

Underground Facilities Safe Excavation Board

*In the Matter of
Kleven Construction, Respondent*

No. 20SA1035

September 14, 2020

DECISION

This decision was made by the Board on September 14, 2020.

Respondent Kleven Construction provided a written response to the Notice of Probable Violation.

Board members Bianchini, Del Toro, Forte, Johns, Munoz, and Voss participated in the decision. Board members Charland and Johnson did not participate in the decision.

Having considered the report of investigation, the evidence presented, and argument presented by Kleven Construction, the Board finds that probable violations of Government Code sections 4216.3(b) (digging without field marks) and 4216.4(a)(1) (use of power tools in the tolerance zone) occurred.

The Board finds that an order directing Kleven Construction to take the Board's education course is an appropriate sanction.

The Board will transmit the investigation results and the recommended penalty to the Contractors State License Board.

Kleven Excavated in the Absence of Field Marks

Once "field marks are no longer reasonably visible," the excavator must stop digging in the area.¹ The asphalt with field marks identifying the line were removed before Kleven damaged the line by boring.

¹ Gov. Code § 4216.3(b)

Kleven Used Power Tools in the Tolerance Zone Before Locating the Installation

An “excavator shall determine the exact location of the subsurface installations in conflict with the excavation using hand tools before using any power-driven excavation or boring equipment within the tolerance zone of the subsurface installations.”²

The tolerance zone of an installation is defined to be “24 inches on each side of the field marking placed by the operator in one of the following ways:

- (1) Twenty-four inches from each side of a single marking, assumed to be the centerline of the subsurface installation.
- (2) Twenty-four inches plus one-half the specified size on each side of a single marking with the size of installation specified.
- (3) Twenty-four inches from each outside marking that graphically shows the width of the outside surface of the subsurface installation on a horizontal plane.”³

The definition of “tolerance zone” does not define or limit the dimensions of the tolerance zone based on depth.

The Board finds that Kleven struck the line while boring. And Kleven admitted that it struck the line with a backhoe while attempting to locate the line.

Referral to the Contractors State License Board is Appropriate

When the Board finds a probable violation of Dig Safe laws, the Board may “transmit the investigation results and any recommended penalty” to the appropriate agency, identified in Government Code section 4216.6(c) or (d).⁴ Section 4216.6(c)(1) provides that the Registrar of Contractors of the Contractors State License Board shall enforce the requirements of Article 2 (commencing with section 4216) on contractors.

“Contractor” is defined by the Business & Professions Code, in section 7026, as one who “does himself or herself or by or through others, construct, alter, repair, add to ... improve ... or demolish any ... project, development or improvement...” And Business and Professions Code section 7011.4(a) makes the Contractors State

² Gov. Code § 4216.4(a)(1)

³ Gov. Code § 4216(u)

⁴ Gov. Code § 4216.19(d)

License Board responsible for enforcing statutes applicable to contractors, including unlicensed persons acting as contractors.⁵

In boring and using the backhoe Kleven Construction acted as a contractor constructing, altering, or repairing the project.

An Order to Take the Board’s Education Course is Appropriate

Section 4216.19(e) provides that sanctions shall be graduated and may include notification and information letters, direction to attend relevant education, and financial penalties. And further, that this information is relevant to the sanction determination:

- (1) The type of violation and gravity.
- (2) The degree of culpability.
- (3) The operator’s or excavator’s history of work conducted without violation.
- (4) The operator’s or excavator’s history of work conducted without violations.
- (5) The efforts taken by the violator to prevent violation and, once the violation occurred, the efforts taken to mitigate the safety consequences of the violation.

Kleven’s response to the Notice of Probable Violation indicates a misunderstanding of the rules regarding use of power tools in the tolerance zone. The Board finds that an order directing Kleven to take the Board’s education course is appropriate.

Date:

Carl Voss, Chair

⁵ For example, Bus. & Prof. Code § 7028, acting as a contractor without a license; § 7028.17, compliance by unlicensed person with CSLB decision; § 7030.1, disclosure of suspended or revoked license