

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

INTERNATIONAL LINE BUILDERS, INC.
2520 Rubidoux Blvd
Riverside, CA 92509

Employer

DOCKET 15-R4D1-0498

DECISION

Statement of the Case

International Line Builders, Inc. (Employer) is a full service electrical distribution and transmission power line construction company. Beginning September 4, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Christian Nguyen (Nguyen), conducted a complaint inspection at a place of employment maintained by Employer on 1156 Hugo Reid Dr., Arcadia, CA 91007 (the site). On January 7, 2015, the Division cited Employer for one general violation for failing to ensure a retaining wall remained stable by installing a support system where employees were working in an adjacent excavation made below the footing of the retaining wall.¹

Employer filed a timely appeal contesting the existence of the alleged violation. Employer also pleaded numerous affirmative defenses.²

This matter came regularly for hearing before Christopher P. Merrill, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on April 19, 2016 and May 17, 2016. Robert D. Peterson, Attorney, of Peterson Law Corporation, represented Employer. Victor Copelan, District Manager, represented the

¹ Unless otherwise specified, all references are to California Code of Regulations, title 8.

² Except as otherwise noted in this Decision, Employer failed to present evidence in support of its pleaded affirmative defenses, and said defenses are therefore deemed waived. (See, e.g. *Central Coast Pipeline Construction Co., Inc*, Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980) [holding that the employer bears the burden of proving all of the elements of the Independent Employee Action Defense.]

Division. The undersigned, on its own motion, extended the submission date to June 18, 2016.

Issues

1. Did Employer violate section 1541, subdivision (i)(2)(A-C), by excavating below the level of the base or footing of any foundation or retaining wall that could reasonably be expected to pose a hazard to employees working inside the excavation?

Findings of Fact

1. On or about September 2, 2014, Employer engaged in construction excavation activities at the site in order to retrofit the infrastructure of an underground concrete encased vault containing power lines for Southern California Edison.
2. The wall adjacent to the excavation was a residential property concrete masonry unit block wall (CMU block wall), not a retaining wall.
3. The Division did not investigate when the CMU block wall was constructed, the existence of a footing, the nature of any footing, and did not determine the footing level or depth of any of the blocks in the CMU block wall adjacent to the excavation.
4. The Division did not demonstrate the CMU block wall adjacent to the excavation was built to code.
5. The Division did not provide credible evidence to demonstrate the CMU block wall adjacent to the excavation had a foundation.

Analysis

- 1. Did Employer violate section 1541, subdivision (i)(2)(A-C), by excavating below the level of the base or footing of any foundation or retaining wall that could reasonably be expected to pose a hazard to employees working inside the excavation?**

Section 1541, subdivision (i)(2)(A-C), found under Article 6 (Excavations) of Subchapter 4 (Construction Safety Orders) provides:

- (i) Stability of adjacent structures.
 - (2) Excavation below the level of the base or footing of any foundation or retaining wall that could be reasonably expected to pose a hazard to employees shall not be permitted except when:
 - (A) A support system, such as underpinning, is provided to ensure the safety of employees and the stability of the structure; or
 - (B) The excavation is in stable rock, or

(C) A registered professional engineer has approved the determination that such excavation work will not pose a hazard to employees.

In citing Employer, the Division alleged:

Prior to and during the course of the inspection including but not limited to, on September 4, 2014, employees were working inside an excavation where the excavation was made below the footing level of the adjacent [sic] retaining wall. The employer did not ensure that the retaining wall remained stable for the duration of work by installing a support system.

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, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.) Words within an administrative regulation are to be given their plain and commonsense meaning, and when the plain language of the regulation is clear, there is a presumption that the regulation means what it says. (*AC Transit*, Cal/OSHA App. 08-135, Decision After Reconsideration (June 12, 2013) (Internal citations omitted).)

In order to prove a violation, the Division has the burden of establishing that (1) Employer is subject to the Construction Safety Order (CSO)³, (2) the excavation is below the base or footing of any foundation or retaining wall; and, (3) such excavation could reasonably be expected to pose a hazard to employees working inside the excavation.

Here, the CSO on its face applies to construction activities in the form of excavation work near an adjacent structure.⁴ The Division presented testimony from David Halladay (Halladay), Employer's supervisor at the site

³ These Orders establish minimum safety standards whenever employment exists in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts. These Orders also apply to all excavations not covered by other safety orders for a specific industry or operation. (Cal. Code Regs., tit. 8, § 1502, subd. (a))

⁴ An "excavation" is defined as "any man-made cut, cavity, trench, depression in an earth surface, formed by earth removal." (Cal. Code Regs., tit. 8, § 1540, subd. (b))

on the day of inspection, regarding the scope of the work at the site.⁵ Employer did not dispute that it engaged in excavation work near an adjacent structure at the site. Employer is, therefore, subject to the CSO.

