BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **A TEICHERT & SON, INC. DBA TEICHERT ROCK PRODUCTS** **Employer**	Docket No. **1047912** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by A Teichert & Son, Inc. dba Teichert Rock Products (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Commencing on March 19, 2015, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in California maintained by Employer. On May 22, 2015, the Division issued one citation to Employer alleging two general violations of occupational safety and health standards codified in California Code of Regulations, title 8.[1] Citation 1, Item 1 alleges a general violation of section 4851, subdivision (g) ["When electrode holders are left unattended, electrodes shall be removed and holders placed to prevent employee injury.]. Citation 1, Item 2 alleges a general violation of Section 5157, subdivision (c)(1), a "Permit-Required Confined Spaces" regulation [(c) General requirements. (1) The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces.].

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-notice contested evidentiary hearing.

On January 23, 2017, the ALJ issued a Decision (Decision) which upheld the alleged violations and associated penalties.

Employer timely filed a petition for reconsideration. The Division filed a response to Employer's petition.

[1] References are to California Code of Regulations, title 8 unless specified otherwise.

ISSUES

1. Does the Decision of the ALJ correctly uphold a general violation of section 4851, subdivision (g)?
2. Does the Decision of the ALJ correctly uphold a general violation of Section 5157, subdivision (c)(1)?

FINDINGS OF FACT

1. Associate Safety Engineer (ASE) Richard Brockman (Brockman) conducted an inspection at 27944 County Road 19, Esparto, California (the worksite) on March 19, 2015.
2. During the course of the inspection, Brockman saw an electrode sitting in its holder on a fabrication table in the maintenance area.
3. Brockman testified that it was customary for the electrode ground clamp to be connected to something like the fabrication table. Brockman did not know specifically where the ground clamp to the electrode was located in the maintenance area.
4. In order for the danger of electrocution to be present, the welder would have to be on, and the person exposed would have to make contact with both the electrode and the grounded structure.
5. Ray Prawl (Prawl), the plant superintendent, accompanied Brockman on the inspection. Prawl testified that the ground lead was not on the fabrication table, but was 6 to 8 feet away, where employee David Gillham (Gillham) had been welding a rotor.
6. There were a number of confined spaces located at the worksite. The spaces must be entered occasionally in the course of regular work and maintenance done at the worksite.
7. Employer failed to identify or evaluate spaces as permit-required confined spaces.

DISCUSSION

Does the Decision of the ALJ correctly uphold a general violation of section 4851, subdivision (g)?

Citation 1, Item 1 alleges a violation of section 4851, subdivision (g): "When electrode holders are left unattended, electrodes shall be removed and holders placed to prevent employee injury." The alleged violative description reads:

> Prior to and during the course of the inspection, including, but not limited to, on March 19, 2015, the electrode was left in the unattended electrode holder of the electric welder at the fabrication area and was not placed to prevent employee injury.

Employer contests the ALJ's finding of employee exposure. As part of the Division's initial burden of proving the violation of a safety order, it must show employee exposure to the allegedly violative condition. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976 Decision After Reconsideration (Apr. 24, 2003), citing *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).) Direct evidence of employee

exposure to a violative condition is not required; circumstantial evidence may be used to demonstrate that employee exposure is more likely than not. (*Benicia Foundry & Iron Works, Inc.*, supra, citing *C.A. Rasmussen, Inc.*, Cal/OSHA App. 96-3953, Decision After Reconsideration (Sep. 26, 2001).) Employer argues that because the Division Associate Safety Engineer failed to establish whether the welder was energized, and where the ground clamp was located, exposure to the hazard the safety order is intended to prevent was not established. The Board agrees.

ASE Brockman testified that a potential hazard of electrocution existed at the workplace. He based that testimony on observing an electrode that was unattended and left in its holder at a fabrication table. Brockman testified to the danger of electrocution should someone touch the electrode. He explained that this danger assumed that the ground clamp was attached to the table; in order for the risk of shock to exist, the individual would need to inadvertently touch both the table and the electrode. Brockman conceded in testimony that he did not see where the ground clamp was located, and that his testimony regarding the hazard assumes that the clamp was attached to the fabrication table.

In rebuttal, Employer's witness, Prawl, testified the ground clamp was 6-8 feet away from the electrode holder, where the employee had been working on a rotor. Prawl also testified that at the time of the inspection, the welder was off. The distance between the ground clamp and the electrode would make it physically impossible for an employee to touch both the ground and the electrode at the same time, thus eliminating the possibility of electrocution. Employee exposure to the hazard of electrocution cannot be said to be present.

