

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

In the Matter of the Appeal of:

**SYAR INDUSTRIES INC
PO Box 2540
Napa, CA 94558**

Employer

DOCKET 14-R5D1-1761

DECISION

Statement of the Case

Syar Industries, Inc. (Employer) is a mining and aggregate company. Beginning March 17, 2014, the Division of Occupational Safety and Health (Division) through Associate Safety Engineer Rich Brockman (Brockman) conducted an accident inspection and annual inspection at a place of employment maintained by Employer at 2301 Napa Vallejo Highway, Napa, California (the site). On April 25, 2014, the Division cited Employer for failure to conduct detailed monthly inspections of all working places and equipment as a safety committee with a proposed penalty of \$560.¹

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, and the reasonableness of the proposed penalty. Employer alleged multiple affirmative defenses but withdrew all affirmative defenses at the hearing.

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Sacramento, California on April 30, 2015. John Walker represented the Employer. Douglas Patterson, Senior Safety Engineer for Mining and Tunneling represented the Division. Leave to file briefs was requested and granted and the matter was submitted on June 9, 2015. The Administrative Law Judge extended the submission date to July 5, 2015, on her own motion.

Issue

- A) Does section 6964, subdivision (a) require the "Safety Committee" to inspect the worksite together, as a group?

¹ The safety order allegedly violated was section 6964, subdivision (a). Unless otherwise specified, all section references are to the California Code of Regulations, title 8.

Findings of Fact²

- 1) Syar Industries operates a rock quarry and mine.
- 2) Employer's Safety Committee conducted monthly inspections.
- 3) Employer's Safety Committee made a detailed inspection of all working places, and equipment.
- 4) Employer's Safety Committee noted any unsafe practices and conditions.
- 5) Dan Kruger was Employer's Safety Director and is the person in charge of its' Safety Committee.
- 6) Employer's Safety Committee made a written record of the suggestions offered and action taken.

Analysis

A. Does section 6964, subdivision (a) require a "Safety Committee" to inspect the worksite together, as a group?

The Division cited Employer for a violation of section 6964, subdivision (a) which provides as follows:

(a) Except as provided in subsection (b) of this section, a safety committee shall be organized at each place of employment to which these Orders apply.

Members of the committee shall acquaint themselves with the Safety Orders of the Division.

They shall review and discuss the cause of accidents occurring to employees in the mine or operations connected therewith, and shall devise and recommend ways and means for the prevention of accidents.

They shall carry on safety education among the employees and encourage employees to make safety suggestions. All safety suggestions shall be considered by the committee.

At least once every month a safety committee shall make a detailed inspection of all working places, and equipment. They shall note any

² At the Settlement Conference held by Presiding Administrative Law Judge Neil Robinson, Employer agreed to withdraw the appeal of Citation 1, Item 1. The parties stipulated to the following facts: Employer's Safety Committee conducted monthly inspections at the Napa facility; there was more than one inspector inspecting different parts of the worksite; they did not inspect the worksite together; one person inspects the processing plants, two people inspect the mobile equipment, one person inspects fire extinguishers and one person inspects the mines and roadways. (Exhibit 1 – Minutes of Mandatory Settlement Conference, March 16, 2015.)

unsafe practices and conditions and shall promptly report their findings to the person in charge. A written record shall be made of the suggestions offered and action taken.

Citation 1, Item 4 alleges as follows:

During an inspection on March 19, 2014, it was determined that the employer did not conduct detailed monthly inspections of all working places and equipment as a committee as required.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) “The Board cannot impose stricter or more detailed requirements than those set in a safety order promulgated by the Standards Board.” (*Mobil Oil Corp.*, Cal/OSHA App. 00-222, Decision after Reconsideration (Apr. 29, 2002); *Hylton Drilling Co.*, Cal/OSHA App. 82-216, Decision after Reconsideration (Jan. 17, 1986); *Lockheed Missiles and Space Co., Inc.*, Cal/OSHA App. 74-629, Decision After Reconsideration (Apr. 10, 1975) In interpreting a statute or regulation, the judge may simply ascertain and declare what is expressed, not insert what may have been omitted.)

