

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

*In the Matter of the Appeal of:*

**BURTECH PIPELINE INC.  
102 Second Street  
Encinitas, CA 92024**

*Employer*

**DOCKETS 13-R3D2-0830  
and 0831**

**DECISION**

**Statement of the Case**

Burtech Pipeline, Inc., (Employer) is a pipeline construction company which installs sewer, water and storm drain pipes. From November 16, 2012 through February 25, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Darcy Murphine (Murphine) conducted a referral inspection at 3677 Brookshire Street, San Diego, California (the site). On November 21, 2013, the Division cited Employer for four general, two regulatory and one serious violations: failure to conduct tailgate safety meetings every ten days or keep written records of safety meetings,<sup>1</sup> failure to train employees on job hazards including hazards of trenches and excavations, heavy equipment and hazardous atmospheres and failure to keep records of training on Code of Safe Practices,<sup>2</sup> failure to post emergency phone numbers at job site,<sup>3</sup> failure to provide heat illness training or provide record of training,<sup>4</sup> failure to maintain records of scheduled and periodic inspections and to identify unsafe conditions and work practices at jobsite,<sup>5</sup> failure to maintain records for training orientation which included the names of training providers,<sup>6</sup> and failure to provide employees with required protection from potential cave-in while working in 8 foot deep excavation with Type B soil.<sup>7</sup>

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<sup>1</sup> Division alleged a general violation of section 1509, subdivision (e) with a proposed penalty of \$280. Unless otherwise specified, all references are to Sections of California Code of Regulations, title 8.

<sup>2</sup> Division alleged a general violation of section 1510, subdivision (a), with a proposed penalty of \$185.

<sup>3</sup> Division alleged a general violation of section 1512, subdivision (e), with a proposed penalty of \$185.

<sup>4</sup> Division alleged a general violation of section 3395, subdivision (f)(1), with a proposed penalty of \$280.

<sup>5</sup> (Division alleged a general violation of section 3203, subdivision (b)(1), with a proposed penalty of \$375.

<sup>6</sup> Division alleged a general violation of section 3203, subdivision (b)(2), with a proposed penalty of \$375.

<sup>7</sup> Division alleged a serious violation of section 1541.1, subdivision (a)(1), and proposed a penalty of \$9,000.

On March 11, 2013, Employer filed a timely appeal regarding whether the safety orders were violated, whether the classification was correct, whether abatement requirements were reasonable and whether the penalty was reasonable and alleged affirmative defenses including lack of employer knowledge and independent employee action.

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, in San Diego on October 15, 2014, and February 11, 2015. Burtech Pipeline, Inc. was represented by Tom Song, Esq., Ogletree, Deakins, Nash, Smoak, and Stewart, P.C. The Division was represented by Kathryn Woods, Esq., Staff Counsel for California Occupational Safety and Health, San Diego District Office. The parties presented oral and documentary evidence and the matter was submitted on March 19, 2015. The Administrative Law Judge extended the submission date to September 15, 2015 on her own motion.

### **Issues**

- A. Did employer fail to conduct tailgate safety meetings every ten days and keep written records of safety meetings?
- B. Did the employer fail to train employees on job hazards, including hazards of trenches and excavations, heavy equipment, hazardous atmospheres, and Code of Safe Practices?
- C. Did the Employer fail to make available phone numbers of emergency medical facilities at the job site?
- D. Did the employer fail to provide heat illness training or provide a record of training?
- E. Did the employer fail to maintain records of scheduled and periodic inspections and fail to identify unsafe conditions and work practices at jobsite?
- F. Did the employer fail to maintain records for training orientation and did those records fail to include the names of training providers?
- G. Did the employer fail to provide employees with required protection from potential cave-in while working in an eight foot deep excavation in Type B soil?
- H. Did the Division establish a rebuttable presumption that a serious violation occurred regarding Citation 2, Item 1?
- I. Did Employer rebut the presumption of a serious classification of Citation 2, Item 1 by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?
- J. Was the proposed penalty reasonable for Citation 2?

### **Findings of Fact:**

1. Employer conducted tailgate safety meetings every ten days and kept written records of safety meetings during October and November 2012.

2. Employer failed to train three of four employees on job hazards, including hazards of trenches and excavations, heavy equipment, hazardous atmospheres, and Code of Safe Practices.
3. Employer had proper equipment for the prompt transportation of the injured or ill person to a physician or hospital where emergency care is provided.
4. Employer made phone numbers for emergency medical facilities in the San Diego area available at the jobsite.
5. Employer failed to provide heat illness training for three employees or provide a record of training its employees on its Heat Illness Prevention Program.
6. Employer failed to maintain records of scheduled and periodic inspections and to identify unsafe conditions and work practices at jobsite.
7. Ramon Higuera, lead man and “knowledgeable person”, was functioning as foreman at the time of the inspection.
8. The excavation was approximately eight feet deep, made of Type B soil with sand in the bottom below the pipe, and was not made entirely in stable rock.
9. Higuera installed a vertical aluminum hydraulic shoring system as cave-in protection in a vertically unshored trench.
10. The bottom rail of the shoring system was almost four feet from the bottom of the trench, thus the lower four feet of the excavation was not protected from a cave-in.
11. Employer failed to provide Higuera with an adequate protective system while working in the excavation.
12. Division established that there was a realistic possibility of a serious physical harm by allowing an employee to work in an eight foot deep excavation which did not have an adequate protective system to prevent a potential cave-in.
13. Employer failed to rebut the presumption that a serious violation occurred.
14. The proposed penalty for Citation 2 was calculated in accordance with the Division’s policies and procedures.

### **Analysis**

#### **A. Did Employer fail to conduct tailgate safety meetings every ten days and keep written records of safety meetings?**

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

The Division cited employer for a violation of Section 1509, subdivision (e), which provides:

Supervisory employees shall conduct “toolbox” or “tailgate” safety meetings, or equivalent, with their crews at least every 10 working days to emphasize safety.

Citation 1, Item 1 alleges:

At the time of the inspection, the employer was not conducting toolbox or tailgate safety meetings or the equivalent, every ten days. Employees who were working at the jobsite located in the street in front of 3677 Brookshire Street, San Diego had not participated in any tailgate safety meetings held by the employer. There were no records of tailgate safety meetings provided by the employer when requested in writing on the Document Request Sheet on 11/20/2012.

