

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

*In the Matter of the Appeal of:*

**GATEWAY PACIFIC CONTRACTORS INC**  
**8055 Freeport Boulevard**  
**Sacramento, CA 95832**

Employer

**DOCKETS 10-R2D3-1502**  
**through 1508**

**DECISION**

**Statement of the Case**

Gateway Pacific Contractors Inc (Employer) constructed an underground pipeline extending from Chico's municipal water treatment plant to the Sacramento River. Beginning November 7, 2009, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer John Wendland, conducted an accident inspection at a place of employment maintained by Employer at Outfall Replacement Project (River Road), Chico, California (the site). On April 29, 2010, the Division cited Employer for ten violations of California Code of Regulations, title 8, six of which remain at issue, all pertaining to excavation operations.<sup>1</sup>

Employer filed timely appeals for each citation, contesting the existence of the violation, the classification, the reasonableness of the abatement requirements, and the reasonableness of the proposed penalty. Employer also alleged certain affirmative defenses for each citation.

This matter was heard by Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Sacramento, California on August 28 and 29, 2014, January 21 and 22, 2015, April 14 and

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<sup>1</sup> Unless otherwise specified, all references are to sections of California Code of Regulations, title 8. In its Opening Brief, the Division withdrew Citation 1, Item 1, an alleged violation of section 341.4. During the hearing, the Division withdrew Citation 1, Item 2, (an alleged violation of section 341.1, subdivision (h)(2)(B)), Citation 1, Item 3, (an alleged violation of section 1541, subdivision (b)(1)(D)), and Citation 5, Item 1, (an alleged violation of section 1541.1, subdivision (g)(2)), at which time Employer agreed to waive any rights it may have pursuant to Labor Code section 149.5 to petition for or recover costs or fees, if any, incurred in connection with the appeal of those items.

15, 2015, and June 23, 24, and 25, 2015. Ron E. Medeiros, Attorney, of the Robert D. Peterson Law Corporation, represented Employer. Mary Allen, Staff Counsel, represented the Division. Third Party Felipe de Jesus Gonzalez Ramirez (Gonzalez) appeared on his own behalf.<sup>2</sup> The submission date was extended to January 30, 2016, on the ALJ's own motion.

### **Issues**

1. Did Employer fail to provide a means of egress from a trench excavation so as to require no more than 25 feet of lateral travel for employees?
2. Did Employer fail to ensure that its worker not be permitted underneath loads handled by lifting or digging equipment?
3. Did Employer fail to protect employees from loose rock or soil that could pose a hazard by falling or rolling from the excavation face?
4. Did Employer fail to ensure that its employees not work in excavations in which there was accumulated water, or in excavations in which water was accumulating, without taking adequate precautions to protect employees against the hazards posed by water accumulation?
5. Did Employer, on November 6, 2009, fail to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivision (b) or (c)?
6. Did Employer, on November 9, 2009, fail to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivision (b) or (c)?
7. Did the Division establish that the violations associated with Citations 2, 3, 4, 6, and 7 were serious?
8. Did Employer present evidence sufficient to demonstrate that it did not, and could not with the exercise of reasonable diligence, have known the presence of the violations characterized as serious?
9. Did the Division establish that Citations 4 and 6 were properly characterized as accident-related?

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<sup>2</sup> After providing testimony on the second day of the hearing Third Party Gonzalez indicated that he no longer wished to participate in further hearing proceedings, and was excused.

10. Did the Division establish that Citations 6 and 7 were properly characterized as willful?
11. Were the abatement requirements for all Citations/Items reasonable?
12. Were the proposed penalties for all Citations/Items reasonable?

**Findings of Fact:**

1. Wendland opened the inspection in this case on November 7, 2009, at the Outfall Project of the Chico Water Treatment Facility, located in Chico, California.
2. Employer employed Scott Robinson (Robinson) as a foreman during the period of November, 2009. Robinson was the manager in charge of underground construction at the site. Robinson was in charge of worker safety at the site.
3. Employer employed Delano Hall (D. Hall) as the Assistant Superintendent during the period of November, 2009.
4. Employer employed Jay Hall (J. Hall) as the Project Manager during the period of November, 2009.
5. On the afternoon of November 9, 2009, Robinson was standing on a pipe with an approximate interior diameter of 84 inches in a trench excavation having an approximate depth of 18 feet. No ladder was located within 25 feet of lateral travel from where Robinson was standing.
6. On the afternoon of November 9, 2009, Robinson was standing next to, and not under, an excavator digger bucket loaded with crushed rock.
7. On the afternoon of November 9, 2009, one side of the trench excavation wall was scaled more vertical than one foot horizontal to one foot vertical, there were no protective barriers in the trench, and there were no other means that provided equivalent protection for workers in the trench.

8. On the afternoon of November 9, 2009, Robinson and D. Hall were standing on a pipe in the trench in an area where the wall of the trench was scaled more vertical than one foot horizontal to one foot vertical. D. Hall was also observed standing on a partially graded portion of the excavation where the wall of the trench was scaled more vertical than one foot horizontal to one foot vertical.
9. On November 6, 2009, at the location of a cave-in, water had accumulated and was accumulating into the trench.
10. On November 9, 2009, at a location approximately 24 feet and upstream from the cave-in which occurred on November 6, 2009, water had accumulated and was accumulating into the trench.
11. None of the excavations at issue were made entirely in stable rock, nor were they less than five feet in depth.
12. Gonzales was an employee of Gateway who suffered a serious injury within the meaning of the Labor Code and applicable regulations.
13. On November 6, 2009, at the time of the cave-in, Gonzalez was in the open trench and was not inside the trench shield. The sloping of the trench at this time was more vertical than one foot horizontal to one foot vertical. Gonzalez was partially buried by dirt when the bench wall collapsed.
14. On November 9, 2009, the trench shield was not being utilized. The sloping of the trench at this time was more vertical than one foot horizontal to one foot vertical. Robinson and D. Hall were standing on a pipe in the trench.
15. The proposed penalties are reasonable for all Citations/Items, as modified herein.

### **Analysis**

#### **1. Did Employer fail to provide a means of egress from a trench excavation so as to require no more than 25 feet of lateral travel for employees?**

Section 1541, subdivision (c)(2), under "Excavations, General Requirements," provides the following:

- (c) Access and egress.

(2) Means of egress from trench excavations.

A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet or more in depth so as to require no more than 25 feet of lateral travel for employees.

In the amended citation, the Division alleges the following:

On 11/09/09, at the Outfall Replacement Project (River Road), Chico, CA, on a construction site, the Division observed 2 employees in a trench excavation at a depth of 18 feet, slightly up stream and in close proximity in the same trench excavation where the cave-in occurred on 11/06/09, with no egress at 25 feet of lateral travel for the employees.