Citation 1, Item 1 is vacated.

Does the Decision of the ALJ correctly uphold a general violation of Section 5157, subdivision (c)(1)?

Citation 1, Item 2 is an alleged general violation of section 5157, subdivision (c)(1). That subdivision, found under the "Permit-Required Confined Spaces" regulation requires that "The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces." In a prior Board Decision After Reconsideration, the Board stated, "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 Technologies, Inc.*, Cal/OSHA App. 08-1721, Decision After Reconsideration (Feb. 7, 2014).)

The Division's citation alleges: "Prior to and during the course of the inspection, including, but not limited to, on March 19, 2015, the employer had not evaluated the workplace to determine if any spaces at the Esparto facility are permit-required spaces." What constitutes a Permit-Required Confined Space is described in section 5157, subdivision (b):

> Permit-required confined space (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;
> (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 or health hazard.

The evidence preponderates to a finding that the Employer did not engage in effective permit-required confined space evaluations. While Employer did have a confined space evaluation and entry permit program, the program did not correctly identify several locations on-site as permit-required. (Ex. C.)

ASE Brockman testified that it would be necessary during maintenance work to enter a number of the confined spaces he identified at the worksite, and that sloped walls or entries from above would make it possible to be trapped in these spaces. He also explained that there were material hazards, such as water and aggregate, that could engulf or crush workers, should machinery accidentally be turned on, or material accidentally loaded while a worker was inside the space. Brockman also discussed fresh welding marks he noticed as evidence that entries were regularly occurring in the confined spaces. Due to the use of welding tools and other devices, those spaces became permit-required, as there was a risk of oxygen depletion, leaking hoses, and other conditions. Brockman's testimony was unrebutted on these points, was credited by the ALJ, and is credited here. (Decision, p. 5.) The evidence supports a finding that employees were entering confined spaces that should have been classified as permit-required, but Employer failed to conduct the necessary workplace surveys in order to recognize the spaces as permit-required.

Employer argues in its defense that it made the required evaluations of its workplace, but had come to the conclusion that the spaces at issue were not permit-required confined spaces. It contends that because it mitigated or abated the hazards of a potentially hazardous atmosphere, the spaces were no longer permit-required. Such reclassification of a confined space from permit-required to non-permit-required is possible, but requires the employer to take certain affirmative steps, and keep documentation related to those steps, as the regulation describes at 5157, subdivision (c)(5):

> (A) An employer whose employees enter a permit space need not comply with subsections (d) through (f) and (h) through (k), provided that:
> 1. The employer can demonstrate that the only hazard posed by the permit space is an actual or potential hazardous atmosphere;
> 2. The employer can demonstrate that continuous forced air ventilation alone is sufficient to maintain that permit space safe for entry;
> 3. The employer develops monitoring and inspection data that supports the demonstrations required by subsections (c)(5)(A)1. and 2.;
> 4. If an initial entry of the permit space is necessary to obtain the data required by subsection (c)(5)(A)3., the entry is performed in compliance with subsections (d) through (k);
> 5. The determinations and supporting data required by subsections (c)(5)(A)1., 2. and 3. are documented by the employer and are made available to each employee who enters the permit space under the terms of subsection (c)(5) or to that employee's

> authorized representative; and
> 6. Entry into the permit space under the terms of subsection (c)(5)(A) is performed in accordance with the requirements of subsection (c)(5)(B).
> NOTE: See subsection (c)(7) for reclassification of a permit space after all hazards within the space have been eliminated.

Employer did not demonstrate that it complied with any of the steps described in section 5157, subdivision (c)(5)(A). Specifically, Employer failed to show that it had collected any monitoring or inspection data, despite the need to collect such data in order to reclassify a space as non-permit required. The Board has previously stated, "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (*C.C. Myers, Inc.*, Cal/OSHA App. 94-1862, Decision After Reconsideration (Nov. 25, 1998), citing Evid. Code 412.) Employer also failed to demonstrate that the only hazard was atmospheric conditions, as required by the regulation. (Section 5157.) The only confined space evaluation form the Employer introduced at hearing was blank, further supporting a finding that the required determinations were simply not made. (Ex. C.) As the ALJ concluded, Employer's evaluations were ineffective and insufficient, and cannot be said to comply with the cited safety standard. (Decision, p. 7.)

The Division established that Employer had failed to properly evaluate the workplace to determine if any spaces are permit-required confined spaces. We uphold the ALJ's finding of a general violation in Citation 1, Item 2.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Art R. Carter, Chairman
Ed Lowry, Board Member
Judith S. Freyman, Board Member

FILED ON: 06/30/17