

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

DAVIDSON ENTERPRISES, INC.
3223 Brittan Street
Bakersfield, CA 93308

Employer

DOCKETS 14-R4D7-3738
through 3743

DECISION

Statement of the Case

Davidson Enterprises, Inc. builds and repairs mobile tanks. Beginning May 16, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Gregory Clark conducted an inspection at a place of employment maintained by Employer at 3223 Brittan Street, Bakersfield, California (the site). On October 20, 2014, the Division issued Employer citations¹ for lack of high-heat procedures², lack of an adequate guard on a bench grinder wheel³, lack of grounding prongs on electrical cord plugs⁴, lack of an adequate respiratory protection program⁵, lack of evaluations of whether a space was a permit-required confined space⁶, lack of a written permit-required confined space program⁷, lack of means, procedures, or practices necessary for safe access to permit-required confined spaces⁸, lack of adequate entry permits for permit-required confined spaces⁹, and lack of training for employees entering permit-required confined spaces¹⁰.

¹ Unless otherwise specified, all section references are to California Code of Regulations, title 8. The Division issued six citations, alleging nine violations.

² Citation 1, Item 1—§ 3395, subdivision (f)(3), General

³ Citation 1, Item 2—§ 3577, subdivision (b), General

⁴ Citation 1, Item 3—§ 2395.23, subdivision (a), General

⁵ Citation 1, Item 4—§ 5144, subdivision (c)(1), General

⁶ Citation 2—§ 5157, subdivision (c)(1), Serious

⁷ Citation 3—§ 5157, subdivision (c)(4), Serious

⁸ Citation 4—§ 5157, subdivision (d)(1), Serious

⁹ Citation 5—§ 5157, subdivision (f), Serious

¹⁰ Citation 6—§ 5157, subdivision (g)(1), Serious

Employer filed timely appeals contesting the existence of the alleged violations, their classifications, and the reasonableness of the proposed penalties. Employer alleged multiple affirmative defenses.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Bakersfield, California on March 10, 2015 and April 15, 2015. Daniel K. Klingenberger, Attorney, of LeBeau Thelen LLP represented Employer. David Pies, Staff Counsel, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on April 15, 2015. The ALJ extended the submission date to July 21, 2015.

Issues

1. Is Employer in the construction industry?
2. Was the wheel of Employer's bench grinder guarded?
3. Was an electrical extension cord missing a grounding pin?
4. Was the proposed penalty for the violation of section 2395.23, subdivision (a) reasonable?
5. Was Employer required to have a written respiratory protection program?
6. Did Employer evaluate truck-based metal tanks for the purpose of determining whether the tanks were permit-required confined spaces (PRCS)?
7. Did Employer decide that its employees would enter tanks classified as PRCS?
8. Did Employer develop and implement all the means, procedures, and practices necessary for safe PRCS entry operations?
9. Was Employer required to have an entry permit for PRCS?
10. Was Employer required to train employees who entered PRCS?

Findings of Fact

1. Employer's employees worked outside. Employer had a written Heat Illness Prevention Program (HIPP). Employer's HIPP did not include high-heat procedures.
2. Employer fabricated and repaired mobile metal tanks. The tanks were not fixed structures or attached to fixed structures.
3. Employer had a stationary bench grinder at the site. The wheel of the bench grinder did not have a hood or safety guard. Part of the work rest was missing.
4. One of Employer's electrical cord plugs for an extension cord did not have a grounding prong attached.
5. Employer did not require use of respirators.
6. One of employer's employees voluntarily wore a dust mask while performing duties for Employer.

7. Employer did not have a written respiratory protection program that included all the elements required by section 5144, subdivision (c).
8. Employer had metal tanks at the site that were large enough for an employee to enter, had limited means for entry and exit, and were not designed for continuous employee occupancy.
9. When a tank arrived at the site, Employer did not immediately classify it as a non-permit required confined space before testing the tank.
10. Employer tested all tanks to determine oxygen levels, internal temperature, and flammable gas levels before any employees entered a tank.
11. Employer evaluated all tanks to determine if they were PRCS before any employee would enter the tank.
12. When Employer determined that any tank was a PRCS, no employee entered the tank. Employer cleaned out the tank so that it was not a PRCS before any employee entered that tank.
13. No employee conducted PRCS entry operations.

Analysis

1. Is Employer in the construction industry?

Employer argued that it was not required to have high heat provisions in its HIPPP because it was not in the construction industry.

The Division cited Employer for a violation of section 3395, subdivision (f)(3)¹¹, Heat Illness Prevention, the relevant portions of which provide as follows:

(f) Training.

(3) The employer's procedures for complying with each requirement of this standard required by subsections (f)(1)(B), (G), (H), and (I) shall be in writing

Section 3395, subdivision (f)(1)(B) refers to "[t]he employer's procedures for complying with the requirements of this standard."