Associate Safety Engineer John Wendland (Wendland) testified that when he went to the work site on the afternoon of November 9, 2009, he observed foreman Robinson standing on the bell end of a pipe located in the trench, which he documented in a photograph (Exhibit 23). The photograph depicts Robinson standing in a portion of the trench excavation which was substantially more than four feet deep. Wendland estimated that Robinson would have had to walk approximately 60 feet to get out of the trench. The pipe on which Robinson was standing measured approximately 84 inches in interior diameter, and was in close proximity to the location of a cave-in incident which occurred on November 6, 2009. Robinson measured the trench depth at the cave-in location to be 18 feet.

Thus, because Robinson was required to walk 60 feet on the pipe to exit the trench, Employer did not provide a safe means of egress within 25 feet of lateral travel to protect its workers from the hazards associated with trench wall collapses. As such, the Division has met its burden of proof, and the violation is established.

**2. Did Employer fail to ensure that its worker not be permitted underneath loads handled by lifting or digging equipment?**

Section 1541, subdivision (e), under "Excavations, General Requirements," provides the following:

(e) Exposure to falling loads. No employee shall be permitted underneath loads handled by lifting or digging equipment. Employees shall be required to stand away from any vehicle being loaded or unloaded to avoid being struck by any spillage or falling materials. Operators may remain in the cabs of vehicles being

loaded or unloaded when the vehicles are equipped, in accordance with Section 1591(e), to provide adequate protection for the operator during loading and unloading operations.

In the citation, the Division alleges the following:

On 11/09/09, at the Outfall Replacement Project (River Road), Chico, CA, on a construction site, the Division observed an employee that was permitted to stand underneath a load handled by a Volvo excavator (digging equipment). The employee did not stand away from the excavator bucket while being unloaded to avoid being struck by any spillage or falling material.

On direct examination Wendland testified that when he went to the work site on the afternoon of November 9, 2009, he observed Robinson walking underneath the load of the bucket. By the time Wendland got his camera out to take a photograph, Robinson was already on the side of the bucket which was emptying out crushed rock (Exhibit 23). On cross examination Wendland appeared to change his testimony. When asked if Robinson was underneath the load, Wendland testified that Robinson was “within proximity of the load being dumped out of the bucket.” Wendland’s testimony on cross examination is given greater weight than his direct examination testimony as Exhibit 23 shows Robinson standing next to the bucket as the crushed rock is being emptied. In Exhibit 23 Robinson appears to be positioned so as to avoid being struck by any spillage or falling material. The Division failed to establish that Robinson was standing underneath the load, and failed to establish that Robinson was exposed to the hazard of being struck by spillage or falling material. As such, Employer’s appeal is granted.

**3. Did Employer fail to protect employees from loose rock or soil that could pose a hazard by falling or rolling from the excavation face?**

Section 1541, subdivision (j)(1), under “Excavations, General Requirements,” provides the following:

(j) Protection of employees from loose rock or soil.

(1) Adequate protection shall be provided to protect employees from loose rock or soil that could pose a hazard by falling or rolling from an excavation face. Such protection shall consist of scaling to remove loose material; installation of protective barricades at intervals as necessary on the face to stop and contain falling material; or other means that provide equivalent protection.

In the amended citation, the Division alleges the following:

On 11/09/09, at the Outfall Replacement Project (River Road), Chico, CA, on a construction site, the Division observed 2 employees slightly up stream and in close proximity in the same trench excavation where the cave-in occurred on 11/6/09 that were not provided with adequate protection to protect the employees from loose rock or soil that posed a hazard by falling or rolling from the excavation face. Such protection did not consist of scaling to remove loose material; installation of protection barricades at intervals necessary on the face to stop and contain falling material; or means that provide equivalent protection.

Wendland testified that on the afternoon of November 9, 2009, he observed that one side of the trench excavation was scaled more vertical than one foot horizontal to one foot vertical<sup>3</sup>, and that no protective barriers were in place. Wendland explained that the right side of the trench as depicted in Exhibit 24 had loose material which posed a risk; debris could fall off and strike a worker in the trench.<sup>4</sup>

Wendland testified that he observed both D. Hall and Robinson standing on a pipe in the trench at the location where one side of the trench had not been adequately scaled.<sup>5</sup> Wendland testified that D. Hall and Robinson were exposed to loose material from the right side, especially because of vibration from the equipment.<sup>6</sup> According to Wendland, D. Hall and Robinson were standing on top of a pipe with an inside diameter of 84 inches, in a portion of the trench which was approximately 16 and one-half to 17 feet deep. Wendland testified that there was a possibility that Robinson, while standing on the pipe, could have been stricken by loose debris coming off the slope of the trench wall, making him fall to the ground. Exhibit 23 is a photo of Robinson

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<sup>3</sup> One foot horizontal to one foot vertical (or, one foot sideways for every foot up) would result in a 45 degree slope.

<sup>4</sup> Exhibit 24 contrasts the scaled side of the trench on the left side of the photo, which appears to be smoothed-out, with the opposite side of the trench, which does not appear to have been smoothed-out.

<sup>5</sup> Wendland has worked in underground construction for many years, having worked in that field in the positions of laborer up to superintendent. Wendland has years of experience in classifying soil types and has taken classes on that subject. Wendland has worked for Cal/OSHA for over 10 years, and he is current on his Cal/OSHA-mandated training (Exhibit 36). As such, Wendland is deemed to be an expert in the field of underground construction, in areas including but not limited to, excavation operations and soil typing.

<sup>6</sup> The Division presented testimony that other workers had been in the bottom of the trench in this area installing pipe and grade checking, but failed to provide specificity as to the identity of these workers and where they were positioned in relation to the inadequately scaled trench wall.

standing on a pipe immediately adjacent to the excavator bucket which is being emptied into the trench. Because of the angle of the photo of the trench depicted in Exhibit 23, very little insight is revealed as to the extent of any employee exposure to the hazards presented by loose rock or soil falling or rolling from the excavation face. The angle of the photo of the trench in Exhibit 24 provides more clarity in regard to potential employee exposure.

In Exhibit 24 D. Hall is depicted standing near the precipice of the trench at a point below grade. To his right in the photo exists a portion of the excavation face Robinson identified as not having been adequately scaled. Immediately above at grade is a large excavator, the movements and vibrations of which possibly could have caused loose rock or soil to come in contact with D. Hall. The Division did not provide testimony regarding this scenario, but rather mainly concentrated on the two men standing on the pipe in the trench. The Division failed to establish, by a preponderance of the evidence, that either D. Hall or Robinson, while standing on the pipe, were exposed to the hazard of being struck by loose rock or soil from an inadequately scaled excavation face. As such, Employer's appeal is granted.