Murphine testified that she sent a document request to Jill Mattingly, the Administrator at Burtech Pipeline. (Exhibit 9, Document Request form, dated November 20, 2012.) The document request shows that the Division requested the employer to provide toolbox/tailgate safety meetings for “crew of Bob Campbell (Campbell), foreman, Ramon Higuera (Higuera), Lead, Ed Smathers (Smathers), and Gerardo Cordova (Cordova)” for the period October 2012 through November 2012. No documents were received from the Employer, prior to the issuance of the citations.

At the hearing, Employer presented Exhibit D<sup>8</sup>, which documents safety meetings for Robert Campbell’s crew and contains his signature on each page:

- 10-1-12 Trench C – Grouting MJs Clean Up; Topics: Traffic Control – Hard Hats Hot Weather (Document has signature of Higuera and Smathers, but not Cordova)
- 10-8-12 Sewer Lateral Connection Repair; Topics: Shoring, Traffic Control (Document has signature of Higuera and Smathers, but not Cordova)
- 10-15-12 Digging MHs & Sewer Main C.O.; Topics: B & Ps Inlet Protection Traffic Control (Document has signatures but not Higuera, Smathers, or Cordova)
- 10-22-12 Sewer Main C.O.s – MHs; Topics: Wet Roads – Traffic Control, Tool Safety (Document has signature of Higuera and Smathers, but not Cordova)
- 10-29-12 Sewer Main C.O.s – MHs; Topics: Tool Safety, Fingers in/around saw, Shoring, A-Frame signs (Document has signature of Higuera and Smathers, but not Cordova)
- 11-05-12 Main C.O.s Sewer MHs; Topics: Keeping work areas clean, working together, looking out for any hazards (Document has signature of Higuera and Smathers, but not Cordova)

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<sup>8</sup> The Division’s objection to Exhibit D on the ground of lack of foundation is overruled. These tailgate meeting records have the employer’s logo, the date of the meeting, the activities being performed, the topics discussed, the name of the trainer, and the printed names and signatures of each employee who attended each tailgate meeting. Division did not present evidence that the documents were not what they purport to be and they were produced in response to the Division’s discovery request. (California Evidence Code, sections 1400 and 1420.)

- 11-13-12 R-R MHs Installing Main C.O.s; Topics: Traffic Control, Shoring - Ladders (Document has signature of Higuera and Smathers, but not Cordova)
- 11-19-12 Sewer C.O.s MHs; Topics: Shoring – Trench Safety (Document has signature of Higuera and Smathers, but not Cordova)

Employer provided a CD containing these documents to the Division after the appeal was filed, during discovery period. Murphine admitted that Exhibit D, which documented these safety meetings, met the requirements of the safety order. Robert Campbell's name and signature are at the bottom of each form, after the term "amended by". The Division did not question Cordova regarding these training records or establish that the training was done by someone other than Robert Campbell.<sup>9</sup>

It is found that Employer held weekly safety meetings during the period October 1 through November 19, 2012. The documentation contained the name and signature of the foreman who conducted the safety meetings. Division failed to establish a violation of Section 1509, subdivision (e). The employer's appeal of Citation 1, Item 1, is granted, and the penalty is set aside.

**B. Did Employer fail to train employees on job hazards, including hazards of trenches and excavations, heavy equipment, hazardous atmospheres, and Code of Safe Practices?**

The Division cited employer for a violation of section 1510, subdivision (a), which provides:

When workers are first employed they shall be given instructions regarding the hazards and safety precautions applicable to the type of work in question and directed to read the Code of Safe Practices.

Citation 1, Item 2 alleges:

At the time of the inspection, where employees were performing work at the construction jobsite located in the street in front of 3677 Brookshire Street, San Diego, the employer had not trained three of the four employees present on the hazards likely to be present at the construction job site, such as but not limited to the hazards of trenches and excavations, heavy equipment and hazardous atmospheres. The employees had not read the Code of Safe Practices. There were no records that the employees had been trained on or directed to read the Code of Safe Practices, or given instructions on

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<sup>9</sup> The documents were admitted over the Division's objection to the authenticity of the documents. The fact that they were not produced prior to the issuance of the citations does not establish lack of authenticity. Murphine admitted that she did not evaluate the documents produced during discovery and presented no evidence to support the Division's position on this issue.

the hazards and safety precautions relevant to excavation safety, heavy equipment, heat, and other hazards present at the jobsite.

Murphine requested “all safety training records for Ramon Higuera, Gerardo Cordova and Ed Smathers since May 2012” and “Safety Instructions/ Equipment Manuals - Trenching and Shoring” from Jill Mattingly, the Administrator at Burtech Pipeline. (Exhibit 9, Document Request form, dated November 20, 2012.) No documents were received from the Employer, prior to the issuance of the citations.

The Division introduced Exhibit 11, a five page chart showing Burtech employees who attended training on various topics, including Code of Safe Practices, Competent Person, Confined Space, and listing the date of the training during 2005 through 2012. This document states that “the training program is ongoing” and provided the following information for the three employees whose training records were requested:

Cordova	Code Safe Practices Heat Stress, 08/07/2006 Confined Space, 3/3/2012 CPR/AED & 1 <sup>st</sup> Aid, 3/10/2012 OSHA Pocketbook, 1/26/2006 Cal OSHA, 1/21/2012
Higuera	Competent Person, 6/24/2000 Competent Person, Retrain, 5/31/2008 Confined Space, 3/29/2008 and 3/3/2012 CPR/AED & 1 <sup>st</sup> Aid, 4/19/2008, 9/18/2010, 3/10/2012 OSHA Pocketbook, 1/26/2006 Cal OSHA, 2/22/2008 CIPP Inversion Process for Pipe Lining Supply, 7/7/2008
Smathers	Confined Space, 3/3/2012 CPR/AED & 1 <sup>st</sup> Aid, 9/18/2010, 3/10/2012 Cal OSHA, 1/21/2012

Employer objected to the use of Exhibit 11 to establish a violation because it “is from a prior inspection, unrelated in time and physical space to the instant citations.” However, employer introduced no evidence at the hearing which contradicted or updated this document or Murphine’s testimony that the two employees, Higuera and Smathers were not trained on the Code of Safe Practices. Further, employer failed to introduce the Code of Safe Practices or associated training records as exhibits.

