

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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**PROPOSED PETITION DECISION OF THE
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
(PETITION FILE NO. 546)****INTRODUCTION**

The Occupational Safety and Health Standards Board (Board) received a petition on January 23, 2015, from Mr. Steeve Inagaki P.E. (Petitioner). The Petitioner requests the Board to amend Title 8, California Code of Regulations, Section 8407 of the Tunnel Safety Orders (TSO) to require employers provide tunnel safety refresher training every 5 years for specific topics.

Labor Code section 142.2 permits interested persons to propose new or revised regulations concerning occupational safety and health and requires the Board to consider such proposals, and render a decision no later than six months following receipt. Further, as required by Labor Code section 147, any proposed occupational safety or health standard received by the Board from a source other than the Division of Occupational Safety and Health (Division) must be referred to the Division for evaluation, and the Division has 60 days after receipt to submit an evaluation regarding the proposal.

SUMMARY

The Petitioner states that existing Section 8407 does not require employers to retrain employees after the employees have received initial training and requests that employers provide tunnel safety refresher training every five years for the following topics:

1. Ventilation
2. Recognition of Hazardous Atmospheres
3. Illumination
4. Communications
5. Mechanical Equipment
6. Personnel Protective Equipment
7. Explosives (if applicable)
8. Fire Prevention and Protection
9. Emergency Procedures including evacuation plans and
10. Check-in/check-out system

The Petitioner highlights:

1. tunnel related incidents in 1971, 1990, and 1995 in Los Angeles, California as a warning that accidents do occur in tunnel construction;
2. the different trades typically involved in tunneling work; and
3. an instance where an employee expressed concerns over the absence of refresher training.

The Petitioner contrasts refresher training required of miners, governed under Federal Mine Safety and Health Administration (MSHA) with the lack of these requirements in tunneling. Miners are required to be retrained annually. The trades performing tunneling work are exposed to the same/similar hazards as those as miners are exposed to and are under lesser requirements to keep their training current/up-to-date. The Petitioner states that the only training provided by one of his former employers was the initial training required under Section 8407(a). In a subsequent telephonic discussion, the Petitioner reasoned that providing retraining to employees advances their knowledge of new technologies, techniques, and safety measures—thus increasing the employee’s awareness of hazards and means to protect themselves from those hazards.

DIVISION’S EVALUATION

It is the Division’s opinion that the training required by Section 8407(c) of the TSO and Section 3203 of the General Industry Safety Orders (GISO) exceeds the training required by Federal OSHA for underground construction. The retraining of employees every five years would be an extremely rare situation because tunnel construction projects generally do not exceed five years with the same employer. In addition, the five year retraining proposal is unnecessary as any new hazards or changes in working condition which create hazards already require retraining pursuant to Section 3203. Therefore, the Division, in their evaluation dated May 14, 2015, recommends the denial of the petition on the grounds that frequent training is required by existing regulations.

STAFF’S EVALUATION

Section 8407(a) requires the “person in charge” to perform two duties. The first duty is to examine the extent of the employee’s experience. The second is to instruct the employee in the recognition of hazardous conditions and the protective measures to address the hazardous conditions. Section 8407(a) may be interpreted as two independent duties. Where the duties are viewed as independent, the “person in charge” would cover all topics “where appropriate.” The “person in charge” would then use the employee’s experience for a separate purpose, such as job assignment.

Another interpretation infers that the two duties are viewed in conjunction with each other. The “person in charge” would use the employee’s experience as the basis to forego or abbreviate instructions of topics an employee has already received, while emphasizing topics where the employee’s training was deficient. From the perspective of those implementing Section 8407(a), the requirement of a “person in charge” to determine all of the different aspects of tunneling requirements that have changed over the course of an employee’s career, would require an exhaustive inquiry into the employee’s background and knowledge/experience with the state-of-the-art methods and technologies. The ‘determination’ requirement with Section 8407(a) parallels the Mine Safety Orders under Section 6963. In both the Mine Safety Orders and the TSO, the “person in charge” instructs the employee on the ‘hazards’ of the employee’s “job” or “activity.” The term “person in charge” is not defined in the definitions section of Section 8405. Moreover, there are no qualifications set forth by the TSO to ensure the “person in charge” can

tailor the requisite training to the employee’s experience level. The TSO directs the “person in charge” to provide training where appropriate on the following topics:

- (1) Air Monitoring;*
- (2) Ventilation;*
- (3) Illumination;*
- (4) Communications;*
- (5) Ground Control;*
- (6) Flood Control;*
- (7) Mechanical Equipment;*
- (8) Personal Protective Equipment;*
- (9) Explosives;*
- (10) Fire Prevention and Protection; and*
- (11) Emergency Procedures, including evacuation plans and a check-in/check-out system.*

Any retraining on the above topics is only provided when the “person in charge” deems it appropriate (discretionary). In contrast, the MSHA requires employees receive annual refresher training. It is important to note, that MSHA requirements are not binding on tunneling work.