**4. Did Employer fail to ensure that its employees not work in excavations in which there was accumulated water, or in excavations in which water was accumulating, without taking adequate precautions to protect employees against the hazards posed by water accumulation?**

Section 1541, subdivision (h)(1), under "Excavations, General Requirements," provides the following:

- (h) Protection from hazards associated with water accumulation.
- (1) Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

In the amended citation, the Division alleges the following:

The Company violated this standard in the following 2 instances:

On 11/06/09, at the Outfall Replacement Project (River Road), Chico, CA, on a construction site, an employee was allowed to work in an excavation at a depth of 18 feet, where water was accumulating without the proper precautions necessary to protect the employee from cave-ins, to include a special support or trench shield or use of a safety harness and lifeline. The trench collapsed burying the employee causing a serious injury.

On 11/09/09, at the Outfall Replacement Project (River Road), Chico, CA, on a construction site, the Division observed two employees that were allowed to work in the same trench excavation where the cave-in occurred on 11/6/19, slightly upstream and in close proximity, with a depth of 18 feet, where water was accumulating without the proper precautions necessary to protect the employee from cave-ins, to include a special support or trench shield or use of a safety harness and lifeline.

Robinson testified that after the initial 200 feet downstream from the initiation of the 2,900 foot underground pipeline project, water intrusion started. Once the trench progressed past the first 200 feet water was in the trench the whole time. The trench depth started at the high end at approximately 15 feet and ended at a coffer dam<sup>7</sup> near the river where the trench depth was approximately 19 feet deep. Robinson explained that that they hit ground water at 15 feet which was freely seeping in to the trench. D. Hall testified that there was water in the bottom of the excavation of the levee trench section when it was excavated. J. Hall testified that water from the river was getting into the trench by passing through the rocks around the HDPE pipe, which resulted in water having to have been pumped out of the trench.

Robinson testified that the pump depicted in Exhibit 19 was used to pump the water out that was reaching the trench from the river. Wendland testified that when a submersible pump is used it means that there is freely seeping water, and that the purpose of the submersible pump is to control that seeping water. Wendland also testified that Robinson, the foreman, told him that his crew was always trying to pump the water out, trying to keep up with the seepage.<sup>8</sup> Gonzalez testified that at the time of his accident there was

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<sup>7</sup> The coffer dam is the barrier where the water arriving from the water treatment facility in reinforced concrete pipe (RCP) transitions to high density polyethylene pipe (HDPE) which drains into the river.

<sup>8</sup> The Appeals Board has determined that statements a foreman makes to a Division inspector during the course of an investigation normally are admissible over hearsay objection either under Evidence Code section 1222 as an authorized admission or under Evidence Code section 1224 as statements of a supervisor whose violation of a safety order may be imputed to the employer. (See *Dutchman Plastering, Inc.*, Cal/OSHA App. 90-594, Decision After

water in the trench about four inches deep running along the sides of the trench. Robinson testified that Gonzalez told him that the water was up to his ankles.<sup>9</sup> Jauregui, the excavator operator, testified that whenever they would dig, there would be some water on the surface, and that they would use some pumps to pump it out.

Water accumulated for the entire length of the project except for the initial 200 feet. Water intrusion, according to Wendland's testimony, makes the soil less stable, and makes the excavation more susceptible to cave-ins. The soil type at the location of the separate instances of November 6 and 9, 2009, according to Wendland, was type B soil over type C soil. In the November 6, 2009, instance the trench had benches and its slopes were more vertical than one foot horizontal to one foot high, proving a failure to protect against cave-ins.<sup>10</sup> In the November 9, 2009, instance the slopes of the trench wall were more vertical than one foot horizontal to one foot high, proving a failure to protect against cave-ins. Employer conceded that no trench shield was in use in the trench during the occurrence of either instance. Failure to adequately slope results in a failure to protect employees against cave-in risks associated with water accumulation.

In both instances, Employer failed to take adequate precautions to protect employees against the hazards posed by water accumulation. As such, the Division has met its burden of proof, and the violation is established in each instance.

**5. Did Employer fail to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivision (b) or (c)?**

Section 1541.1, subdivision (a)(1), under "Excavations, Requirements for Protective Systems," provides the following:

(a) Protection of employees in excavations.

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Reconsideration (Feb. 8, 1991).) Since such an admission would be admissible over objection in a civil action, it may, in an Appeals Board proceeding, support a finding of fact by itself. (See section 376.2.)

<sup>9</sup> The statement of Gonzalez to Wendland, although hearsay, was corroborated by Gonzalez, who testified that the water was up to his ankles.

<sup>10</sup> Evidence relating to the findings related to soil type, benching, shielding, and sloping is analyzed in Issue 6, below.

(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)<sup>11</sup> 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.

In the amended citation, the Division alleges the following:

On 11/06/09, at the Outfall Replacement Project (River Road), Chico, CA, on a construction site, an employee was allowed to work in an excavation at a depth of 18 feet, where water was accumulating without the proper precautions necessary to protect the employee from cave-ins. Employer did not follow either aspect of its drawn plan to include sloping/benching above a special support or trench shield or shoring (Ref. §§ 1541.1(b)(1), (b)(2), (b)(3), (b)(4), (c)(2), and (c)(4).) Nor did it use any other protective system designed in accordance with Section 1541.1(b) or (c). The trench collapsed burying the employee causing a serious injury. This is an accident related citation.

Wendland testified that J. Hall provided to Wendland a copy of its “Activity Notification for Holder of Annual Permits” (Exhibit 4). According to that document no soil testing was to be performed, and as such one and one-half feet horizontal to one foot vertical sloping was required.

Wendland testified that project manager J. Hall told him that Employer did not do soil testing and that they should have been sloping one and one-half

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<sup>11</sup> Section 1541.1, subdivision (b) addresses designs of sloping and benching configurations, and subdivision (c) addresses design of support and shield protective systems. Under subdivision (b), sloping /benching systems, there are four subcategories, which are: (1) [(b)(1)] is simply treating the soil as type C soil, and sloping/benching according to type C; (2) [(b)(2)] is determining which of A, B, or C soil are present by using Appendix A manual and visual tests, and then using one of the Appendix B samples, corresponding configurations for that soil type; (3) [(b)(3)] is selecting a sloping or benching system using tabulated data approved by a registered engineer; and (4) [(b)(4)] is using a sloping and benching system stamped and signed by a registered engineer. Subdivision (c) support and shield systems, also has four subcategories, which are: (1) [(c)(1)] is using Appendices A, C, and D; (2) [(c)(2)] is using manufacturer’s tabulated data; (3) [(c)(3)] is using other tabulated data; and (4) [(c)(4)] is using a design by a registered engineer.

to one<sup>12</sup>. Wendland tested the soil three days after the accident, at the location of the cave-in, by using a thumbprint test<sup>13</sup>, and found it to be type B closer to the top of the grade over C soil toward the bottom of the trench. Water accumulation was continuous in this portion of the trench, as explained in the analysis of Issue 4 above. Wendland also testified that because water was freely seeping into the trench at the time of the cave-in the soil was to be treated as type C soil, and as such, one and one-half feet horizontal to one foot vertical sloping was required (Exhibit 6, excerpt from Appendix B).