Section 3395, subdivision (e), provides as follows:

(e) High-heat procedures. The employer shall implement high-heat procedures when the temperature equals or exceeds 95 degree Fahrenheit. These procedures shall include the following to the extent practicable:

¹¹ This is the safety order in effect at all relevant times. Section 3395 was subsequently amended effective May 1, 2015.

- (1) Ensuring that effective communications by voice, observation, or electronic means is maintained so that employees at the work site can contact a supervisor when necessary. An electronic device, such as a cell phone or text messaging device, may be used for this purpose only if reception in the area is reliable.
- (2) Observing employees for alertness and signs of symptoms of heat illness.
- (3) Reminding employees throughout the work shift to drink plenty of water.
- (4) Close supervision of a new employee by a supervisor or designee for the first 14 days of the employee's employment by the employer, unless the employee indicates at the time of hire that he or she has been doing similar outdoor work for at least 10 of the past 30 days for 4 or more hours per day.

Section 3395, subdivision (a), provides as follows:

(a) Scope and Application.

- (1) This standard applies to all outdoor places of employment. Exception: If an industry is not listed in subsection (a)(2), employers in that industry are not required to comply with subsection (e), High-heat procedures.
- (2) List of industries subject to all provisions of this standard, including subsection (e):
 - (A) ...
 - (B) Construction

Section 1502, subdivision (a) defines the scope of Construction Safety Orders (CSOs) as including "construction, alteration, painting, repairing, maintenance, renovation, removal, or wrecking any fixed structure or its parts."

"Structure" is defined in section 1504 as: "That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner."

The alleged violation description reads as follows:

On or about May 16, 2014, the Division initiated an inspection. The Division determined that the employer's Heat Illness Prevention Program did not contain high-heat procedures as required by the

standard. Missing procedures included, but are not limited to: 1) Defining high-heat procedures when the temperature equals or exceeds 95 degrees Fahrenheit, 2) Observing employees for alertness during high heat conditions, and 3) Reminding employees throughout the work shift to drink plenty of water during high-heat conditions.

The Division has the burden to prove a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Travenol Laboratories, Hyland Division*, Cal/OSHA App. 76-1073, Decision After Reconsideration (Oct. 16, 1980) at pp. 2-3; *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

California Code of Regulations, Title 8, Division 1, Chapter 4, Subchapter 4 contains the Construction Safety Orders (CSOs), which were implemented long before 2010 when section 3395, subdivision (a)(2)(B) was passed¹². The Courts presume that the Legislature is aware of existing and related laws when enacting a statute and intend to maintain a consistent body of rules. (*Stone Street Capital, LLC v. California State Lottery Com'n* (2008) 165 Cal.App. 4th 109, 118.) Thus, the term “construction industry” in section 3395 presumably has the meaning given in the CSOs.

In this case, employees worked on, repaired and fabricated mobile tanks. The tanks carried liquids and were hauled by truck¹³. The tanks were composed of parts joined together in a definite manner, so they fell within the definition of “structure.” However, they were not fixed structures and they were not attached to fixed structures. Thus, work performed on them was not construction.

It was the Division’s burden of proof to show that Employer was engaged in the construction industry. Because the structures on which Employer worked were not fixed structures, the Division did not meet its burden of proof.

Therefore, employer’s appeal of Citation 1, Item 1, is granted, and the penalty is set aside.

2. Was the wheel of Employer’s bench grinder guarded?

The Division cited Employer for a violation of section 3577, subdivision (b), which provides as follows:

¹² California construction safety orders date back to 1945.

¹³ Exhibits 2a, 2b, 4

(b) Abrasive wheels shall be provided with protection hoods or safety guards which shall be of such design and construction as to effectively protect the employee from flying fragments of a bursting wheel insofar as the operation will permit.

The alleged violation description reads as follows:

On or about May 16, 2014, the Division initiated an inspection. The inspection determined that within the tank repair area a stationary bench grinder was present and the grinder did not have the required safety guarding.

In order to establish the violation, the Division must prove that 1) employees used a stationary bench grinder and 2) the grinder did not have the required safety guarding.

Associate Safety Engineer Gregory Clark (Clark) observed a stationary bench grinder at the site and took photographs¹⁴. The bench grinder was in the tank repair area. Clark saw employees working in the area, but he did not see any employees using the grinder. The work rest on the bottom was missing. The wheel guard on the left was so high that if the wheel exploded, it would not protect an operator from flying fragments of a bursting wheel. The right side did not have any guard on the wheel.

In order to establish a violation, employee exposure¹⁵ to a hazard must be established.

Although the grinder showed evidence of use, the record was void of evidence showing that it was used while in the condition Clark observed. While a site may have a hazard, there is no violation if there is no employee exposure.

Therefore, no violation of section 3577, subdivision (b), was established. Employer's appeal of Citation 1, Item 2 is granted, and the penalty is set aside.