A party's failure to offer evidence, although production of the evidence was easily within the party's power to do so, raises the inference that the evidence, if produced, would have been adverse to their position. (*Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013), citing *Shehtanian v. Kenny* (1958) 156 Cal. App. 2d 580.) Because employer could have produced sufficient training records for Higuera and Smathers and did not, an

inference can be made that those records, if produced, are adverse to employer's claim that section 1510, subdivision (a) was not violated. Exhibit 11 indicates that the employer did train Cordova and other employees on the Code of Safe Practices in 2006, but is devoid of any evidence that Higuera and Smothers were trained, as required. California Evidence Code, section 412 provides: "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Employer failed to introduce records establishing compliance and refuting the testimony of Murphine.

All the elements of the violation being met, a violation of section 1510, subdivision (a) is established.

Since safety training relates to employee health and safety, the violation was properly classified as general. (*California Dairies, Inc.*, Cal/OSHA App. 07-2080, Denial of Decision After Reconsideration (June 25, 2009), citing *A. Teichert & Sons, Inc.*, Cal/OSHA App. 97-2733, Decision After Reconsideration (Dec. 11, 1998).) A review of the proposed penalty of \$185 was calculated in accordance with the Division's policies and procedures. A penalty of \$185 is found reasonable and is assessed.

**C. Did the Employer fail to make available phone numbers of emergency medical facilities at job site?**

The Division cited employer for a violation of Section 1512, subdivision (e), which provides:

Proper equipment for the prompt transportation of the injured or ill person to a physician or hospital where emergency care is provided, or an effective communication system for contacting hospitals or other emergency medical facilities, physicians, ambulance and fire services, shall be provided. The telephone numbers of the following emergency services in the area shall be posted near the job telephone, telephone switchboard, or otherwise made available to the employees where no job site telephone exists:

- (1) A physician and at least one alternate if available.
- (2) Hospitals.
- (3) Ambulance services.
- (4) Fire-protection services.

Citation 1, Item 3 alleges:

At the time of the inspection, where the employer was performing construction work at the jobsite located in the street in front of 3677 Brookshire Street, San Diego including pipeline installation, the emergency phone numbers as required above were not posted at the job site or otherwise available to the employees.

The Division is required to establish that 1) an employer is subject to the Construction Safety Orders, and 2) failed to have an effective communication system for contacting emergency services in the area, which includes the telephone numbers of one or more physicians, hospitals, ambulance and fire services. (*Triad Geotechnical Consultants, Inc.*, Cal/OSHA App. 95-2232 Decision After Reconsideration (Nov. 10, 1999) citing *Oltman's Construction Co.*, Cal/OSHA App. 84-715, Decision After Reconsideration (Jan. 17, 1986), *Channel Constructors, Inc.*, Cal/OSHA App. 81-1015, Decision After Reconsideration (Dec. 7, 1984).)

Section 1512 of the Construction Safety Orders applies to all construction projects. It is undisputed that employees were performing construction work at this jobsite. Thus, Employer is subject to the Construction Safety Orders.

The safety order requires that the telephone numbers of emergency services in the area shall be posted near the job telephone, telephone switchboard, or otherwise made available to the employees where no job site telephone exists: 1) a physician and at least one alternate if available, 2) hospitals, 3) ambulance services and 4) fire-protection services. When a term used in a safety order is undefined, the Appeals Board has long assumed that the Standards Board intended it to have its ordinary meaning. (*Colich & Sons/J.R. Pipeline, J.V.*, Cal/OSHA App. 08-5061, Denial of Decision After Reconsideration (Dec. 9, 2009) citing *Knotts Berry Farm*, Cal/OSHA App. 01-4331, Decision After Reconsideration (May 31, 2007). The term “emergency services”, as defined in Dictionary.com is “an organization that responds to and deals with emergencies, esp. ambulance, EMTs, firefighters, and police”.

The Division alleged that Employer failed to have the emergency phone numbers posted at the job site or otherwise available to the employees. Murphine testified that she asked foreman Bob Campbell (Campbell) for the contacts for emergency services. She admitted that Campbell handed her a binder which contained the required information including contact numbers and addresses for urgent care facilities in San Diego County. Although employer’s binder provided phone numbers for urgent care centers, Murphine felt that this failed to comply with the safety order because it did not include a “24 hour emergency room.” A copy of the binder containing the listing of emergency services in the San Diego area was not introduced by either party at the hearing. The requirement to provide phone numbers of “hospitals or other emergency medical facilities”, the term used in the safety order, does not specify that the employer must provide a phone number for a “24 hour emergency room” and the undersigned does not interpret such a restriction, based on the evidence in this record.

Therefore, the Division failed to establish a violation of section 1512, subdivision (e) by a preponderance of the evidence.

**D. Did the Employer fail to provide heat illness training or provide a record of training?**

The Division cited employer for a violation of Section 3395, subdivision (f)(1) which provides:

(f) Training

(1) Employee training. Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness:

(A) The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment.

(B) The employer's procedures for complying with the requirements of this standard.

(C) The importance of frequent consumption of small quantities of water, up to 4 cups per hour, when the work environment is hot and employees are likely to be sweating more than usual in the performance of their duties.

(D) The importance of acclimatization.

(E) The different types of heat illness and the common signs and symptoms of heat illness.

(F) The importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves, or in co-workers.

(G) The employer's procedures for responding to symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.

(H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.

(I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

Citation 1, Item 4 alleges:

At the time of the inspection, for the employees performing outdoor work digging in the street to replace sewer pipelines and clean-out pipes in San Diego, the employer had not provided heat illness training on their heat illness plan and the topics under (A) through (I) above. Of the four employees at the job site, there were no records of training on the employer's Heat Illness Plan for three of them.