In neither type B over C soil, or type C soil, according to Wendland, benching is allowed. Robinson testified that there were 15 foot high benches<sup>14</sup> on either side of the trench. Gonzalez testified that the benches were six feet high. Neither of the benching heights as recalled during the testimony of Gonzalez and Robinson would satisfy the requirements of the regulations as both men testified that the benches were over four feet high. Benching is permitted in type A or B soil, but even in that case is not permitted over 4 feet high (Exhibit 6, Appendix B).

Wendland also testified that the sloping at the location of the trench was not sloped<sup>15</sup> one and one-half feet horizontal to one foot vertical. Wendland measured the trench to be 18 feet deep with a top grade measurement of 43 and one-half feet wide. Jauregui testified that the bottom of the trench was 11 feet wide. Such a configuration would require that the width of the trench at top of grade to be 65 feet in order to have a slope of one and one-half feet horizontal to one foot vertical. In fact, the sloping was more vertical than one foot horizontal to one foot vertical.<sup>16</sup> As such, the trench at issue was not sloped one and one-half feet horizontal to one foot vertical.

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<sup>12</sup> Although this statement of the project manager is hearsay, it is deemed admissible for the same reasons which are set forth in footnote 8 above.

<sup>13</sup> Wendland described the thumbprint test as follows: (1) grab some soil; (2) roll it in your hand a try to make a ball; (3) once you make a ball put your thumb in the ball; and (4) based on the cohesiveness of the soil (how much water moisture is in the soil), determine whether it will fall apart or if you can actually push down hard enough to see your thumbprint. More moisture in the soil will allow the soil ball to crumble easier, indicating a lack of cohesiveness in the soil.

<sup>14</sup> Section 1540, subdivision (b) defines “Benching” (Benching system) as follows: A method of protecting employees from cave-ins by excavating the sides of an excavation to form one or a series of horizontal levels or steps, usually with vertical or near-vertical surfaces between levels.

<sup>15</sup> Section 1540, subdivision (b), in relevant part, defines “Sloping” (Sloping system) as follows: A method of protecting employees from cave-ins by excavating to form sides of an excavation that are inclined away from the excavation so as to prevent cave-ins.

<sup>16</sup> A slope of one foot horizontal to one foot vertical would have required a trench width of 47 feet, a width greater than the actual width of 43 and one-half feet of the trench at issue.

Employer provided to the Division an engineered drawing which demonstrates how the trench shield<sup>17</sup> was to be utilized (upper right diagram on Exhibit 5). Both Robinson and Wendland testified that the shield which Employer provided was too small and that the employees were often times outside the trench shield when conducting their assigned tasks, which included grade checking and setting the pipes. Robinson testified that the trench shield in use at the time of the accident was 16 feet long, too short to accommodate the 24 foot long pipe. Robinson testified that a 28 foot long trench shield was required in order for the workers to be inside the trench shield so they can set each pipe while they and the pipe are inside the trench shield. Employer did not utilize a trench shield as described in the engineered drawing.

It is undisputed that Gonzales was checking the grade of the trench while outside the trench shield and while outside the previously installed pipe. Robinson testified that the trench shield was out of the trench and that Gonzalez was in the open trench at the time of the cave-in. Jauregui and Gonzalez testified that the trench shield was in the trench at the time of the cave-in but that Gonzalez was in an open area of the trench between the trench shield and the previously installed pipe. Jauregui testified that Gonzalez would run from the trench shield to the pipe because of the danger presented by possible cave-ins. Jauregui testified that the area marked "V" on Exhibit 11 is the location where the bench wall collapsed. It is not in dispute that, during the rescue operation, the trench shield was moved close to the location where Gonzalez was partially buried.

The sloping of the trench at this time was more vertical than one foot horizontal to one foot vertical, when type B over C soil requires that the slope be one and one-half feet horizontal to one foot vertical. The trench contained benches on each side which measured at least six feet high which are not allowed in type B over C soil.<sup>18</sup> Water was freely seeping into the trench at the time of the cave-in which required that the soil be treated as type C because of the water's effect on the stability of the soil. The bench wall collapsed as a result of these lapses, where Gonzalez sustained injuries when he was partially

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<sup>17</sup> Section 1540, subdivision (b), defines "Shield" (Shield system) as follows: A structure that is able to withstand the forces imposed on it by a cave-in and thereby protect employees within the structure. Shields can be permanent structures or can be designed to be portable and moved along as work progresses. Additionally, shields can be either premanufactured or job-built in accordance with Section 1541.1(c)(3) or (c)(4). Shields used in trenches are usually referred to as "trench boxes" or "trench shields."

<sup>18</sup> Such a configuration would not conform to the sloping requirements for type C or type B over C soil. (See the excerpt from section 1541.1, Appendix B, as shown on pages 1 and 2 of Exhibit 6.

buried by dirt. Because the trench shield was too small Gonzalez was in the open trench and was not inside the trench shield at the time of the cave-in.

Employer failed to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivision (b) or (c). The Division has met its burden of proof, and the violation is established.

**6. Did Employer, on November 9, 2009, fail to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivision (b) or (c)?**

Section 1541.1, subdivision (a)(1), and applicable law, are set forth in analysis section 5, *supra*.

In the amended citation, the Division alleges the following:

On 11/09/09, at the Outfall Replacement Project (River Road), Chico, CA, on a construction site, the Division observed two (2) employees working in the same trench excavation where the employee was injured in a cave-in on 11/6/09, slightly up stream and in close proximity, with a depth of 18 feet that were not protected from cave-ins by an adequate protective system designed in accordance with Section 1541.1(b) or (c). Employer had a drawn plan that was a combination of sloping/benching above a shield system, which it failed to follow in either aspect. (Ref. §§ 1541.1(b)(1), (b)(2), (b)(3), (b)(4), (c)(2), and (c)(4).) Nor did it use any other protective system. This is a serious willful citation.

The conditions in this portion of the trench, three days after the November 6, 2009, cave-in, were essentially the same as those discussed in the analysis of Issue 5 above. Robinson testified that one 24 foot pipe had been set on November 9, 2009, at the location where the cave-in occurred. This was an area which Wendland determined to have type B over C soil, which was downgraded to type C soil because of water intrusion. The benches had been removed, but the slope remained more vertical than one and one-half feet horizontal to one foot vertical (Exhibit 24). Water intrusion continued to be a problem, as pumps were required to help control the continuing accumulation of water at this location. Wendland testified that the trench shield was not being utilized when he observed Robinson and D. Hall standing on a pipe in the trench. Depicted in Exhibit 23 is Robinson standing on the bell end of the pipe. Again, Employer was not using the engineered plan as depicted on Exhibit 5.

