 and the Division's answer to it. We have taken no new evidence. 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.

Background

Employer was engaged in a construction project for the Metropolitan Water District in Yorba Linda, California. The project involved excavation of a large trench, called the "144 shoring pit," to a depth of greater than 20 feet, to install a large pipe.

Excavations of five feet or more are required to have a system to protect employees in the excavation from cave-ins. (§ 1541.1, subdivision (a).) The safety order provides that employers may use one of several options to satisfy its requirements. (See § 1541.1, subdivisions (b) and (c).) Employer opted to comply with section 1541.1, subdivision (c)(4), "design by a registered professional engineer" (RPE). The 144 shoring pit was apparently initially constructed in accordance with that requirement. On August 26, 2011, however, a problem arose – the pipe Employer was planning to place in the trench would not fit. On August 27, 2011 Employer modified the trench and its shoring system to allow the pipe to be placed in the excavation without first getting the modifications approved by the RPE. Employer informed the RPE of those changes on the morning of August 29, 2011 and asked him to evaluate the modifications. The RPE said he needed time to do necessary calculations, and around noon that day by telephone informed Employer and a representative of the Water District that the changes were acceptable. The RPE did not issue a written report approving the modifications until September 11, 2011.

The Division, having been informed of the modifications on August 29, 2011, investigated the project site that morning. The Division inspector issued an "order prohibiting use" (OPU) regarding the 144 shoring pit that day because of the modifications. On August 31, 2011 the OPU was removed by the inspector after further modifications to the shoring system which brought it into compliance. It is not disputed that Employer's employees entered the trench after the August 27th modifications and before the OPU was removed on August 31, 2011.

Discussion

1. Statute of Limitations

Employer contends the citation was issued beyond the six-month period provided in Labor Code section 6317, "No citation or notice shall be issued by the division for a given violation or violations after six months have elapsed since the occurrence of the violation." We disagree. The alleged violation was committed on August 27, 2011 when the excavation's protective system was altered by Employer, and continued

until at least August 31, 2011, when the inspector removed the OPU and allowed work in the excavation to resume.[2]

Based on the reasoning of the federal Occupational Safety and Health Review Commission in the *Central of Georgia Railroad* case, OSHRC Docket No. 11742 (1977), line of cases, the Board has held that the "six-month time limit on issuing a citation does not begin to run until . . . the violation ceases." (*Los Angeles County, Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002 [p. 27].) Here the earliest date the violation ceased was August 31, 2011. Therefore, issuing the citation on February 28, 2012 was within six months of the violation's occurring.

2. Existence of the Violation.

The Division alleged Employer violated section 1541.1, subdivision (c)(4), which states:

> (c) Design of support systems, shield systems, and other protective systems. Designs of support systems, shield systems, and other protective systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of Section 1541.1(c)(1); or, in the alternative, Section 1541.1(c)(2); or, in the alternative, Section 1541.1(c)(3); or, in the alternative, Section 1541.1(c)(4) as follows:
>
> [¶s]
>
> (4) Option (4) –Design by a registered professional engineer.
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> (A) Support systems, shield systems, and other protective systems not utilizing Option1, Option 2, or Option 3, above, shall be approved by a registered profession engineer.
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> (B) Designs shall be in written form and shall include the following:
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> 1. A plan indicating the sizes, types, and configurations of the materials to be used in the protective system; and
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> 2. The identity of the registered professional engineer approving the design.
>
> (C) At least one copy of the design shall be maintained at the jobsite during construction of the protective system. After that time, the design may be stored off the jobsite, but a copy of the design shall be made available to the Division upon request.

[2] This is the earliest date when compliance was achieved. Since the RPE did not approve Employer's modifications in writing until September 11, 2011, that day may be viewed as the day the excavation complied with section 1541.1, subdivision (c)(4)'s requirement that the design be in writing and identify the RPE who approved it. For present purposes we will assume, without deciding, that Employer came into compliance on August 31, 2011.