To establish a violation of section 3395, subdivision (f)(1), Division is required to establish that 1) employer failed to provide effective training on heat illness prevention 2) before beginning to do work that should reasonably be anticipated to result in exposure to the risk of heat illness. (*HHS Construction*,

Cal/OSHA App. 12-0492 Decision After Reconsideration (February 26, 2015); *Rosendin Electric, Inc.*, Cal/OSHA App. 12-3028 Decision After Reconsideration (Nov. 21, 2014.)

Murphine testified that she interviewed employees about heat illness, and they could not tell her what the procedures were. The Division's Document Request, Exhibit 9, did not request Employer's Heat Illness Prevention Program, but did request training records. It is undisputed that no training records were provided prior to the issuance of the citation or at the hearing, other than Exhibit 11. Employer did not provide any contrary evidence to dispute the information in Exhibit 11 that lists training given to Burteck employees. This document does not indicate that Bob Campbell, Ramon Higuera and Edward Smathers received training on Heat Stress.<sup>10</sup>

A party's failure to offer evidence they are required to maintain raises an adverse inference, as discussed above. (*Shimmick-Obayashi, supra*, and *Shehtanian v. Kenny, supra*.) At the hearing, Employer presented no documents regarding Employer's heat illness prevention program or training records regarding heat illness prevention and did not claim that it provided such documents to the Division at any time. It is found that employer failed to provide effective training on heat illness prevention.

Employer challenges the application of the safety order based on inadequate proof that the conditions at the time of the inspection were such that the risk of heat illness was "reasonably anticipated". Murphine arrived at the worksite at 8:00 a.m., the conditions at that time of day were "cool and cloudy" and the job was expected to last one hour. This is not a defense to the citation for several reasons. Section 3395 applies to outdoor places of employment. There is no temperature trigger in the safety order which was in effect at the time of the inspection. The employees were working in a trench which was located outdoors in direct sunlight in San Diego during March through November 2012. Murphine credibly testified that the employees were exposed to the risk of heat illness which was "reasonably anticipated" on this project because the employees were outside in full sun during daylight hours. The employer was required to provide heat illness training for all members of the construction crew.

The Division established by a preponderance of the evidence that Employer failed to provide Heat Illness Prevention Program training to three employees in violation of section 3395, subdivision (f)(1).

The Division classified the violation as general. Since training on heat illness prevention relates to access to employee health, the violation was properly classified as general. A review of the proposed penalty of \$280 was calculated in

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<sup>10</sup> Exhibit 11 was "a past training record of Employer that is not associated with the current inspection" which Employer claims cannot support the current state of employer's heat illness prevention training. Division introduced this record and credited Cordova with having received training in "Code of Safe Practices/Heat Stress". Employer had an opportunity to present records of heat illness training of the other three employees, but failed to do so.

accordance with the Division's policies and procedures. A penalty of \$280 is found reasonable and is assessed.

**E. Did the Employer fail to maintain records of scheduled and periodic inspections and to identify unsafe conditions and work practices at the jobsite?**

The Division cited employer for a violation of Section 3203, subdivision (b)(1), which provides:

(b) Records of the steps taken to implement and maintain the Program shall include:

(1) Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices.

Citation 1, Item 5 alleges:

At the time of the inspection, the employer had not maintained records of scheduled and periodic inspections required by 3203(a)(4) and by the employer's written Safety Policy to identify unsafe conditions and work practices at the jobsite located in the street in front of 3677 Brookshire Street, San Diego where employees were performing construction work replacing a cleanout pipe.

Section 3203, subdivision (b)(1) mandates that an employer 1) maintain records of schedules and periodic inspections 2) which identify unsafe conditions and work practices and action taken to correct the identified unsafe conditions and work practices.

Murphine requested from Campbell Employer's records of inspections and was told that Employer was doing inspections but not keeping records of the inspection. Employer did not introduce any evidence to contradict this testimony, such as copies of records which demonstrate that the inspections were done and the unsafe conditions were corrected. In this case it was within Employer's ability to produce records to show that inspections were conducted in compliance with section 3203, subdivision (b)(1) but it failed to do so. The regulatory violation is sustained. The proposed civil penalty of \$375 is found to be reasonable and is assessed.

**F. Did the employer fail to maintain records for training orientation and did those records fail to include the names of training providers?**

The Division cited employer for a violation of section 3203, subdivision (b)(2), which provides:

(b)(2) Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers. This documentation shall be maintained for at least one (1) year.

Section 3203, subdivision (a)(7) provides:

(a) Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program. The Program shall be in writing and, shall, at a minimum:

(7) provide training and instruction:

(A) When the program is first established;

(B) To all new employees;

(C) To all employees given new job assignments for which training has not previously been received;

(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;

(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Citation 1, Item 6 alleges:

a) Training records for employees were requested on 11/20/2012. There were no records that three of the four employees had training orientation as specified in the employer's Safety Program.

b) Training records for employees did not include the name of the training providers.

Section 3203, subdivision (b)(2) mandates that an employer 1) maintain records of safety and health training for at least one year, 2) which includes the employee's name or other identifier, training dates, type(s) of training, and training providers.

Murphine requested from Campbell employer's records of safety and health training and none were provided prior to the issuance of the citations. The following document was provided to the Division during discovery, after the appeal had been filed: Exhibit A, a certificate of completion and wallet sized copy establishing Higuera was trained in excavation/trenching/shoring, dated January 20, 2012 and signed by the instructor, Joe Guricau. Thus, employer maintained

records of safety and health training for at least one year for Higuera, and those records included the employee's name, training dates, type(s) of training, and training provider.

Employer also provided Exhibits C-1, C-2 and C-3 during discovery, namely, "certification cards" for Higuera, issued in 2012, Gerardo Nacias, for 2010 and Ed Smathers for 2010. They show successful completion of a training course provided by Basic Plus covering "CPR, AED and First Aid". (Bates No. BUR 000083 through 000086, and 000095.) The certification cards list the name of the employee, year of issuance, and "Basic Plus", the training provider. It should be noted that the "certification cards" were issued well over one year earlier, for two of the three employees. It is arguable whether the type of training was clearly articulated.