With regard to the second element, the parties disputed whether the excavation at the site was done below the base or footing of any retaining wall. During both direct and cross-examination Nguyen testified that although he characterized the wall adjacent to the excavation as a "retaining wall" in the Alleged Violation Description (AVD) contained in the citation (Exhibit 1) and the 1B Worksheet (Exhibit A), the wall adjacent to the excavation is not a retaining wall.⁶ Nguyen testified the wall adjacent to the excavation at the site is in fact a CMU block wall.⁷ Employer, therefore, did not excavate below the level of the base or footing of a retaining wall as alleged in the AVD.

Absent the presence of a retaining wall, the Division then bears the burden of demonstrating the excavation was below the level of the base or footing of any foundation. The Board has held it does "not assume facts that are not in evidence, or take official notice of an element of a violation on which the Division bears the burden of proof." (*California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009).)

In order to meet its burden, the Division must prove the CMU block wall at the site had a base or footing. The Division asserts that because CMU block walls, in general, have certain types of footings this falls within the plain meaning of the CSO and conclusively demonstrates the CMU block wall adjacent to this particular excavation had a footing. The Division's only evidence to support this position was Nguyen's conclusory testimony that despite the fact he mischaracterized the wall adjacent to the excavation as a retaining wall, he considered the alleged violation within the scope of the CSO because, in general, CMU block walls built to code in various surrounding municipalities have distinct types of footings which are usually one to two feet below the grade.⁸ This testimony is given little weight because the site of the

⁵ Halladay testified Employer was retrofitting and removing underground infrastructure for Southern California Edison. The preliminary work consisted of the excavation of the ground above concrete encased power lines by various methods. The CMU block wall was adjacent to the excavation.

⁶ The AVD in the citation (Exhibit 1 pg. 5) and the Division's 1B Worksheet (Exhibit A pgs. 1, 2) specifically state numerous times the excavation was made below the footing level of the adjacent retaining wall.

⁷ Nguyen testified he has worked for Cal/OSHA since 2000, earned a Bachelor in Science degree in construction engineering and management, has received and is current on all Division required training. Nguyen, however, is not a California Registered Professional Engineer.

⁸ Nguyen testified on general CMU block wall standards (Exhibit 8), City of Beverly Hills 6" Concrete Masonry Block Fence Wall Detail (Exhibit 9), City of Cypress Minimum Requirements for 6" Block Wall (Exhibit 10), and City of Pasadena 6" Concrete Masonry Block Wall Detail.

inspection took place in Arcadia, California, and the Division provided no credible evidence to suggest the CMU block wall in question had similar attributes to the general CMU block wall guidelines Nguyen testified to. The Division, therefore, presented no credible evidence with respect to the base or footing of the CMU block wall at the site.

Employer did not present any direct testimony to contradict the Division's position on general CMU block wall footing requirements or footing levels. Employer did, however, cross-examine Nguyen on his familiarity with the footing of the CMU block wall adjacent to the excavation at the site. Nguyen testified he first saw the excavation on September 4, 2014, which was after the trench box was in place. Nguyen, therefore, could not see if the CMU block wall at the site had a footing without taking further investigative steps. Nguyen testified he did not investigate to determine when the CMU block wall was constructed and did not talk to the owner of the residential property about whether or not the CMU block wall at the site had a footing. Nguyen admitted he took no investigatory steps to determine the existence of, the nature of, or the level of any footing in the CMU block wall adjacent to the excavation at the site. Nguyen's basis for the citation assumed the existence and level of the footing in the CMU block wall at site mirrored his understanding of the general requirements for CMU block walls. The Division's evidence, therefore, is not credible to support a finding that the CMU block wall at the site had a footing; or, alternatively, if a footing existed, what the footing level might be.

The Division also bears the responsibility of demonstrating the CMU block wall at the site had a foundation. When asked during cross-examination if the CMU block wall was a foundation, Nguyen testified the CMU block wall did not have anything on top of it and it was just a block wall. On redirect, Nguyen testified in general terms that a wall would have a foundation as the main load distributor. Nguyen further testified on redirect that in general if a non-load bearing wall was constructed to code it would have a foundation. The Division, however, did not present any credible evidence regarding the existence of a foundation or the code compliance of the CMU block wall at the site. Nguyen's testimony regarding the general nature of wall foundation built to code cannot be assumed to conclusively demonstrate the CMU block wall at the site mirrored general code mandated requirements for CMU block walls. Therefore, the Division did not demonstrate the CMU block wall at the site had a foundation.