¹⁴ Exhibits 8 and 9

¹⁵ The Division may establish employee exposure to a violative condition by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger. The "zone of danger" is "that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).)

5. Was an electrical extension cord missing a grounding pin?

The Division cited Employer for a violation of section 2395.23, subdivision (a), which provides as follows:

For a grounded system, a grounding electrode conductor shall be used to connect both the equipment grounding conductor and the grounded circuit conductor to the grounding electrode. Both the equipment grounding conductor and the grounding electrode conductor shall be connected to the grounded circuit conductor on the supply side of the service disconnecting means, or on the supply side of the system disconnecting means or overcurrent devices if the system is separately derived.

The alleged violation description reads as follows:

On or about May 16, 2014 the Division initiated an inspection. The inspection determined two electrical extension cords in building MFG2 were missing grounding pins.

To establish a violation, the Division must prove 1) Employer had an electrical cord and 2) the plug to the electrical cord was missing a grounding pin.

During his inspection inside building MFG 2, Clark saw an electrical cord plugged in to an electrical outlet. He did not remember which machine the cord was attached to. When he removed the plug, he found that it did not have a grounding pin attached. At another location, he found a broken off grounding pin in an electrical outlet box for four plugs and a second electrical cord plug missing a grounding pin. He took photographs of the plug and the grounding pin¹⁶.

Employer did not rebut his testimony.

Therefore, the Division established a general¹⁷ violation of section 2395.23, subdivision (a) by a preponderance of the evidence.

¹⁶ Exhibits 10 and 11

¹⁷ A violation is classified as general when the violation has a relationship to occupational safety and health of employees. *California Dairies, Inc.*, Cal/OSHA App. 07-2080, Denial of Decision After Reconsideration (June 25, 2009), citing *A. Teichert & Sons, Inc.* Cal/OSHA App.

6. Was the proposed penalty for the violation of section 2395.23, subdivision (a), reasonable?

Labor Code section 6319, subdivision (c), sets forth the factors which the Director of the Department of Industrial Relations must include when promulgating penalty regulations: size of the employer, good faith, gravity of the violation, and history of any previous violations. (§§ 333-336) Penalties proposed in accordance with the penalty setting regulations promulgated by the Director of the Department of Industrial Relations are presumptively reasonable and will not be reduced absent evidence that the proposed penalty was miscalculated, the regulations were improperly applied or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (May 27, 2006).)

If the Division introduces the proposed penalty worksheet and testifies that the calculations were completed in accordance with the appropriate regulations and procedures, it has met its burden to show the penalties were calculated correctly, absent rebuttal by the Employer. (*M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014).)

Where the Division does not provide evidence to support its proposed penalty, an employer must be given the maximum credits and adjustments allowable. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); *RII Plastering, Inc.*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).)

Here, the Division introduced the Proposed Penalty Worksheet, and it was admitted as Exhibit 18. Clark testified that he calculated the penalty in accordance with the Division's policies and procedures. He rated severity and extent as high and likelihood as medium. He applied penalty adjustment factors of zero for good faith, 30% for size, and 10% for good history. The adjusted penalty of \$1,500 was reduced 50% by application of the abatement credit, resulting in a proposed penalty of \$750.

Clark testified that he rated severity as high due to the potential for shock or electrocution. If there is a fault in the equipment, electrical energy builds up, and will find a place to dissipate. Without the grounding ping, the electricity is likely to go through a human body to ground. He rated extent as high because out of the three plug-ins present, two of them had missing grounding pins. He rated likelihood as medium based upon his experience.

97-2733 (Dec. 11, 1998). The purpose of a grounding pin is to prevent electrical shock or electrocution by causing electricity to go to ground in the event of an electrical surge. This relates to employee safety.

Clark further testified that he allowed a 10% penalty adjustment for good history and a 30% penalty adjustment due to Employer's size. Clark rated good faith as zero. Clark did not explain why he rated good faith as zero.

Since the Division introduced the proposed penalty worksheet, Clark testified that the calculations were completed in accordance with the appropriate regulations and procedures, and Employer did not offer rebuttal, the Division met its burden to show that the penalty was calculated correctly except for the rating for good faith. Since the Division did not present evidence regarding the calculation for good faith, good faith must be given the maximum credit of 30%.

Therefore, the proposed penalty of \$750 is not found reasonable. Recalculating the penalty with a 30% credit for good faith results in a penalty of \$375, which is found reasonable.

7. Was Employer required to have a written respiratory protection program?

The Division cited Employer for a violation of section 5144, subdivision (c)(1), which provides as follows:

(c) This subsection requires the employer to develop and implement a written respiratory protection program with required worksite specific procedures and elements for required respirator use. The program must be administered by a suitably trained program administrator. In addition, certain program elements may be required for voluntary use to prevent potential hazards associated with the use of a respirator.