Robinson and D. Hall were standing on a pipe in the trench, and as such, they too were in the trench. Neither was protected against cave-ins by the use of a trench shield in an area of the trench where the excavation wall had collapsed only three days prior. Appendix B (Exhibit 6) allows for two configurations in type C soil or type B over C layered soil: (1) use a trench shield, or (2) slope one and one-half feet horizontal to one foot vertical. Employer did not utilize either configuration.

Employer failed to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivision (b) or (c). As such, the Division has met its burden of proof, and the violation is established.

**7. Did the Division establish that the violations associated with Citations 4, 6, and 7 were serious?**

Labor Code section 6432, subdivision (a), under “Serious violation”; “Substantial probability,” provided the following:<sup>19</sup>

(a) As used in this part, a “serious violation” is deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a violation, including, but not limited to, circumstances where there is a substantial probability that either of the following could result in death or great bodily injury:

- (1) A serious exposure exceeding an established permissible exposure limit.
- (2) The existence of one or more practices, means, methods, operations, or processes which have been adopted or are in use, in the place of employment.

Under Labor Code section 6432, subdivision (b), a violation meeting the above criteria will nevertheless not be classified serious if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know the violation's presence.

Under Labor Code section 6432, subdivision (c), “substantial probability” refers not to the probability that an accident or exposure will occur as the result of the violation, but rather to the probability that death or serious

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<sup>19</sup> Section 6432 of the Labor Code was amended on January 1, 2011. All references to former Labor Code section 6432, then comprised of subdivisions (a), (b), and (c), will be addressed as the regulation was written at the time of the inspection and when the citations were issued.

physical harm will result assuming an accident or exposure occurs as a result of the violation.

Serious injury or harm, as defined under Labor Code section 6302, subdivision (h), includes any employment-related injury or illness that requires at least 24 hours of hospitalization for treatment (not observation) or that involves a loss of a member of the body or any serious degree of permanent disfigurement.

The “substantial probability” element at Labor Code section 6432, subdivision (b), is “the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation.” The Appeals Board has further interpreted that language to mean that the Division must prove that serious injury “more likely than not” will occur. (See *Abatti Farms/Produce*, Cal/OSHA App. 81-0256, Decision After Reconsideration (Oct. 4, 1985); and *Pacific Steel Casting Co.*, Cal/OSHA App. 79-1514, Decision After Reconsideration (Nov. 15, 1984.)

Citation 4, Instance 1, is analyzed in Issue 4 above. Employer knew that its employees were working in an excavation in which there was accumulated water. Employer failed to take adequate precautions to protect employees against the hazards associated with water accumulation. Wendland testified that the hazard associated with the violation is a cave-in and burial of an employee. Wendland testified that serious injury or death was more likely than not when employees were exposed on November 6, 2009. Wendland provided unrefuted testimony that he had conducted four prior cave-in investigations during his tenure at the Division, and all four of those cave-ins resulted in serious injuries to the workers. In this case the violation resulted in serious injury to Gonzalez within the meaning of the Labor Code and applicable regulations. As such the Division, by a preponderance of the evidence, established the serious classification of the violation.

Citation 4, Instance 2 is analyzed in Issue 4 above. The Division presented the same factors and conclusions of Wendland as the in the first instance above for the basis of the serious classification of the second instance. The second is distinguishable from the first instance in that the employee in the first instance was on the bottom of the trench during the cave-in event. In the second instance the employees were standing on an 84 inch interior diameter pipe in the trench. Although the Division established that the two workers were in the trench, it failed to present evidence sufficient to establish that a cave-in would result in serious injury to either exposed worker standing on an 84 inch interior diameter pipe in the trench on November 9, 2009.

Citation 6 is analyzed in Issue 5 above. The Division presented the same factors and conclusions of Wendland as in Citation 4, Instance 1, above for the basis of the serious classification of this violation, which are applied here. In this citation the walls of the excavation were not sloped at a minimum of one and one-half feet horizontal to one foot vertical to protect against cave-ins. An adequately-sized trench shield was not being utilized to protect employees from cave-ins. Water accumulation existed in the trench which increased the possibility of cave-ins. In this citation the violation resulted in serious injury to Gonzalez within the meaning of the Labor Code and applicable regulations. The Division, by a preponderance of the evidence, established the serious classification of the violation which occurred on November 6, 2009.

Citation 7 is analyzed in Issue 6 above. The Division presented the same factors and conclusions of Wendland as in Citation 6 above for the basis of the serious classification of this violation, which are applied here. In this citation the walls of the excavation were not sloped at a minimum of one and one-half feet horizontal to one foot vertical to protect against cave-ins. An adequately-sized trench shield was not being utilized to protect employees from cave-ins. Water accumulation existed in the trench. However, no one sustained any injury related to this violation. Citation 7 is distinguishable from the Citation 6 in that the employee in the Citation 6 was on the bottom of the trench during the cave-in event. In Citation 7 the employees were standing on an 84 inch inside diameter pipe in the trench. Although the Division established that the two workers were in the trench, it failed to present evidence sufficient to establish that a cave-in would result in serious injury to either exposed worker standing on the 84 inch interior diameter pipe in the trench on November 9, 2009. Thus, there is insufficient evidence to establish the serious classification of the violation.

**8. Did Employer present evidence sufficient to demonstrate that it did not, and could not with the exercise of reasonable diligence, know the presence of the violations in Citations 4 and 6?**

The Appeals Board has consistently held employers accountable for the acts and knowledge of their foremen. In *Greene and Hemly, Inc.*, Cal/OSHA App. 76-435, Decision After Reconsideration (April 7, 1978), the Board held that foreman's knowledge of a violative condition could be imputed to his employer even though upper management had no actual knowledge.

Whether foremen/supervisors know the condition is unlawful is immaterial, since ignorance of the specific safety order's mandates is no defense. (*McKee Electric Company*, Cal/OSHA App. 81-0001, Decision After

Reconsideration (May 29, 1981); and *Southwest Metals Company*, Cal/OSHA App. 80-068, Decision After Reconsideration (May 22, 1985).)

Failure to exercise supervision adequate to insure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (See *Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (March 9, 1990).) Reasonable diligence includes the obligation by foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists (See *A. A. Portanova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986), pp. 4-5.).

Employer, in its appeals of each of Citations 4 and 6, asserts that “Appellant had no actual knowledge, nor, with the exercise of reasonable diligence, could have known, of the existence of the violation.”