For the foregoing reasons, the Division failed to establish a violation of section 1541, subdivision (i)(2)(A-C) by a preponderance of the evidence.⁹

⁹ The Division did not meet its burden of proof for the second element of the CSO. Therefore, any discussion of the reasonable expectation of a hazard posed to employees working in the excavation is intentionally omitted.

Conclusion

Employer's appeal from Citation 1, item 1, is granted. The Division did not establish the existence of the violation alleged in Citation 1, Item 1 by a preponderance of the evidence.

Order

It is hereby ordered that Citation 1, Item 1 is vacated.

Dated: July 12, 2016
CPM:lgf


CHRISTOPHER P. MERRILL
—Administrative Law Judge

APPENDIX A
SUMMARY OF EVIDENTIARY RECORD
INTERNATIONAL LINE BUILDERS INC.
Docket 14-R3D2-3707

Date of Hearings: April 19 and May 17, 2016

Division's Exhibits

Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Division's C-10 Proposed Penalty Worksheet	Yes
3	Photographs depicting the site	Yes
4	Photographs depicting the site	Yes
5	Photographs depicting the site	Yes
6	Photograph depicting Mr. Guzman at the site	Yes
7	Photograph taken by neighbor depicting the site	No
8	Building in California Information Bulletin: Standard CMU Block Wall Detail Sheet	Yes
9	City of Beverly Hills 6" Concrete Masonry Block Fence Wall Detail Sheet	Yes
10	City of Cypress Department of Building and Safety Minimum Requirements for 6" Block Wall Sheet	Yes
11	City of Pasadena 6" Concrete Block Masonry Wall Detail Sheet	Yes
12	Document Request Sheet	Yes
13	Copy of Foreman Victor Lucatero's business card	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Division's 1B Worksheet	Yes

Witnesses Testifying at Hearing

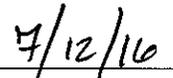
1. Jesus Leon
2. David Hallady
3. Christian Nguyen
4. Joaquin Guzman

CERTIFICATION OF RECORDING

I, CHRISTOPHER P. MERRILL, 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. To the best of my knowledge, the electronic recording equipment was functioning normally.



CHRISTOPHER P. MERRILL



Date

**SUMMARY TABLE
DECISION**

In the Matter of the Appeal of:

**INTERNATIONAL LINE BUILDERS, INC.
DOCKET 15-R4D1-0498**

IMIS No. 126160753

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

DOCKET	CITATION	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIDAVIT	PENALTY PROPOSED BY DOSH AT HEARING	PENALTY PROPOSED BY DOSH IN CITATION	FINAL PENALTY ASSESSED BY BOARD
15-R4D1-0498	11	1541(j)(2)(A-C)	G	ALJ granted appeal	X	\$810	\$810	\$0
Sub-Total						\$810	\$810	\$0
Total Amount Due*						\$810	\$810	\$0

(INCLUDES APPEALED CITATIONS ONLY)

*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.

NOTE: Please do not send payments to the Appeals Board.

All penalty payments should be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

**ALJ: CPM/Igf
POS 07/12/16**

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, 100 North Barranca Street, Suite 410, West Covina, California, 91791.

On July 12, 2016, 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 West Covina, 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:

ROBERT D. PETERSON, Esq.
PETERSON LAW CORPORATION
3300 Sunset Blvd., Suite 110
Rocklin, CA 95677

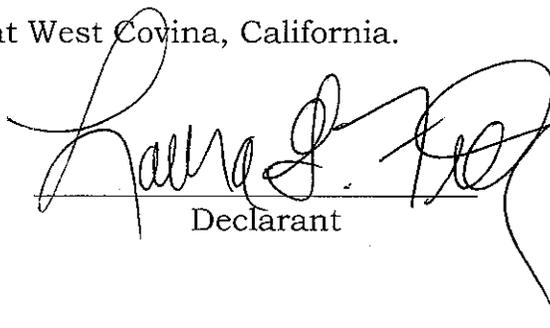
District Manager
DOSH - Los Angeles
320 West Fourth Street, Suite 670
Los Angeles, CA 90013

DOSH LEGAL UNIT
SAN FRANCISCO
ATTN: Amy Martin, Chief Counsel
1515 Clay Street, 19th Floor
Oakland, CA 94612

DOSH LEGAL UNIT
LOS ANGELES
320 West Fourth Street, Suite 400
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 12, 2016 at West Covina, California.


Declarant