(1) In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with worksite-specific procedures. The program shall be updated as necessary to reflect those changes in workplace conditions that affect respirator use. The employer shall include in the program the following provisions, as applicable:

- (A) Procedures for selecting respirators...
- (B) Medical evaluations...

- (C) Fit testing procedures...
- (D) Procedures for proper use...
- (E) Procedures and schedules for cleaning...
- (F) Procedures to ensure adequate air quality...
- (G) Training of employees in respiratory hazards...
- (H) Training of employees in proper use...
- (I) Procedures for regularly evaluating...

...

The alleged violation description reads as follows:

On or about May 16, 2014, the Division instituted an inspection. The inspection determined that employees were using respirators on-site and the employer did not have a written respiratory protection program or worksite-specific procedures for respirator use.

To establish the violation, the Division's burden included proving the threshold issue of whether respirators were either necessary or required to protect the health of the employees¹⁸.

Employer's General Manager and part owner Robert Davidson (Davidson) and Repair Department Supervisor Philip Krise testified that use of dust masks was voluntary. Associate Safety Engineer Gregory Clark (Clark) testified that a laborer, Brandon Bristol (Bristol), told him that he was told to use a dust mask. Employer's direct evidence outweighs the Division's weaker hearsay evidence.¹⁹ Further, the Division's evidence is viewed with distrust because the Division chose to rely on weaker, less satisfactory evidence when it could have called Bristol to testify²⁰. It cannot be found that Employer required respirator use²¹.

¹⁸ Voluntary use of respirators is covered in section 5144, subdivision (c)(2), which provides as follows: In addition, the employer must establish and implement those elements of a written respiratory protection program necessary to ensure that any employee using a respirator voluntarily is medically able to use that respirator, and that the respirator is cleaned, stored, and maintained so that its use does not present a health hazard to the user. Exception: Employers are not required to include in a written respiratory protection program those employees whose only use of respirators involves the voluntary use of filtering facepieces (dust masks).

¹⁹ Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions. Section 376.2. Evidence Code section 1200, subdivision (a), defines hearsay evidence as evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

²⁰ Evidence Code section 412 provides, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." The Board has gone beyond the

Thus, the Division had to establish that respirators were necessary to protect the health of their employees in order to prove a violation.

Bristol was covered with dust and particles when he came out from working inside a tank. This alone is insufficient to prove that respirators were necessary to protect the health of employees. The Division did not offer proof that the substances that Clark observed on Bristol were regulated substances, or if regulated, the concentrations exceeded the standard for that substance.

Section 5144, subdivision (d), requires employers to evaluate and identify respiratory hazards and goes into detail regarding when respirators are necessary and which respirators are appropriate for the specific conditions at the worksite²². Employer was not cited for failure to evaluate the respiratory hazards.²³ Accordingly, it can be inferred²⁴ that the conditions at the site did not require respirator use.

Here, if no respirators were used, there would not be any violation. Consequently, the Division did not establish that the safety order applied to the conditions at the site.

“distrusting” weak evidence rule. In *Rudolph & Sletten, Inc.*, Cal/OSHA App. 85-419, Decision After Reconsideration (Dec. 24, 1985), it held that “failure to provide the testimony of a critical witness which would have established a defense may result in an inference adverse to Employer’s contention.” That employer relied on its project superintendent and foreman’s hearsay testimony rather than call the field superintendent who allegedly made the statements about what the workers were doing. The principle would apply where the Division fails to call a critical employee necessary to establish the element of required use of dust masks by Employer. Further, the Board has found that a party’s failure to offer evidence although production of the evidence was easily within the party’s power to do so raises the inference that the evidence, if produced, would have been adverse to their position. (*Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013), citing *Shehtanian v. Kenny* (1958) 156 Cal. App. 2d 580.)

²¹ At least one employee wore a dust mask while working. On May 16, 2014, Clark saw an employee, Brandon Bristol, who had been working inside a tank, walk outside. When he came out of the tank, he was holding a dust mask that he had been wearing. Clark took a photograph (Exhibit 12). Employer did not have a written respiratory protection program that met all the requirements of section 5144, subdivision (c)(1).

²²The safety orders have numerous, extensive, specific, detailed provisions defining when respirator use is required to protect the health of employees. For example, section 5141, subdivision (c) and section 5144, subdivision (a)(1) require respirator use when engineering controls are not available. Section 5155 contains a list of permissible exposure limits for airborne contaminants.

²³ The evidence that the Division presented tended to show that Employer evaluated respiratory hazards at the site.

²⁴ Reasonable inferences can be drawn from evidence introduced at hearing. (*ARB, Inc.*, Cal/OSHA App. 93-2984, Decision After Reconsideration (Dec. 22, 1997).) “An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or established in the action.” (Evidence Code § 600(b).)

Therefore, Employer's appeal of citation 1, Item 4, is granted and the penalty is vacated.

8. Did Employer evaluate truck-based metal tanks for the purpose of determining whether the tanks were permit-required confined spaces (PRCS)?