It is not disputed that on Saturday, August 27, 2011, Employer modified the protective system of the 144 shoring pit without consulting the RPE, and did not consult him until Monday, August 29th. It is also not disputed that the RPE did not approve the modifications in writing until September 11, 2011, although he did verbally approve them on August 31, 2011.[3] Thus, the modified design was not approved until August 31st at the earliest, and Employer was out of compliance with section 1541.1, subdivision (c)(4) until then. Also, it is not disputed that Employer's employees were working in the excavation before the OPU was issued, and thus were exposed to the violative condition. In short, the Decision correctly analyzed the elements of a violation and the operative facts, and properly concluded a violation was established. (Decision, p. 5.)

3. Classification of the Violation.

The Division classified the citation as "willful serious." Each of those terms must be examined in light of the facts here and their legal definitions.

A. The Serious Classification.

Labor Code section 6432 sets forth the elements of a "serious" violation. Section 6432, subdivision (a) provides, in part, that a violation is serious if "there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." Subdivision (a) goes on to state that "The actual hazard may consist of, among other things, . . . (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use."

The ALJ found that the Division established that there was a realistic possibility of death or serious physical harm had the excavation caved in after Employer modified it on August 27, 2011. (Decision, pp. 6, 7.) We agree.

It was also established that Employer's employees were in the excavation after its modification, showing that there was exposure to the hazard.

[3] Since August 31st was the day the Division removed the OPU and allowed work to continue, it may be inferred that the inspector was satisfied with the RPE's verbal approval or his own evaluation of the modifications.

Employer argues that it acted with due diligence in making the design modifications, believed them to be appropriate, and further that they were ultimately vindicated in that belief when the RPE first verbally and later in writing approved them.

The flaw in Employer's argument is that the hazard in this matter consisted not only of the risks that modification was faulty and the excavation might cave in, but also that Employer's decision to modify the design of the support system without first consulting the RPE brought into "existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use[,]" namely the decision to let individuals who were not RPEs modify a design when the lives of their fellow employees would depend on the soundness of that modification. That such a process worked *this* time does not mean it is one which should be condoned. Said another way, an employer may not substitute its own safety measures for those required by an applicable safety order. (*Hollander Home Fashions*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 12, 2012); writ denied, Los Angeles superior court (Jan. 2013).) Therefore we find there was a serious violation of section 1541.1, subdivision(c)(4), despite Employer's presumably good intentions because its employees were exposed to the hazard that the excavation could cave in.[4]

B. The Willful Classification.

Section 334, subdivision (e) defines a "willful violation" as "[A] violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition."

The Court of Appeal has held:

> Section 334 establishes two alternate tests for determining whether a violation is willful. The first test requires the Division to prove "the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and

[4] As noted, the excavation's depth exceeded 20 feet, and section 1541.1 applices to excavations as shallow as 5 feet. The stark reality is that anyone engulfed in a cave-in of an excavation at least 20 feet would have little if any chance of survival, and we have no difficulty in finding there is a risk of death or serious physical harm such an event.

> the employer is conscious of the fact that what he is doing constitutes a violation of a safety law . . ." (§ 334, subd. (e).) The second and alternate test requires the Division to prove the employer, even though 'not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.' (*Ibid.*)"

(Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Board (2000) 80 Cal.App.4th 1023, 1034.)

Proving a willful violation requires showing "no more than a conscious awareness of either the safety law violated [i.e. the first alternative test] or of a dangerous condition [i.e. the second alternative]." (*Rick's Electric, Inc.,* 80 Cal.App.4th p. 1035, (internal quotes omitted).)

Given the facts here, it is fair to infer that Employer was conscious of the requirements of section 1541.1. Employer had engaged the services of an RPE to design the support system for the excavation, and albeit belatedly, sought the RPE's approval of the modification it made on August 27th. Thus the first alternative test, awareness of the applicable standard, is satisfied.

It is also reasonable to infer that Employer was aware of the hazards of having employees work in excavations. It had the excavation shored in the first instance, and attempted to make modifications to the design of the shoring system which would be approved by its RPE, as they ultimately were. Thus, Employer knew that working in deep excavations presents a risk to employees so engaged, and it had to realize that, if its design were faulty, those employees were at great risk. We conclude that the second alternative test of willful, awareness of a dangerous condition, is also satisfied in the present circumstances.

In short, we affirm the ALJ's Decision that a willful/serious violation of section 1541.1(c)(4) was established.

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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