The Division failed to identify which subsection of (a)(7) was violated. In other words, what category of training was required during the prior twelve months and was not provided? There was no showing that this situation involved new employees, new job assignments, new equipment, or unrecognized hazards. If the employees were not required to have training and instruction in one of those subsections within the prior year, employer did not violate the safety order.

Based on the foregoing, the evidence is insufficient to support the citation. Division failed to establish that employer did not maintain training records as required by section 3203, subdivision (b)(2), or failed to provide training required by section 3203, subdivision (a)(7). The appeal is granted.

**G. Did the Employer fail to provide employees with required protection from potential cave-in while working in an eight foot deep excavation with Type B soil?**

The Division cited employer for a violation of Section 1541.1, subdivision (a)(1):

- (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.

Citation 2, Item 1 alleges:

On 11/16/2012, an employee was observed inside an 8 foot deep excavation cutting the end of a sewer pipe with a power tool at the jobsite located in the street in front of 3677 Brookshire Drive, San

Diego 92111. The employees were adding an adapter to a ten inch clay sewer pipe to add a PVC cleanout pipe. There was only one aluminum speed shore with four foot rails inside the excavation at the top half only, with no protection from cave-in at the bottom four feet of the excavation. The trench was in type B soil, 8 feet deep by 3 feet wide and 6 feet long, located in the middle of the street where there was additional surcharge from passing vehicles. The employee in the trench was the competent person on the site. The employee in the trench was exposed to a serious engulfment hazard.

In order to establish a violation of section 1541, subdivision (a)(1), the Division is required to establish that 1) an employee was exposed to the hazard by working in an excavation, 2) the employer failed to protect the employee from cave-ins, by an adequate protective system designed in accordance with Section 1541.1 subdivisions (b) or (c). (*Mountain Cascade, Inc.*, Cal/OSHA App. 98-1129, Decision After Reconsideration (August 29, 2001).)

One factor in the analysis is the soil type involved, because the shoring required for adequate protection is different for different soils. Employer and the Division disagreed about the type of soil into which the excavation was dug. Employer has the burden of showing that an exception from a safety order applies. There are two exceptions: (A) unless the excavations was not made entirely in stable rock, or (B) the excavations was less than five feet in depth, and examination of the ground by a competent person provides no indication of a potential cave-in. *Dick Miller, Inc.*, Cal/OSHA App. 13-545, Decision After Reconsideration (March 5, 2014).)

An “excavation” is defined as “any man-made cut, cavity, trench, depression in an earth surface, formed by earth removal.” (Section 1540, subdivision (b).) Murphine measured the depth of the trench vertically as seven feet, eleven inches to the bottom of the asphalt pavement. (Exhibit 4.) The asphalt was two or three inches thick, hence the trench was approximately eight feet deep. The walls of the trench were vertical and made up of layers, including the top layer of thick asphalt pavement, a middle layer of hard dirt and a layer of sand below the pipe he was working on, at the bottom of the trench.

Higuera, a piper and the lead man, testified that he was a “knowledgeable person” with respect to trenching and was functioning as foreman at the time of the inspection. Higuera testified that the trench was dug earlier that day and was approximately seven feet deep, three feet wide, and five or six feet in length. (Exhibits 2 through 8.) Higuera was assigned to go into the trench, find a clay pipe, trim it, and install a two foot long clean out fitting, as part of the sewer system. He accessed the trench using a ladder and was working in a kneeling position at the bottom of the trench<sup>11</sup> when Murphine arrived at the jobsite. There was minimal traffic along one side of the trench. His co-workers, Smothers and Cordova, were working at street level during this operation. (Exhibit 6.) Vertical

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<sup>11</sup> Higuera used “trench” interchangeably with “ditch”.

Aluminum Hydraulic Shoring was placed in the trench before Higuera went into the trench. It is undisputed that Higuera was working in an “excavation”.

Before determining whether an “adequate protective system” was used, we examine whether the employer established its burden of proof that either exception (A) or (B) applies. (*Dick Miller, Inc., supra*, citing *Tutor-Saliba-Perini*, Cal/OSHA App. 97-2799, Decision After Reconsideration (Mar. 2, 2001).) Division establishes the soil type through testing, visual indications of distress, or, as is frequently the case, testimonial descriptions of potential or actual movement of material. (*Ghilotti Bros. Construction, Inc.*, Cal/OSHA App. 04-2321, Decision After Reconsideration (July 26, 2011).)

During the investigation, Foreman Campbell told Murphine that the soil was Type B.<sup>12</sup> Employer’s foreman’s testimony that the excavation was not made entirely in solid rock is dispositive. (*Dick Miller, Inc., supra*.) That evaluation is supported by the photographs in Exhibits 2, 3, and 8, which show that the walls of the trench are not solid rock, or smooth.

The employer attempted to dispute Murphine’s testimony with testimony that the soil was between Types A and B. Higuera identified Exhibit 2 as the trench that he was working in when the investigation occurred. He believed the soil was between Types A and B but admitted that the trench was located on a road which was built two years earlier when the sewer system was worked on.<sup>13</sup> The type of soil at the top under the asphalt was hard, but was not solid rock; the soil at the bottom of the trench, below the pipe, was sand. The asphalt on the surface of the road was two to three inches deep and was cracked. These cracks can be seen along the edge of the right side trench in Exhibit 2 and are also observable in Exhibits 6 and 8.

Type A soil is defined in Appendix A to section 1541.1, in pertinent part, states: “However, no soil is Type A if: (2) The soil is subject to vibration from heavy traffic, pile driving or similar effects; or (3) The soil has been previously disturbed. Type A soil is hard to break, such as undisturbed clay soil, or non-fissured rock, whereas here, the walls of this trench are made of previously disturbed soil.” The excavation was more than 5 feet deep; the trench was measured as having a depth of seven feet, eleven inches, not including the asphalt layer. Therefore, neither exception is applicable here. It is found that Division established this excavation was not made “entirely in stable rock”.

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<sup>12</sup> Statements made by Campbell, the foreman to Murphine, the inspector are authorized admissions subject to California Evidence Code, section 1222. (*Caves Construction*, Cal/OSHA App. 90-498, Decision After Reconsideration (May 8, 1991).)