The Division cited Employer for a violation of section 5157, subdivision (c)(1), which provides as follows:

(c) General Requirements

- (1) The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces.

"The purpose of section 5157(c)(1) is for the employer to conduct a workplace survey and to determine if the space creates an exposure hazard of some kind to employees." (*Liquivision Technology, Inc.*, Cal/OSHA App. 08-1712, Decision After Reconsideration (Feb. 7, 2014).)

Section 5157, subdivision (b), contains the following definitions:

*Confined space*²⁵ means a space that:

- (1) Is large enough and so configured that an employee can bodily enter and perform assigned work.
- (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
- (3) Is not designed for continuous human occupancy.

*Non-permit confined space*²⁶ means a confined space that does not contain or, with respect to atmospheric hazards, have the potential to contain any hazard capable of causing death or serious physical harm.

*Permit-required confined space*²⁷ (permit space) means a confined space that has one or more of the following characteristics:

- (1) Contains or has a potential to contain a hazardous atmosphere;

²⁵ Emphasis added

²⁶ Emphasis added

²⁷ Emphasis added

- (2) Contains a material that has the potential for engulfing an entrant;
- (3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or
- (4) Contains any other recognized serious safety hazard.

*Hazardous atmosphere*²⁸ means an atmosphere that may expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (that is, escape unaided from a permit space), injury, or acute illness from one or more of the following causes:

- (1) Flammable gas, vapor, or mist in excess of 10 percent of its lower flammable limit (LFL);
- (2) Airborne combustible dust at a concentration that meets or exceeds its LFL; NOTE: This concentration may be approximated as a condition in which the dust obscures vision at a distance of 5 feet (1.52 M) or less.
- (3) Atmospheric oxygen concentration below 19.5 percent or above 23.5 percent;
- (4) Atmospheric concentration of any substance for which a dose is published in Group 14 for Radiation and Radioactivity or a permissible exposure limit is published in section 5155 for Airborne contaminants, and which could result in employee exposure in excess of its dose or permissible exposure limit;

NOTE: An atmospheric concentration of any substance that is not capable of causing death, incapacitation, impairment of ability to self-rescue, injury, or acute illness due to its effect is not covered by this provision.

- (5) Any other atmospheric condition that is immediately dangerous to life or health.

NOTE: For air contaminants for which a dose is not published in Group 14 for Radiation and Radioactivity or a permissible exposure limit is not published in section 5155 for Airborne contaminants, other sources of information such as: Safety Data Sheets that comply with section 5194, published information, and internal documents can provide

²⁸ Emphasis added.

guidance in establishing acceptable atmospheric conditions.

The alleged violation description reads as follows:

On or about May 16, 2014 the Division initiated an inspection. The Division determined that the employer had not evaluated employee entry into large truck-based metal tanks for the purposes of determining whether the tanks were a permit-required confined space. The employer classified tank entry as a non permit-required confined space.

To establish the violation, the Division must prove that Employer did not evaluate tanks to determine whether they were permit-required confined spaces (PRCS).

Employer serviced and repaired tanks pulled by trucks. Employer and the Division classified the tanks as confined spaces because (1) they were large enough that employees entered and performed assigned work, (2) there were limited means for entry or exit, and (3) they were not designed for continuous human occupancy.

The tanks carried liquids.²⁹ Employer required the tanks to be empty when brought to the site. It was undisputed that before any employee entered a tank, Employer tested the tanks to determine whether there was a hazardous atmosphere. Employer tested for oxygen level, internal temperature, and flammable substances. The results were recorded on the back of the Tank Data Sheet for that specific tank.³⁰

When tanks were found to meet the criteria for classification as a permit-required confined space, employer classified the space as PRCS. Employees were not permitted to enter any PRCS.

To determine the levels of potentially harmful airborne substances inside the tanks, Employer used an oxygen monitor³¹, litmus paper for toxins and an MSA³² meter for flammables. Clark took photographs of the equipment.³³ The tank temperature was also taken. One of the monitors showed that calibration service was due in December 2013, which would

²⁹ The most common liquids were diesel fuel, liquid petroleum gas, acids, and chemicals like chlorine.

³⁰ Exhibits 7, 13a-13(i). Some tanks were found to have zero percent oxygen and 100% flammable gases inside.

³¹ Exhibit D

³² Mine Safety Appliance, Exhibit 14

³³ Exhibits 14, 15, 16

make it out of date as of May 2014. General Manager Robert Davidson (Davidson) testified that he was familiar with the machine. Employer's personnel tested, serviced, and calibrated the equipment in December 2013, but did not change the due date for service shown. Davidson's testimony is found credible and it is found that neither the calibration nor service were out of date.

