

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

In the Matter of the Appeal of:

TL PAVLICH CONSTRUCTION, INC.
7256 Weaver Street
Highland, CA 92346

Employer

Dockets. 11-R3D6-1303 through 1310

**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 ordered reconsideration of the Decision of the Administrative Law Judge on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on December 14, 2010 the Division of Occupational Safety and Health (Division) conducted an accident inspection at a site where TL Pavlich Construction, Inc. (Employer) was conducting work in Montebello, California. On April 14, 2011 the Division issued eight citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹ Three of the citations alleged “serious willful” violations.

The serious willful citations are at issue here. Citation 6 alleges a serious willful violation of section 5158(d)(2) [failure to purge confined space of flammable, injurious or incapacitating substances prior to entry]. Citation 7 alleges a serious willful violation of section 5158(d)(3) [failure to appropriately test air inside confined space prior to entry]. Citation 8 alleges a serious willful violation of section 5158(d)(8) [introduction of source of ignition into confined space without ensuring that dangerous air contamination did not exist].

Employer filed timely appeals of the citations.

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

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. At hearing, the parties stipulated that the issue had been narrowed to the issue of penalties and that the matter would be submitted for the ALJ's decision on the briefs. The stipulation is described on page 3 of the ALJ's Decision, issued on December 17, 2012. The parties jointly moved to limit their appeal to the issue of whether one penalty of \$70,000 would suffice for Citations 6, 7 and 8, or whether two penalties should be assessed. The parties agreed that if the ALJ accepted the Division's position that only one of the penalties should be reduced, then the penalties would be \$140,000 for two of the serious willful citations, with a zero penalty for Citation 8, plus a total of \$8,602 for the remaining citations. If the ALJ accepted the Employer's position that two of the serious willful penalties should be reduced, then the penalties would be \$70,000 for one serious willful citation and \$0 for the other two serious willful citations, plus \$8,602 for the remaining non serious willful citations.

The ALJ's Decision upheld the serious willful classification of two of the three penalties, imposing total civil penalties of \$148,602, per the stipulation of the parties, from an initial total of \$229,855.

The Board ordered reconsideration of the Decision of the ALJ's decision on its own motion. The Division and Employer each filed an answer to the Board's Order of Reconsideration.

ISSUE

Was the ALJ's decision correct in assessing two penalties for two willful violations?

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the Employer and Division's answers to its Order of Reconsideration.

The facts of the incident are not themselves in dispute; the parties contest only the serious willful penalties proposed by the Division, and submitted stipulated penalties. Stipulations are binding on the Appeals Board unless contrary to law or policy, and may have the effect of removing factual and legal issues from the consideration of the Board. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration (Sep 6, 2012), citing, *Kinder Morgan Energy Partners, L.P.*, Cal/OSHA App. 05-2013 Decision After Reconsideration (Oct. 28, 2011).) All other issues outside of the penalties being waived, the violations are established by operation of law. (Section

361.3; *Pacific Cast Products, Inc.*, Cal/OSHA App. 99-2855, Denial of Petition for Reconsideration (Jul. 19, 2000).)

Employer, which was engaged in construction work on a public residential road, was cited for multiple violations stemming from an accident which took place in a 30 inch diameter steel pipe lined with concrete 12 feet below grade. Employees entered the pipe to conduct shield metal arc welding, for the purpose of sealing the seams connecting 40 foot length segments of the pipe, which was being laid for purposes of water distribution. A soils report obtained for the project by Employer indicated that the area had previously contained oil and gas wells, and there was a potential for migration of methane into the area where work was occurring.

On December 14, 2010, a welder dropped his equipment inside the pipe, as he was setting up for work. A spark was created, igniting a gas-- possibly methane—and causing a flash fire which seriously injured the exposed employee. The blower used by Employer to force outside air into the pipe was not operative at the time of the accident.

The Employer did not have appropriate air testing equipment with remote sensing capability, which would have allowed for gas level readings and detection in the pipe prior to entry by employees. The personal monitor worn by the employee was not capable of remote sampling, was not properly calibrated, and was possibly covered by the employee's jacket, causing the monitor to fail to indicate when conditions were above the 10% Lower Explosive Limit (LEL) in the pipe. From February through December 14, 2010, Employer would occasionally tie a personal monitor to a string and lower it into the trench where the pipe was located to monitor air contamination, or would fail to monitor the pipe at all.

Employer failed to assess if either of the blowers it was utilizing were effectively clearing the pipe of gasses or protecting employees from the inhalation hazards associated with shield metal arc welding. No air monitoring or air flow measurements had occurred within the pipe either before or during welding operations. On December 15, 2010, the Division issued an Order Prohibiting Use (OPU), directing Employer to set up a confined space program related to the hazards of shield metal arc welding in the pipe, including a remote sensing procedure, and to submit the plan for approval prior to lifting of the OPU. However, Employer continued to perform welding activities during the OPU period, without informing the Division that employees would be conducting work in the pipe.