<sup>13</sup> Although he testified that he did not feel “unsafe” while working in the trench, Higuera subjective belief is not evidence of classification of the soil or compliance with the safety order. His testimony that below the pipe he was working on, the type of soil was sand, is inconsistent with his testimony that the walls of this trench were Type A soil, which he defined as “smooth” and “hard”.

The Division must establish that the employer's protective system was not adequately designed in accordance with Section 1541.1, subdivisions (b) or (c)?<sup>14</sup> 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).)<sup>15</sup> *Delta Excavating, Inc.*, Cal/OSHA App. 94-2389, Decision After Reconsideration (Aug. 10, 1999) held:

Where an employer uses benching as its protective system, it must comply with section 1541.1(b) (Design of sloping and benching systems) and, as there incorporated by reference, sections 1541.1(b)(1), 1541.1(b)(2), 1541.1(b)(3), or 1541.1(b)(4). The Division inspector's unrefuted testimony, supported by the record, shows that Employer did not use the first option (1541.1(b)(1)) because it was evident that the walls were not sloped at 1 1/2 horizontal to 1 vertical, which that option requires. Employer did not use Options 3 and 4 (following a written design containing tabulated data [§ 1541.1(b)(3)] or an engineer's written design [§ 1541.1(b)(4)]). In response to Williams' statements to Employer about the benching deficiencies, Employer representatives acquiesced, doing nothing to question the inspector's assertion that the benching did not meet Title 8 occupational safety and health standards. The failure to deny Williams' claim (during the inspection) warrants an inference, in the absence of proof to the contrary at the hearing, that Employer used no acceptable alternate written design. (See Evidence Code § 413 ["Failure to Explain or Deny Evidence"], § 623 ["Conduct or statements leading another to believe a particular thing true"], and § 1221 ["Words or conduct manifesting belief in truth of assertion"] and *Petrolite Corporation*, Cal/OSHA App. 93-2083, Decision After Reconsideration (March 3, 1998), p.4).

It is undisputed that Higuera installed a vertical aluminum hydraulic shoring system as cave-in protection in the vertically unshored trench. (Exhibit 8.) The walls were not sloped, so Option 1 was not used. The bottom rail of the shoring system measured more than two feet to the ground of the trench and almost four feet from the bottom of the trench. The lower four foot portion of the excavation was not protected from a cave-in. The employer did not refute this evidence or provide evidence that an acceptable alternate written design was used. As in *Delta Excavating, Inc.*, *supra*, when Murphine instructed Higuera to get out of the trench and to install spot bracing to the bottom of the trench, as illustrated in Exhibit 12-2, this equipment was taken out of employer's vehicle on site. The violation was promptly abated by installing the correct shoring.

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<sup>14</sup> 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.

<sup>15</sup> In contrast, in *Ghilotti Bros. Construction, Inc.*, *supra*, there was no violation found because the employer established the exception: the unshored vertical walls of the excavation were made "entirely in stable rock."

Murphine testified that section 1541.1, subdivision (c)(1) requires: “designs for aluminum hydraulic shoring shall be in accordance with section 1541.1(c)(2), but if manufacturer’s tabulated data cannot be utilized, designs shall be in accordance with Appendix D.” Division established the employer selected a vertical aluminum hydraulic shoring system and failed to comply with the requirements, until instructed by Murphine. Employer’s argument that the Division “falsely paraphrased” *Delta Excavating, Inc.* or the requirements of section 1541.1, subdivision (a)(1) is rejected.<sup>16</sup>

A violation of section 1541.1, subdivision (a)(1) was established by preponderant evidence.

**H. Did the Division properly classify Citation 2, Item 1 as a serious violation?**

To sustain a serious violation of Labor Code section 6432, subdivision (a), the Division was required to establish the serious classification:

There shall be a rebuttable presumption that a ‘serious violation’ exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm<sup>17</sup> could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

- (1) A serious exposure exceeding an established permissible exposure limit.
- (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.

When the Division alleges a serious violation, it must present evidence to show 1) a realistic possibility that death or serious physical harm 2) could result

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<sup>16</sup> Where an element of an alleged violation must be proven and the employer does not present any evidence disproving that element, the Division need only present evidence sufficient to establish that it is more likely than not that the violation existed. (*Petrolite Corporation*, OSHAB 93-2083, Decision After Reconsideration (Mar. 3, 1998).)

<sup>17</sup> Labor Code section 6432, subdivision (e) provides: “Serious physical harm” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

from the actual hazard created by the violation and 3) in a place of employment, in order to create a rebuttable presumption that the citation was correctly classified as serious. The employer has the statutory right to contradict or rebut the evidence that a serious violation was established.

The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*International Paper Co.*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015), citing *Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015); *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001).)

Murphine’s opinion<sup>18</sup> was that there was a realistic possibility of serious physical harm if a cave-in caused by the failure to have an adequate protective system occurred. She testified that trenching cave-ins result in serious injuries; death by crushing or affixation is likely if the excavation blows out<sup>19</sup>. She cited Centers for Disease Control, National Institute of Occupational Safety and Health research that between 2000 and 2009, 360 workers died in trenching or excavation cave-ins, an average of 35 fatalities per year.

At the time she arrived at the work site, the trench was partially shored, Higuera was bent down, working in the bottom of the trench and was exposed to a serious engulfment hazard. The soil weighs between 75 and 100 pounds per cubic foot and if the soil is displaced, potentially thousands of pounds of material would fall onto Higuera, who was working at the bottom. The bottom four feet of the excavation was unprotected with shoring. The shoring in place at the top four feet of the excavation was not sufficient to comply with the safety order.