The Division alleged that Employer should have tested for carbon monoxide and hydrogen sulfide, since carbon monoxide is a product of combustion and hydrogen sulfide is associated with petroleum. The Division alleged that Employer should have tested for more toxins. However, the record is void of evidence that any of these substances were ever present. Davidson credibly testified that carbons were never burned inside the tanks, so there was no source of carbon monoxide. Hydrogen sulfide is a flammable gas that is detected by the MSA meter Employer used, so there was no reason to separately test for it. The study SCIF³⁴ conducted for Employer showed that hydrogen sulfide and carbon dioxide were not present.³⁵ Thus, it cannot be found that Employer's methods of evaluating a confined space were inadequate.

Davidson acknowledged that the air was not tested while employees were inside the tanks. Davidson testified that there was no basis to believe that continual air testing was necessary. He pointed to the results of testing done by SCIF³⁶ finding that employee exposures were within acceptable limits at all times.

There was no evidence to find that the tanks contained a material that had the potential for engulfing an entrant, had an internal configuration such that an entrant could be trapped or asphyxiated, or contained some other serious safety or health hazard that would cause the tank to potentially be classified as a PRCS.

Therefore, it must be found that Employer conducted appropriate workplace surveys and determined if the space created an exposure hazard of some kind to employees and fell within the PRCS standards.

Accordingly, the Division did not meet its burden of proof. Employer's appeal of Citation 2 is granted, and the penalty is set aside.

9. Did Employer decide that its employees would enter tanks classified as PRCS?

³⁴ State Insurance Compensation Fund

³⁵ Exhibit G.

³⁶ Exhibit F

The Division cited Employer for a violation of section 5157, subdivision (c)(4), which provides as follows:

- (c) General requirements. ...
 - (4) If the employer decides that its employees will enter permit spaces, the employer shall develop and implement a written permit space program that complies with this section. The written program shall be available for inspection by employees and their authorized representatives.

Section 5157, subdivision (c)(7)(A) provides as follows:

- (c) General requirements.
 - (7) A space classified by the employer as a permit-required confined space may be reclassified as a non-permit-required confined space under the following procedures:
 - (A) If the permit space poses no actual or potential atmospheric hazards and if all hazards within the space are eliminated without entry into the space, the permit space may be reclassified as a non-permit required space for as long as the non-atmospheric hazards remain eliminated.

The alleged violation description reads as follows:

On or about May 16, 2014 the Division initiated an inspection. The Division determined that employees entered permit-required confined spaces for which the employer had not developed and implemented a written Permit-Required Confined Space Program.

In order to establish this violation, the Division must prove that Employer decided that its employees would enter a PRCS.

As discussed above, Employer determined that some tanks were PRCS. However, General Manager Robert Davidson (Davidson) testified that employees were not permitted to enter tanks when they were classified as PRCS.

When a tank was classified as a PRCS, the tank was cleansed at the site without any employee entering the tank. The tanks were tested again and the

results recorded on the tank data sheets³⁷. When there was no danger to employees, the tanks were reclassified as non-PRCS, and only then were employees permitted to enter. The tanks were tested when they first arrived, and they were tested after they were cleaned before an employee was to enter. If an employee entered a tank after the first entry, Employer tested the tank again to make sure it was a non-PRCS.³⁸ Although the safety order allowed some level of flammable gases, Davidson insisted that the level of flammable gases inside the tank be reduced to zero before any employee entered the tank.

The Division argued that the atmosphere in the tank might change and become dangerous after an employee entered, ending the classification as non-PRCS. The provisions requiring continuous monitoring of entry conditions become operable only when it is established that isolation of the space is infeasible.³⁹ Welding was done inside the tank. Clark testified that welding produced gases that could displace oxygen or release flammable gases. However, welding was done by using electricity, not gases. There was no evidence of any source of hazardous substances or gases that might enter the tank or compromise isolation. The Division presented evidence of a truck tank explosion while the tank was being cleaned, but no employee was inside the tank.⁴⁰

Therefore, it cannot be found that Employer decided that its employees would enter a PRCS or that there was a hazard that the space would become a PRCS after employee entry. Therefore, the Division did not meet its burden of proof.

Accordingly, Employer's appeal of Citation 3 is granted and the penalty is set aside.

10. Did employees conduct PRCS entry operations?

The Division cited Employer for a violation of section 5157, subdivision (d), which provides as follows:

- (d) Permit-required confined space program (permit space program). Under the permit required confined space program required by subsection (c)(4), the employer shall: ...
 - (1)...

³⁷ Exhibits 7, 13(a)-(i)

³⁸ Exhibits 7, 13(a)-(i).

³⁹ Section 5157, subsection (d)(5)(A); See, e.g., *Latchford Glass Company*, Cal/OSHA App. 76-624, Decision After Reconsideration (May 11, 1978), citing *Delco-Remy Division of General Motors Company*, Cal/OSHA App. 75-100, Decision After Reconsideration (Dec. 1, 1977).