Robinson testified that he was responsible for worker safety at the site. Robinson was aware on a daily basis that his workers were being exposed to the hazard of cave-ins. Robinson testified that on a daily basis he advised D. Hall, Assistant Superintendent, that the trench shield was too small for the task at hand. Robinson also testified that when he advised D. Hall that a larger trench shield was needed, D. Hall responded as follows: “We’re using what we got.” D. Hall testified that he had no recollection of these conversations. Robinson’s testimony is credited as being more reliable as Robinson, throughout the hearing, appeared to have a good memory of the events of November, 2009, as D. Hall, during his testimony, often could not recall the events of that same time period. Furthermore, Robinson’s knowledge of the violative condition could be imputed to his employer even if upper management had no actual knowledge (See *Greene and Hemly, Inc. supra*).

In Citations 4 and 6, Robinson had actual knowledge that his workers were exposed to the hazards associated with cave-ins due to the fact that the trench shield was too small to protect the workers. Employer failed to exercise reasonable diligence when Robinson allowed workers, including himself, to enter the trench, fully knowing that the trench shield would not afford workers the needed protection. Robinson’s failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge (See *Stone Container Corporation, supra*, and *A. A. Portanova & Sons, Inc., supra*).

The Division did not need to establish that Robinson, as project foreman, knew that any of the conditions in Citations 4 and 6 was unlawful. Knowledge

by a foreman that a condition is unlawful is immaterial, since ignorance of a specific safety order's mandates is no defense (See *McKee Electric Company, supra*). Employer failed to present evidence sufficient to demonstrate that it did not, and could not with the exercise of reasonable diligence, have known the presence of the violations in Citations 4 and 6. As such, Employer failed to demonstrate that it did not, and could not, with the exercise of reasonable diligence, have known the violations which existed in Citations 4 and 6.<sup>20</sup> As such, Employer failed to meet its burden of proof, and the serious classifications of Citations 4 and 6 are sustained.

**9. Did the Division establish that Citations 4 and 6 were properly characterized as accident-related?**

In order for a citation to be classified as accident related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury". (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012) (writ denied, Dec. 5, 2014, 4th Dist. Ct of App.) citing *Obayashi Corp.*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).)

In regard to Citation 4, Instance 1: The record supports a finding that Employer failed to ensure that its employees not work in an excavation in which there was accumulated water and water accumulating, without taking adequate precautions to protect employees against the hazards posed by water accumulation. The record also supports a finding that if Employer had provided and properly utilized a trench shield of adequate size, or if Employer had adequately sloped the walls of the trench, Gonzalez would not have been partially buried by dirt when the excavation wall collapsed. The Division has met its burden to demonstrate the causal nexus between the violation of section 1541, subdivision (h)(1), and the serious injury sustained by Gonzalez. As such, the serious accident-related characterization of the serious violation is sustained.

In regard to Citation 6: The record supports a finding that Employer failed to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivision (b) or (c). The record also supports a finding that if Employer had provided and properly utilized a trench shield of adequate size, or if Employer had adequately sloped the walls of the trench, Gonzalez would not have been partially buried by dirt when the excavation wall collapsed.

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<sup>20</sup> Employer asserted a series of additional affirmative defenses for each citation on its appeal forms. Employer failed to present evidence to establish any of those other claimed affirmative defenses.

The Division has met its burden to demonstrate the causal nexus between the violation of section 1541.1, subdivision (a)(1), and the serious injury sustained by Gonzalez. As such, the serious accident-related characterization of the serious violation is sustained.

**10. Did the Division establish that Citations 6 and 7 were properly characterized as willful?**

Section 334, subdivision (e), provides the following:

Willful Violation - is 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 Division has two alternate means of proving the willfulness of an employer's conduct under section 334, subdivision (e). It could prove either (1) that the employer knew the provisions of the cited safety order and intentionally violated them ("intentionally violated a safety law"), or, (2) that the employer knew "that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition." (See *Rick's Electric, Inc. v. Occupational Safety & Health Appeals Bd.* (2000) 80 Cal.App.4<sup>th</sup> 1023, 1034, and *Mladen Buntich Construction Co.*, Cal/OSHA App. 85-1668 through 1670, Decision After Reconsideration (Oct. 14, 1987).)

Foreman Scott Robinson testified that he knew that the trench shield was too small to protect the workers from cave-ins in the trench. Robinson also testified that he had repeatedly asked for a larger trench shield from upper management and was told to use what he had at the site. Robinson continued to allow his crew to enter the trench, where they were not protected by a trench shield. Robinson and upper management knew that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

Despite being aware of the unsafe condition in the trench, Employer knowingly allowed employees to conduct work in the trench, without first making a reasonable effort to eliminate the condition. (See *Rick's Electric, Inc. v. Occupational Safety & Health Appeals Bd.*, *supra*). As such, the willful characterizations of Citations 6 and 7 are established.

## **11. Were the abatement requirements reasonable?**

In order to establish that abatement requirements are unreasonable an employer must show that abatement is not feasible, impractical, or unreasonably expensive. (See *The Daily Californian/Calgraphics*, Cal OSHA/App. 90-929, Decision After Reconsideration (Aug. 28, 1991).)

In *Paso Robles Public Schools*, Cal/OSHA App. 96-1722, Decision After Reconsideration, (Oct. 4, 2000), the Board upheld the ALJ's Decision that the regulations were clear and provided no exception. That Decision After Reconsideration held that the Division's abatement requirements were reasonable, that the ALJ had no authority to allow noncompliance with clear regulations, and that Employer had to apply to the Standards Board for a variance if there was to be an exception to the safety orders. Further, if Employer cannot successfully abate, it may seek a permanent variance from the Occupational Safety and Health Standards Board. (See, Labor Code section 143.)

Employer appealed contesting the reasonableness of abatement requirements. The cited regulations are clear and provide no exceptions. Here, the abatement requirements are clear: (1) Citation 1, Item 4, requires Employer to provide a means of egress from a trench excavation so as to require no more than 25 feet of lateral travel for employees; (2) Citation 4 requires Employer to take adequate precautions to protect employees against the hazards posed by water accumulation; and (3) Citations 6 and 7 both require Employer to protect each employee in an excavation from cave-ins by an adequate protective system. Employer failed to present evidence sufficient to establish that abatement of any of the citations was unfeasible, impractical, or unreasonably expensive. For the above reasons, it is found that requiring an employer to abate practices which can prevent workers from being buried by cave-ins at excavation sites to be reasonable.

## **12. Were the proposed penalties reasonable?**

At the hearing Employer stipulated that the penalty adjustment factors for good faith, size, and history, as shown on the amended Penalty Calculation Worksheet (Exhibit 3), were correctly calculated for each citation. As such, those adjustment factors for good faith (0%), size (0%), and history (10%), are found to be reasonable.