Citation 6, alleged a serious willful violation of section 5158(d)(2), which reads as follows:

(d) Pre-Entry. The applicable provisions of this subsection shall be implemented before entry into a confined space. (2) The space shall be emptied, flushed, or otherwise purged of flammable, injurious or incapacitating substances to the extent feasible.

The citation describes three instances of violations of the standard, including failure to flush the pipe on the date of the accident, December 14, 2010, failure to ensure the blowers used on the job were effective to purge the length and configuration of the pipe, and allowing work in the pipe after an OPU had been issued, without notifying the Division or receiving approval of an appropriate purging and air ventilation plan.

Citation 7 alleged a serious willful violation of section 5158(d)(3), which states:

(d) Pre-entry. The applicable provisions of this subsection shall be implemented before entry into a confined space. (3) The air shall be tested with an appropriate device or method to determine whether dangerous air contamination, oxygen enrichment and/or an oxygen deficiency exists. A written record of such testing results shall be made and kept at the work site for the duration of the work. Affected employees and/or their representative shall be afforded an opportunity to review and record the testing results. If an electronic or thermal device is used to test a confined space that contains or is likely to develop a dangerous air contamination due to flammable and/or explosive substances, then the device must be approved for use in such explosive or flammable conditions as required by section 2540.2.

The citation also describes three separate instances of violations of the safety order, including the initial failure on December 14, 2010 to perform remote sampling of the pipe's atmosphere prior to entry, and lack of calibration of the personal monitor worn by the employee. Instance two involved failure from February 2010 through December 2010 to use appropriate monitoring for contamination and oxygen levels, and instance 3 describes ten occurrences of welders entering the pipe after the OPU was issued by the Division, without air monitoring being conducted with a direct reading instrument with remote sensing capability prior to entry.

A serious willful violation of section 5158(d)(8) is alleged in Citation 8. The language of that section is as follows:

(d) Pre-entry. The applicable provisions of this subsection shall be implemented before entry into a confined space. (8) No source of ignition shall be introduced until the implementation of appropriate provisions of this section have ensured that dangerous air contamination due to oxygen enrichment, flammable and/or explosive substances does not exist.

The citation alleges that the Employer introduced a source of ignition into the confined space of the pipe without ensuring that flammable substances did not exist, resulting in a flash fire.

The Employer's initial appeal was limited to the serious willful penalties, which Employer argued should be reduced to zero in two out of three citations as duplicative pursuant to *A & C Landscaping, Inc. aka A & C Construction, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010). In *A & C Landscaping, Inc.*, the Board held that where the safety orders cited pertain to a single hazard and a single form of abatement will eliminate the hazard, the Board will eliminate what constitutes a duplicative penalty. In her decision, the ALJ in this case found that the hazards contemplated by Citations 7 and 8 were not the same, and based on the stipulations of the parties, assessed two serious willful penalties.

Employer points to the Board's Decision After Reconsideration in *Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012) to support its argument that the citations are duplicative. In that proceeding the Board affirmed both a section 3329(b) failure to vent gas/ failure to close a vent valve violation and a section 5461(c) failure to test for concentration of natural gas violation. The two violations pertained to the same hazard of explosion, and a single abatement was possible, whether it be the proper venting so as to eliminate the natural gas buildup that occurred in the atmosphere, or testing the air to ensure that the buildup was not present prior to introducing an ignition source. Thus, both prongs of the test in *A & C Landscaping, Inc.* were met, as the citations addressed the same hazard, and the same abatement was capable of curing both violations.

Here, the hazard contemplated by section 5158(d)(8) is the risk of an explosion. While sections 5158(d)(2) and (d)(3) address the risk of fire and explosion, they also seek to protect employees from the risk of being incapacitated in a confined space by dangerous gases or lack of oxygen. This is reflected in the language of the safety orders, as well as the citations

themselves, which each describe different hazards. Without the same hazard, the first prong of *A & C Landscaping, Inc.* is not met.

Looking to the second prong of *A & C Landscaping, Inc.*, abatement of the three safety orders will require different means. Section 5158(d)(2) requires the confined space to be “emptied, flushed, or otherwise purged” of dangerous substances “to the extent feasible”, while section 5158(d)(3), acknowledging that conditions in confined spaces can change, and purging may not remove all dangerous substances from the atmosphere, requires testing of the air in a confined space with appropriate devices or methods to determine if air contamination or an oxygen deficiency exists. Finally, abatement in section 5158(d)(8) requires ensuring that no source of ignition is introduced until air testing has occurred to ensure that there is no air contamination present which could lead to an explosion.

While these safety orders are undoubtedly interrelated, no single action will result in abatement of all hazards. Without both a single hazard and a single means of abatement, penalty reduction is not warranted. (*A. Teichert & Son Inc. dba Teichert Construction*, Cal/OSHA App. 09-0459, Decision After Reconsideration (Nov. 9, 2012).) The ALJ’s decision, upholding two serious willful penalties and vacating the penalty for Citation 8, pursuant to the stipulation of the parties, is upheld.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: June 16, 2014