⁴⁰ Exhibit 20

- (2)...
- (3)...[means, procedures, and practices necessary]
- (4)...[equipment]
- (5)...[evaluations during entry]
- (6)...[attendants]
- (7)...[multiple space monitoring]
- (8)...[designated personnel]
- (9)...[rescue operations]

The alleged violation description reads as follows:

On or about May 16, 2014 the Division initiated an inspection. The Division determined that the employer had not developed and implemented the means, procedures, and practices necessary for safe permit required confined space entry operations. The non-compliant items while conducting tank entries includes but is not limited to the following items:

Instance 1 – The employer did not specify acceptable entry conditions before entering a permit space and did not verify the condition [*sic*] in the space were acceptable the entire time of entry.

Instance 2 – The employer did not have adequate air monitoring equipment to assess acceptable entry conditions in the tanks and the air monitoring equipment being utilized had out of date calibrations.

Instance 3 – The employer did not properly evaluate permit space conditions while entry operations occurred. The employer failed to test for toxic gases such as hydrogen sulfide and carbon monoxide before allowing entry into a permit space.

Instance 4 – The employer did not designate or have an attendant present and watching a permit space entry during the on-site inspection.

Instance 5 – The employer failed to designate the duties of each employee having an active role in permit space entry operations.

Instance 6 – The employer failed to develop procedures for rescuing employees in a permit space entry operation and had no provisions in place to

prevent unauthorized personnel from attempting a rescue.

Subdivision (d) is inapplicable because a PRCS is not required under the facts of this case. Employees did not conduct PRCS operations consistent with the findings above.⁴¹

Therefore, Employer's appeal of Citation 4 is granted, and the penalty is vacated.

11. Was Employer required to have an entry permit for PRCS?

The Division cited Employer for a violation of section 5157, subdivision (f), which provides as follows:

- (f) Entry permit. The entry permit that documents compliance with this section and authorizes entry to a permit space shall identify:
- (1) The permit space to be entered;
 - (2) The purpose of the entry;
 - (3) The date and authorized duration of the entry permit;
 - (4) The authorized entrants within the permit space, by name or by such other means (for example, through the use of rosters or tracking systems) as will enable the attendant to determine quickly and accurately, for the duration of the permit, which authorized entrants are inside the permit space;
 - (5) The personnel, by name, currently serving as attendants;
 - (6) The individual, by name, currently serving as entry supervisor, with a space for the signature or initials of the entry supervisor who originally authorized entry;
 - (7) The hazards of the permit space to be entered;
 - (8) The measures used to isolate the permit space and to eliminate or control permit space hazards before entry;

⁴¹ Regarding instance 1, Employer specified that entry was not acceptable for a PRCS. Regarding instance 2, it was discussed above that the air monitoring was adequate. Regarding instance 3, it was discussed that there was no basis to believe that continual air testing was necessary or that hydrogen sulfide or carbon monoxide would be present. Regarding instance 4, no attendant was necessary since the space was not PRCS. Regarding instance 5, the duties of each employee did not need to be designated because the space was not PRCS. Regarding instance 6, there was no need for rescue operation procedures or procedures to prevent unauthorized personnel from attempting a rescue.

Note: ...

- (9) The acceptable entry conditions;
- (10) The results of initial and periodic tests performed under subsection (d)(5) accompanied by the name or names of the testers and by an indication of when the tests were performed;
- (11) The rescue and emergency services that can be provided on-site and additional service that can be summoned and the means (such as the equipment to use and the numbers to call) for summoning those services;
- (12) The communication procedures used by authorized entrants and attendants to maintain contact during the entry;
- (13) Equipment, such as personal protective equipment, testing equipment, communications equipment, alarm systems, and rescue equipment, to be provided for compliance with this section;
- (14) Any other information whose inclusion is necessary, given the circumstances of the particular confined space, in order to ensure employee safety; and
- (15) Any additional permits, such as for hot work, that have been issued to authorize work in the permit space.

The alleged violation description reads as follows:

On or about May 16, 2014 the Division initiated an inspection. The Division determined that the employer was authorizing entry of employees into permit-required confined spaces without an entry permit meeting all the requirements of the standard. The form used by the employer (Tank Data Sheet) did not meet requirements on the following items: purpose of entry; authorized duration of entry; authorized employees; means to eliminate hazards in the space; acceptable entry conditions; results of periodic air testing; rescue information; method of communication; required equipment; and additional permit information.

As discussed above, the confined spaces were not PRCS when employees entered them. The safety order does not apply. Therefore, no entry permit was required under section 5157, subdivision (e).

Accordingly, Employer's appeal of Citation 5 is granted, and the penalty is vacated.