Within the TSO, retraining is only required under Section 8430(i) which states employees are required to be retrained regarding self-rescue devices every three months.

The only other section of Title 8 applicable where retraining is specifically mentioned is within the ‘compliance’ section of the Injury and Illness Program (IIPP) under Section 3203(a)(2) of the GISO:

*...Substantial compliance with this provision includes ... training and retraining programs, ... **or** any other such means that ensures employee compliance with safe and healthful work practices.[Emphasis added]*

Retraining is one of multiple means an employer may use to comply with Section 3203(a)(2). Section 3203(a)(2)’s use of “or” to separate each provision listed for substantial compliance does not compel an employer to provide “retraining” (see Shimmick-Obayashi DAR 08-5023 through 5025).¹ As inferred from this Decision After Reconsideration, any reliance on the requirements of the IIPP would fall short of requiring an employer to “retrain” their employees. Retraining, if deemed to be required, must be codified as its own standard or require changes to Section 3203(a)(2).

A common misinterpretation is that employees need only be trained once—initial training. It is important to recognize, under the IIPP, employees are required to be trained when specific circumstances occur even after being hired. Under Section 3203(a)(7) the program shall require:

- (7) Provide training and instruction:*

...

¹ As stated in *Marine Terminals Corp.*, “the Division must show that Employer did not comply with any of the four listed options under section 3203(a)(2).”

(C) To all employees given new job assignments for which training has not previously been received;

*(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace **and** represent a new hazard; [emphasis added]*

(E) Whenever the employer is made aware of a new or previously unrecognized hazard;

Under the current standards, if the workplace or work environment is static, employee retraining is not mandated. If an employee has been trained by their employer to safeguard themselves from each hazard in accordance with Section 3203(a)(7), then the employee would not be subjected to subsequent retraining—if those workplace hazards and sources of hazards remain unchanged. While this may be true for some workplaces, tunnels and tunneling technology is innovatively dynamic and has evolved significantly over the last 40 years. For example, tunnel boring machines and tunnel support/casing systems are more advanced than their 1970's counterparts. The chemicals used in the repair casings have changed. The acceptable levels of airborne contaminants have decreased (permissible exposure limits). In each of these cases a proper implementation of Section 3203(a)(7) requires an employer to identify and provide training to all employees exposed when each “new hazard” is introduced in to the workplace.

While most tunneling projects would be completed short of the five-year cycle proposed by the Petitioner, tunnel renovation and repair are still within the scope of the TSO. Those performing alteration, renovation, or repair of tunnels may work at the same workplace for many years and not undergo refresher training or even a ‘determination’ under Section 8407(a). The Petitioner’s stated goal did not explicitly include the retraining of employees engaged in the alteration, renovation or repair of tunnels. However Board staff expanded the evaluation to include these activities. Refresher training would benefit those that perform alteration, renovation, or repair of tunnels more than those engaged in tunnel construction.

Board staff recommends that the petition be granted to the extent that an advisory committee be convened by staff to examine the necessity for rulemaking based on input from stakeholders to:

1. discuss the necessity for rulemaking for refresher training of employees who conduct tunnel alteration, renovation, and repair;
2. discuss a definition for the term “person in charge” and the qualifications a “person in charge” must possess to “determine the extent of the employee's experience” under Section 8407(a). The options to be considered should include the substitution of previously defined terms such as “Safety Representative” (see Section 8406(f)), “competent person,” or “qualified person” which have pre-defined qualifications and authority.

CONCLUSION AND ORDER

The Board has considered the petition and the recommendations of the Division and Board staff. For reasons stated in the preceding discussion, the Petitioner's request is GRANTED to the extent that Board staff discuss with industry stakeholders the necessity for rulemaking for refresher training of employees who conduct tunnel alteration, renovation, and repair and to discuss a definition for the term "person in charge." If a Staff finding of necessity is reached and an advisory committee is conducted, the Petitioner should be invited to participate in this advisory committee. Any resulting rulemaking proposal based upon Board staff findings or advisory committee deliberations shall be brought to the Board and the public for consideration at a future public hearing.