The “realistic possibility that death or serious physical harm could result” element was established. Similarly, elements two and three, that there was an exposure to an actual hazard created by the violation and that the violation occurred in a place of employment, were not disputed. Division established that there was a realistic possibility of a serious physical harm in working in an eight foot deep excavation without an adequate protective system designed in

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<sup>18</sup> Murphine’s expert opinion was based upon a reasonable evidentiary foundation consisting of her testimony regarding her education, experience and training. (*Rolled Steel Products Corp*, Cal/OSHA App. 10-4047, Decision After Reconsideration (June 30, 2014) note 3, citing California Evidence Code, section 720; *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).) Murphine testified that she earned a BS degree from U.C. Davis. She was a compliance officer for federal OSHA for two years where she completed courses in accident investigation, hazardous materials as well as other core courses. For the past 25 years, she has served as a compliance officer for the Division and testified that she is up-to-date on her OSHA mandated training, which includes six or seven courses in excavation. Additionally, she participated in OSHA training on numerous other topics, including hazard evaluation, scaffolding, machine guarding, personal protective systems, soil testing, permits, and heat illness prevention. The Division could have also introduced a letter from its Director of training stating she was up-to-date on her Division-mandated training, her *curriculum vitae*, resume or training records, to address the concerns raised by the employer, but is not required to present this evidence.

<sup>19</sup> A “blow out” or “cave-in” is the rapid lateral movement of the walls of the excavation.

accordance with Section 1541.1(b) or (c). The Division established a presumption that the citation was properly classified as serious violation, pursuant to Labor Code section 6432.

**I. Did Employer rebut the presumption of a serious classification by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?**

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to Employer to rebut it, pursuant to Labor Code section 6432, subdivision (c). *International Paper Co.*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015) provides a recent example of how the Appeals Board has analyzed section 6432, subdivision (c), concluding that Employer did not rebut the presumption of a serious violation.<sup>20</sup> In this case, the employer failed to establish that it took all the steps a reasonable and responsible employer in like circumstances should be expected to take or that the violation occurred at time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it.<sup>21</sup> It did not rebut the presumption of a serious classification.

**J. Was the penalty for Citation 2, Item 1 properly calculated?**

Murphine testified to the amount of the proposed penalty and how it was calculated, as reflected on the penalty calculation worksheet (Exhibit 10).

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<sup>20</sup> Labor Code section 6432, subdivision (c) provides:

If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

- (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).
- (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

<sup>21</sup> Employer argues that the Division must show that it was actually aware of an unsafe condition to meet its burden of proving “employer knowledge”. Campbell was a roving foreman and was not present at the time of the inspection, according to Higuera, the acting foreman. The employer maintains that Campbell did not know, nor should have known of the violation, so “employer knowledge” was not established. This argument is rejected because Campbell did not testify and his knowledge of the cave-in protection is not in the record. The employer had the burden of rebutting the presumption in Section 6432, subdivision (c). Employers are accountable for the acts and knowledge of their foremen. (*Mountain Cascade, Inc.*, *supra*, citing *Greene and Hemly, Inc.*, Cal OSHA/App. 76-435, Decision After Reconsideration (April 7, 1978).)

Employer did not contest that testimony, nor did it offer any evidence contrary to that testimony.<sup>22</sup>

Murphine testified that the gravity based penalty was \$18,000 because it was rated as “serious”. She evaluated the following factors under the applicable regulations: “severity” was rated as medium, based on the degree of discomfort, temporary disability and time lost from normal activity which an employee is likely to suffer as a result of the violation; “extent” was rated medium, based on the number of employees exposed to the condition; “likelihood” was also rated medium. The gravity based penalty of \$18,000 was not raised or lowered. (Section 336.) A 50% abatement credit was given to the Employer based on the fact that it made a good faith effort to abate the alleged violation. As a result the penalty was reduced to \$9,000. (§ 336, subd. (d)(4)(B).) A reasonable penalty is established in the amount of \$9,000.

### **Conclusion**

The evidence supports the following findings, as discussed above: Employer conducted tailgate safety meetings every ten days and kept written records of safety meetings; the Employer’s appeal is granted and the penalty for Citation 1, Item 1 is vacated. Employer failed to train three of four employees on job hazards including hazards of trenches and excavations and failed to keep records of training on Code of Safe Practices in violation of section 1510, subdivision (a); the penalty for Citation 1, Item 2 of \$185 is assessed. Employer had proper equipment for the prompt transportation of the injured or ill person to a physician or hospital where emergency care is provided, and made emergency phone numbers available to the employees at job site; the penalty for Citation 1, Item 3 is vacated. Employer failed to train three employees on the employer’s Heat Illness Plan in violation of section 3395, subdivision (f)(1); the penalty for Citation 1, Item 4 of \$280 is assessed. Employer failed to maintain records of scheduled and periodic inspections in violation of section 3203, subdivision (b)(1); the penalty for Citation 1, Item 5 of \$375 is assessed. Employer maintained records of safety and health training for at least one year for Higuera, and the Division failed to establish that section 3203, subdivision (b)(2) was violated or that training required by section 3203, subsection (a)(7) was not provided; the penalty for Citation 1, Item 6 is vacated. Employer failed to provide employees with required protection from potential cave-in while working in 8 foot deep excavation with Type B soil in violation of Section 1541, subdivision (a)(1) and failed to rebut

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<sup>22</sup> Penalties calculated in accordance with the penalty setting regulations (§§ 333-336) are presumptively reasonable. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) A penalty proposed by the Division in accordance with those regulations is presumptively reasonable and will not be reduced absent evidence by Employer that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Id.*) The calculation used to determine the proposed penalty is: 50% of \$18,000 is \$9,000.

the presumption of a serious classification; the penalty for Citation 2, Item 1 of \$90,000 is assessed.<sup>23</sup>

**Order**

It is hereby ordered that Employer's appeal of Citation 1, Items 1, 3 and 6 is granted Citation 1, Items 2, 4, 5 and Citation 2, Item 1 are affirmed. The penalties set forth in the attached Summary Table shall be assessed.

DATED: September , 2015

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MARY DRYOVAGE  
Administrative Law Judge

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<sup>23</sup> Employer presented no evidence in support of its other affirmative defenses and offered no argument in its closing argument. With respect to abatement, the citation did not impose any conduct other than compliance with the standard. There is no evidence that compliance is either impractical or unreasonably expensive. Employer's assertion that the abatement requirement is unreasonable is rejected. (*The Daily Californian/Calgraphics*, Decision After Reconsideration Cal OSHA/App. 90-929, Decision After Reconsideration (Aug. 28, 1991).)