12. Was Employer required to train employees who entered PRCs?

The Division cited Employer for a violation of section 5157, subdivision (g)(2), which provides as follows:

- (g) Training.
 - (2) Training shall be provided to each affected employee:
 - (A) Before the employee is first assigned duties under this section;
 - (B) Before there is a change in assigned duties.
 - (C) Whenever there is a change in permit space operations that presents a hazard about which an employee has not previously been trained;
 - (D) Whenever the employer has reason to believe either that there are deviations from the permit entry procedures required by subsection (d)(3) or that there are inadequacies in the employee's knowledge or use of these procedures.

The alleged violation description reads as follows:

On or about May 16, 2014 the Division initiated an inspection. The Division determined that the employer had not trained all employees that were working inside permit-required confined spaces.

This safety order applies only to employees who enter PRCs. As discussed above, employees did not enter confined spaces when they were classified as PRCs. They entered confined spaces only when they were classified as non-PRCs. Therefore, the safety order does not apply.

Accordingly, Employer's appeal of Citation 6 is granted, and the penalty is set aside.

Conclusion

Employer is not required to have high heat provisions in its HIPP because it is not in the construction industry.

The wheel of Employer's bench grinder was not properly guarded, but the Division did not establish employee exposure to the hazard.

Employer used an electrical cord that was missing a grounding pin. Citation 1, Item 3 is affirmed. The \$750 penalty was not found reasonable.

The evidence was insufficient to show that Employer was required to provide respirators.

Employer adequately evaluated the workplace to determine if any spaces were permit-required confined spaces. Employees did not conduct PRCS entry operations. No entry permit was required, no means or practices for PRCS entry were required, no continual air monitoring was required, no attendant was required, no provisions for rescue were required, and no training was required for employees who entered PRCS.

Order

The appeals of Citation 1, Items 1, 2 and 4, and the appeals of Citations 2, 3, 4, 5 and 6 are granted, and the penalties are vacated.

Citation 1, Item 3, is affirmed and a \$375 penalty is assessed.

Date: August 19, 2015

DALE A. RAYMOND
Administrative Law Judge

DAR: ml

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
DAVIDSON ENTERPRISES, INC.
Dockets 14-R4D7-3738 through 3743-**

Date of Hearing: March 10 and April 15, 2015

Division's Exhibits—Admitted

Number	Exhibit Description
1	Jurisdictional Documents
2a	Photo—tank parts
2b	Photo—repairs
3	Photo—tank components
4	Photo—tank 422
5	Photo—tank vent unit
6	Photo—temperature gauge
7	Tank data sheet
8	Photo—grinder
9	Photo—grinder wheel close up
10	Photo—electrical plug close up
11	Photo—electrical plug
12	Photo—Brandon Bristol
13	Tank data sheets 13(a) – 13 (i)
14	Photo—LEL contaminant meter
15	Photo—plate on meter
16	Photo—plate re service date

- 17 Tank data sheet on tank
- 18 Penalty Worksheet
- 19 Contractor's License Detail
- 20 Inspection printout for inspection 300803285, 2/10/2002
- 21 § 5157 Appendix B- Procedures for Atmospheric Testing

Employer's Exhibits—Admitted

Letter	Exhibit Description
A	DMV Vehicle manufacturer license and Bakersfield business license
B	Photo—tank being repaired with tank data sheet attached
C	Photo—tank data sheet on tank
D	Photo—Oxygen monitor
E	Business and Professions Code sections 7025-7034
F	SCIF safety study
G	Respiratory Protection training
H	HIPP
I	Heat Stress training attendance log

Witnesses Testifying at Hearing

1. Gregory S. Clark
2. Robert Davidson
3. Philip Krise

CERTIFICATION OF RECORDING

I, Dale A. Raymond, 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.

DALE A. RAYMOND
Signature

August 19, 2015
Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

DAVIDSON ENTERPRISES, INC.
Dockets 14-R4D7-3738 through 3743

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

IMIS No. 316982040

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R4D7-3738	1	1	3395(f)(3)	G	ALJ vacated violation		X	\$600	\$600	\$0
		2	3577(b)	G	ALJ vacated violation		X	600	600	0
		3	2395.23(a)	G	ALJ reduced penalty	X		750	750	375
		4	5144(c)(1)	G	ALJ vacated violation		X	900	900	0
14-R4D7-3739	2	1	5157(c)(1)	S	ALJ vacated violation		X	5,400	5,400	0
14-R4D7-3740	3	1	5157(c)(4)	S	ALJ vacated violation		X	5,400	5,400	0
14-R4D7-3741	4	1	5157(d)(1)	S	ALJ vacated violation		X	5,400	5,400	0
14-R4D7-3742	5	1	5157(f)	S	ALJ vacated violation		X	5,400	5,400	0
14-R4D7-3743	6	1	5157(g)(1)	S	ALJ vacated violation		X	4,050	4,050	0
							X			
Sub-Total								\$28,500	\$28,500	\$375

Total Amount Due*

\$375

(INCLUDES APPEALED CITATIONS ONLY)

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

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

ALJ: DAR/ml
 POS: 08/19/15