Section 335, subdivision (a)(1)(A), provides in relevant parts:

When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be

appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows: ... HIGH-- Requiring more than 24-hour hospitalization.

Section 335, subdivision (a)(2), provides in relevant parts:

When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as: ... HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

Section 335, subdivision (a)(3) provides in relevant parts:

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as: Low, Moderate or High

Section 336, subdivision (b), provides as follows: (1) the Base Penalty of a General Violation with a High Severity shall be set at \$2,000; (2) if the Extent is rated High, 25% of the Base Penalty shall be added; (3) if the Likelihood is rated as Medium, no adjustment shall be made. The resulting figure is called the Gravity-based penalty.

Section 336, subdivision (e)(1), provides the following:

Abatement Credit for General and Serious Violations - The Adjusted Penalty for General violations is reduced by 50% on the presumption that the employer will correct the violations by the abatement date. The resultant penalty is termed Proposed Penalty. Violations classified as "Repeat General" or "Willful General" are not subject to an abatement credit.

Section 336, subdivision (h), provides as follows:

Willful Violation - If a Regulatory, General, or Serious violation is determined to be willful (as provided under section 334(e) of this article) the Proposed Penalty is adjusted upward as follows:

Regulatory, General and Serious - the Proposed Penalty is multiplied by five. However, the penalty for any willful violation shall not be less than \$5,000 and shall not exceed \$70,000.

(1) Willful Violation Causing Death or Serious Injury, Illness or Exposure - The computation of the Proposed Penalty for a willful violation shall not be subject to reduction, other than the Size pursuant to part (1) of subsection (d) of this section, where the violation is determined by the Division to have caused death or serious injury, illness or exposure within the meaning of Labor Code section 6302.

Where a serious violation causes a serious injury, the only penalty reduction allowable is for size. (Labor Code section 6319, subdivision (d); section 336, subdivision (c)(3); *Dennis J. Amoroso Construction Co., Inc.*, Cal/OSHA App. 98-4256, Decision After Reconsideration (Dec. 20, 2001).)

Where two penalties address a hazard which can be eliminated by a single means of abatement, it is improper to impose two penalties (*Thyssenkrupp Elevator Corporation*, Cal/OSHA App. 11-2299, Denial of Petition for Reconsideration (March 11, 2013)).

In regard to Citation 1, Item 4: The proposed penalty was set a \$1,125. Wendland testified that Severity was set at High because if injured, and employee would spend more than 24 hours in the hospital for discomfort (Section 335, subdivision (a)(1)(A)). Extent was set as High because there was one worker exposed in one trench, making the area 100% in violation (Section 335, subdivision (a)(2)). Likelihood was set at Medium because Wendland determined that 2 to 3 employees were exposed to the lack of a ladder, the location of the worker and his route of travel, and based on his experience, the possible injuries the worker could sustain.

Because the Severity is High, the penalty starts at \$2,000; High Extent requires a 25% increase in that amount; Medium Likelihood required no further adjustment to the figure (Section 336, subdivision (b)). The resulting amount, \$2,500, becomes the Gravity Based Penalty. From the Gravity Based Penalty 10% is deducted for History, as stipulated by the parties, leaving an adjusted penalty of \$2,250. The penalty is further reduced by 50%, which results in a final proposed penalty of \$1,125 (Section 336, subdivision (e)(1)).

Employer offered no evidence to rebut Wendland's calculations. As such, the proposed penalty of \$1,125 is found to be reasonable.

In regard to Citation 4: The proposed penalty for the violation was set at \$18,000. Here, a serious violation caused a serious injury and Employer had over 100 employees. Hence, no reduction is available for size. (Labor Code section 6319, subdivision (d); section 336, subdivision (c)(3); *Dennis J. Amoroso Construction Co., Inc., supra*). The proposed penalty for the violation of section 1541, subdivision (h)(1), addresses the hazards associated with excavation cave-ins, and the protection of workers from such cave-ins. The penalty for the violation of section 1541, subdivision (h)(1), is eliminated as duplicative of the penalty imposed in Citation 6 for the violation of section 1541.1(a)(1). (See *Thyssenkrupp Elevator Corporation, supra*.)

In regard to Citation 6: The proposed penalty for the violation was set at \$70,000. Wendland testified that the penalty started at \$18,000 for severity, and that he rated extent and likelihood as medium. As such, the gravity-based penalty was set at \$18,000. Here, a serious violation caused a serious injury and Employer had over 100 employees. Hence, no reduction is available for size. (Labor Code section 6319, subdivision (d); section 336, subdivision (c)(3); *Dennis J. Amoroso Construction Co., Inc., supra*). The Division established the willful characterization of the violation. Section 336, subdivision (h), provides that the proposed penalty for a Willful Serious violation shall be adjusted upward by multiplying it by five, not to exceed \$70,000.<sup>21</sup> Employer offered no evidence to rebut Wendland's calculations. As such, the proposed penalty of \$70,000 is found to be reasonable.

In regard to Citation 7: The proposed penalty for the violation was set at \$70,000. The Division established a violation, but failed to establish the serious classification. In this instance, it is not necessary to calculate the penalty for a reclassified general violation, as any penalty for this violation of section 1541.1(a)(1), would address the hazards associated with excavation cave-ins, and the protection of workers from such cave-ins. The penalty for this violation of section 1541.1(a)(1), is eliminated as duplicative of the penalty imposed in Citation 6 for the violation of section 1541.1(a)(1). (See *Thyssenkrupp Elevator Corporation, supra*.)

### **Conclusions**

In Citation 1, Item 4, the evidence supports a finding that Employer violated section 1541, subdivision (c)(2), by failing to provide a means of egress

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<sup>21</sup> Multiplying the base penalty by five would result in a \$90,000 penalty, which exceeds the \$70,000 limit proscribed by the regulation.

from a trench excavation so as to require no more than 25 feet of lateral travel for employees. The general violation is sustained.

In Citation 2, the Division, by a preponderance of the evidence, failed to establish that Employer violated section 1541(e), by failing to ensure that its worker not be permitted underneath loads handled by lifting or digging equipment. The violation is dismissed, and the associated penalty is vacated.

In Citation 3, the Division, by a preponderance of the evidence, failed to establish that Employer violated section 1541, subdivision (j)(1), by failing to provide adequate protection to protect employees from loose rock or soil that could pose a hazard by falling or rolling from the excavation face. The violation is dismissed, and the associated penalty is vacated.

In Citation 4, the evidence supports a finding that Employer violated section 1541, subdivision (h)(1), by failing to ensure that its employees not work in excavations in which there was accumulated water, or in excavations in which water was accumulating, without taking adequate precautions to protect employees against the hazards posed by water accumulation. The serious accident-related violation is sustained.