**APPENDIX A  
SUMMARY OF EVIDENTIARY RECORD  
BURTECH PIPELINE INC.  
DOCKETS 13-R3D2-0830 and 0831  
DATE OF HEARING: October 15, 2014 and February 11, 2015**

**Division's Exhibits**

<b><i>Exh. No.</i></b>	<b>Exhibit Description</b>	<b>Admitted</b>
1	Jurisdictional Documents	Yes
2	Photograph of Higuera in trench	Yes
3	Photograph of trench with hammer and shovel	Yes
4	Photograph of tape measuring depth of trench as 7 feet 10 inches	Yes
5	Photograph of Backhoe and Employer's Truck	Yes
6	Photograph of trench with 2 men and ladder	Yes
7	Photograph of trench with shoring – street level	Yes
8	Photograph of trench with two shores	Yes
9	Document request – Construction, 11/20/2012	Yes
10	Proposed penalty worksheet	Yes
11	Training Program (2006) (5 pages)	Yes
12-1	Drawing – Vertical Aluminum Hydraulic Shoring (Spot Bracing) (1page)	Yes
12-2	Drawing – Vertical Aluminum Hydraulic Shoring (Stacked) (1page)	Yes
13	IBY letter, 12/5/2012 (2 pages)	Yes

**Employer's Exhibits**

<b><i>Exhibit Letter</i></b>	<b>Exhibit Description</b>	<b>Admitted</b>
A	Certificate of Training, 1/20/2012 and certificate of training for Ramon Higuera, 1/20/2012 (2 pages)	Yes
B	Cal OSHA Form I-A and I-B for Burtech Pipeline inspection (DOSH 00023-39)	Yes
C-1	CPR Certification Card – Gerardo Niacias	Yes
C-2	CPR Certification Card – Ramon Higuera	Yes
C-3	CPR Certification Card – Ed Smothers	Yes
D	Burtech Safety Meeting attendance records for October and November 2012 (BUR 0075-82)	Yes
E	Darcy Murphine Field Notes for Burtech Pipeline inspection (BUR 0053-54) (1 page)	Yes

**Witnesses Testifying at Hearing**

1. Ramon Higuera
2. Darcy Murphine

**CERTIFICATION OR RECORDING**

I, MARY DRYOVAGE, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.

\_\_\_\_\_  
MARY DRYOVAGE

\_\_\_\_\_  
DATE

# SUMMARY TABLE ORDER

*In the Matter of the Appeal of:*  
**BURTECH PIPELINE INC.**  
**DOCKETS 13-R3D2-0830 and 0831**

Abbreviation Key:		Reg=Regulatory
G=General		W=Willful
S=Serious		R=Repeat
Er=Employer		DOSH=Division

Site: 3677 Brookshire Street, San Diego, CA 92111  
Date of Inspection: 11/16/12 - 02/25/13

IMIS No. 315346858

Date of Citation: 02/26/13

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	<b>FINAL PENALTY ASSESSED BY BOARD</b>
13-R3D2-0830	1	1	1509(e)	G	[Failure to conduct toolbox safety meetings every 10 days.] ALJ vacated citation.		X	\$280	\$280	<b>\$0</b>
		2	1510(a)	G	[Failure to train employees on hazards of trenches of excavations, heavy equipment.] ALJ sustained citation.	X		\$185	\$185	<b>\$185</b>
		3	1512(e)	G	[Failure to post emergency phone numbers at jobsite.] ALJ vacated citation.		X	\$185	\$185	<b>\$0</b>
		4	3395(f)(1)	G	[Failure to provide heat illness training.] ALJ sustained citation.	X		\$280	\$280	<b>\$280</b>
		5	3203(b)(1)	Reg	[Failure to maintain records of scheduled and periodic inspections.] ALJ sustained citation.	X		\$375	\$375	<b>\$375</b>
		6	3203(b)(2)	Reg	[Failure to have records of training on IIPP and records did not include name of training providers.] ALJ vacated citation.		X	\$375	\$0	<b>\$0</b>
13-R3D2-0931	2	1	1541.1(a)(1)	S	[Failure to shore 8 foot deep trench properly, which was in type B soil.] ALJ sustained citation.	X		\$9,000	\$9,000	<b>\$9,000</b>

# SUMMARY TABLE ORDER

*In the Matter of the Appeal of:*  
**BURTECH PIPELINE INC.**  
**DOCKETS 13-R3D2-0830 and 0831**

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
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DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	<b>FINAL PENALTY ASSESSED BY BOARD</b>
					<b>Sub-Total</b>			\$10,680	\$10,305	<b>\$9,840</b>
					<b>Total Amount Due*</b>					<b>\$9,840</b>

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board.  
**All penalty payments must be made to:**  
 Accounting Office (OSH)  
 Department of Industrial Relations  
 P.O. Box 420603  
 San Francisco, CA 94142  
 (415) 703-4291, (415) 703-4308 (payment plans)

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

**ALJ: MD**  
**POS: 09/\_\_\_\_/15**

**DECLARATION OF SERVICE BY MAIL**

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, California 95833.

On September \_\_\_\_, 2015, I served the attached Decision by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with first-class postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

Tom Song, Esq.  
Kevin D. Bland, Esq.  
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, PC  
695 Town Center Drive, Suite 1500  
Costa Mesa, CA 92626

SAN DIEGO DISTRICT OFFICE  
7575 Metrolopitan Drive, Suite 207  
San Diego, CA 92108

DOSH LEGAL UNIT  
ATT: Amy Martin, Chief Counsel  
1515 Clay Street, Suite 1901  
Oakland, CA 94612

DOSH LEGAL UNIT  
Kathryn Woods, Staff Counsel  
320 West Fourth Street, Room 400  
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on September \_\_\_\_, 2015, at Sacramento, California.

\_\_\_\_\_  
Declarant

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

*In the Matter of the Appeal of:*

**BURTECH PIPELINE INC.  
102 Second Street  
Encinitas, CA 92024**

*Employer*

**DOCKETS 13-R3D2-0830  
and 0831**

**TRANSMITTAL**

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. The petition for reconsideration must be sent to:

**OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD  
2520 Venture Oaks Way, Suite 300  
Sacramento, CA 95833**

Your petition for reconsideration must fully comply with the requirements of Labor Code Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

**For further information, call: (916) 274-5751.**