In Citation 6, the evidence supports a finding that Employer violated section 1541.1, subdivision (a)(1), on November 6, 2009, by failing to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivision (b) or (c). The willful serious accident-related violation is sustained.

In Citation 7, the evidence supports a finding that Employer violated section 1541.1, subdivision (a)(1), on November 9, 2009, by failing to protect each employee in an excavation from cave-ins by an adequate protective system designed in accordance with section 1541.1, subdivision (b) or (c). A willful general violation is established.

### **ORDER**

It is hereby ordered that the citations are established as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: February \_\_\_\_, 2016  
KR:kav

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**KEVIN J. REEDY**  
**Administrative Law Judge**

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.

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.**

**APPENDIX A**  
**SUMMARY OF EVIDENTIARY RECORD**  
**GATEWAY PACIFIC CONTRACTORS INC**  
**DOCKETS 10-R2D3-1502 through 1508**

**Dates of Hearing: August 28 and 29, 2014, January 21 and 22, 2015,  
April 14 and 15, 2015, and June 23, 24, and 25, 2015**

**Division's Exhibits**

<b>Exh. No.</b>	<b>Exhibit Description</b>	
<b>1</b>	Jurisdictional documents	<b>ADMITTED</b>
<b>2</b>	Division's synopsis of amended citations 1.4, 3.1, 4.1, 6.1, and 7.1	<b>ADMITTED</b>
<b>3</b>	Original and Amended Proposed Penalty Worksheets	<b>ADMITTED</b>
<b>4</b>	DOSH Activity Notification Form for Holder of Annual Permits	<b>ADMITTED</b>
<b>5</b>	Project schematics	<b>ADMITTED</b>
<b>6</b>	Excavation sloping, shoring, and shielding data	<b>ADMITTED</b>
<b>7</b>	Diagram of trench at the site	<b>ADMITTED</b>
<b>8</b>	Documents relating to OSHAB Docket Nos. 03-R2D1-4546 through 4550	<b>ADMITTED</b>
<b>9</b>	BOI Report of Investigation, dated 3/4/04	<b>ADMITTED</b>
<b>10</b>	Superior Court of California, County of Placer, Stipulated Judgment, Case No. SCV-19617	<b>ADMITTED</b>
<b>11</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>

<b>12</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>13</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>14</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>15</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>16</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>17</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>18</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>19</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>20</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>21</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>22</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>23</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
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<b>26</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>27</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>28</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>29</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>30</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>31</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>32</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>33</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>

<b>34</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>35</b>	Photo of excavation/trenching operation	<b>ADMITTED</b>
<b>36</b>	DOSH letter, dated 7/8/14, confirming that District Manager John Wendland is current on his Division-mandated training	<b>ADMITTED</b>
<b>37</b>	Internet download from "roadplates.cm"	<b>ADMITTED</b>
<b>38</b>	DOSH Document Request Sheet	<b>ADMITTED</b>
<b>39</b>	Enloe Medical Center report regarding patient Felipe Gonzalez	<b>ADMITTED</b>
<b>40</b>	Photos of model of excavation site	<b>ADMITTED</b>
<b>41</b>	Inspector's notes, dated 6/12/09	<b>EXCLUDED</b>
<b>42</b>	Diagram of trench shield and pipe	<b>ADMITTED</b>
<b>43</b>	Sloping diagram	<b>ADMITTED</b>
<b>44</b>	Trench shield tabulated data forms	<b>ADMITTED</b>

**Employer's Exhibits**

No employer exhibits presented

**Witnesses Testifying at Hearing**

Scott Robinson  
Felipe de Jesus Gonzalez Ramirez  
Asuncion Jauregui  
John Wendland  
Gary McIver  
Delano Hall  
Jay Hall

**CERTIFICATION OF RECORDING**

*I, **Kevin J. Reedy**, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings.<sup>22</sup> To the best of my knowledge, the electronic recording equipment was functioning normally.*

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Signature

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Date

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<sup>22</sup> The Division had the hearing recording transcribed, and upon agreement of the parties, the parties were allowed to cite to the written transcript for the purpose of post-hearing briefing. Copies of the written transcript were provided by the Division to Employer and to the Appeals Board.

## SUMMARY TABLE

### DECISION

<i>In the Matter of the Appeal of:</i>  <b>GATEWAY PACIFIC CONTRACTORS INC</b> <b>DOCKETS 10-R2D3-1502 – 1508</b>						ABBREVIATION KEY:  Reg=Regulatory G=General S=Serious ER=Employer  DOSH=Division W=Willful R=Repeat				
IMIS No. 120200902										
DOCKET NO.	CIT. NO.	ITEM NO.	SECTION NO.	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
10-R2D3-1502	1	1	341.4	Reg	DOSH withdrew citation.		X	\$1,250	\$1,250	<b>\$0</b>
		2	341.1(h)(2)(B)	Reg	DOSH withdrew citation.		X	\$1,250	\$0	<b>\$0</b>
		3	1541(b)(1)(D)	G	DOSH withdrew citation.		X	\$1,125	\$0	<b>\$0</b>
		4	1541(c)(2)	G	ALJ affirmed violation.	X		\$1,125	\$1,125	<b>\$1,125</b>
10-R2D3-1503	2	1	1541(e)	S	ALJ vacated violation.		X	\$9,000	\$8,100	<b>\$0</b>
10-R2D3-1504	3	1	1541(j)(1)	S	ALJ vacated violation.		X	\$9,000	\$8,100	<b>\$0</b>
10-R2D3-1505	4	1	1541(h)(1)	S	ALJ affirmed violation.	X		\$18,000	\$18,000	<b>\$0</b>
10-R2D3-1506	5	1	1541.1(g)(2)	S	DOSH withdrew citation.		X	\$9,000	\$0	<b>\$0</b>
10-R2D3-1507	6	1	1541.1(a)(1)	SW	ALJ affirmed violation.	X		\$70,000	\$70,000	<b>\$70,000</b>
10-R2D3-1508	7	1	1541.1(a)(1)	SW	ALJ affirmed violation, as modified.	X		\$70,000	\$70,000	<b>\$0</b>
<b>TOTALS ON PAGE 2</b>										
<b>PAGE 1 OF 2</b>										

<b>SUMMARY TABLE</b> <b>PAGE 2 OF 2</b> <b>10-R2D3-1502 - 1508</b>										
					<b>Sub-Total</b>		\$189,750	\$176,575	<b>\$71,125</b>	
					<b>Total Due</b>				<b>\$71,125</b>	
NOTE: <i>Please do NOT send payments to the Appeals Board.</i> <b>All penalty payments must be made to:</b>					(INCLUDES APPEALED CITATIONS ONLY)					
Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142					*You will owe more than this amount if you did not appeal one or citations or items containing penalties. Please call (415) 703-4291 if you have questions					

**ALJ: KR**  
**POS: 02/25/16**