In order to prove a violation of section 6964, subdivision (a), the Division must establish 1) the applicability of the Mine Safety Orders, and that one or more of the following elements exists: 2) Employer failed to conduct monthly inspections, 3) Employer’s Safety Committee failed to make a detailed inspection of all working places and equipment, 4) Employer’s Safety Committee failed to note any unsafe practices and conditions, 5) Employer’s Safety Committee failed to promptly report its findings to the person in charge, and 6) Employer’s Safety Committee failed to ensure a written record was made of the suggestions offered and action taken. The Division did not charge employer with a violation of prongs 4, 5 or 6.

1. Do the Mine Safety Orders apply to Syar Industries (Napa)?

Subchapter 17 of title 8, commencing with section 6950, known as the Mine Safety Orders, “establish minimum safety standards in places of employment at mines and premises appurtenant thereto.” At mines, these Orders take precedence over any other Safety Order of the Division with which they are inconsistent.” (Section 6954, subdivision (a) and (b).)

Syar Industries is a mining company, which supplies aggregate rock products and paving materials. Brockman testified that the investigation in this case involved the Napa Quarry facility which mines and processes mineral aggregate for use in construction projects. It is undisputed that the Mine Safety Orders apply to the employer in the operation of its rock quarries.

2. Did the Employer conduct monthly inspections?

The parties stipulated that Syar conducted monthly inspections at the Napa Quarry facility. (Exhibit 1 – Minutes of Mandatory Settlement Conference, March 16, 2015.) This fact is established by Exhibit C, “Syar Industries Inc. Napa Quarry Monthly Inspection,” a series of monthly inspection reports conducted by James Kerr and signed by Mike Berneson, Quarry Manager, in September 2013, October 2013, November 2013, December 2013, January 2014, and February 2014 (monthly inspection reports). The Division failed to establish that monthly inspections required by Section 6964, subdivision (a) were not conducted.

3. Did Employer’s safety committee make a detailed inspection of all working places, and equipment?

Section 6954 provides:

(b) At mines these Orders take precedence over any other Safety Orders of the Division with which they are inconsistent.

(c) Machines, equipment, processes, and operations not specifically covered by these Orders shall be governed by the General Industry Safety Orders [GISO].

The Appeals Board held in *Troy Gold Industries, Ltd*, Cal/OSHA App. 80-740, Decision After Reconsideration (August 31, 1983) that “[t]he cardinal rules for statutory construction require first, that a determination be made of the legislative intent based on all the circumstances surrounding the passage of the legislation, particularly with reference to the entire statutory system of which it forms a part, so that all of the different parts of the legislative scheme can be harmonized.” Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes. (*Central Valley Engineering & Asphalt, Inc.*, Cal/OSHA App. 08-5001, Decision After Reconsideration (December 4, 2012) citing *Los Angeles County Metropolitan Transportation Authority v Alameda Produce Market, LLC* (2011) 52 Cal. 4th 1100, 1108, quoting *In re Jennings* (2004) 34 Cal. 4th 254, 273).

The Division maintains that the safety order requires the safety committee to stay together as a group during the monthly inspections. The parties stipulated that there was more than one inspector inspecting different parts of the worksite; the safety committee did not inspect the worksite together; one person inspects the processing plants, two people inspect the mobile equipment, one person inspects fire extinguishers and one person inspects the mines and roadways. (Exhibit 1 – Minutes of Mandatory Settlement Conference, March 16, 2015.) Employer’s entire safety committee does not conduct the monthly inspection at each plant or worksite, but instead delegates portions of the inspection to one or

more members of the safety committee. The monthly inspection reports establish that the monthly inspections were done.³

Division argues that section 3203, subdivision (c)(3) should be incorporated into the requirements of section 6964, subdivision (a) of the Mine Safety Orders. Neither party claims, or has provided any argument or evidence, that section 6964, subdivision (a) is not inconsistent with section 3203, subdivision (c)(3).

Section 3203, subdivision (c)(3)⁴ sets forth requirements for employers who elect to use a labor/management safety and health committee to comply with the communication requirements of section 3203, subdivision (a)(3).⁵ Those requirements cannot be interpreted to require all members of the safety committee to participate in all monthly inspections, because although they are more specific, they do not conflict with the requirements of section 6954, subdivision (a).⁶ Title 8 distinguishes the application of the General Industry Safety Orders and the Mine Safety Orders. Under the plain language of section 6954, subdivision (b) and (c), either the General or the Mine provisions apply, but not both. Here, as analyzed above, the Mine Safety Orders apply.

³ The four monthly inspection reports for Plant AC state "Plant Closed. Locked out." These reports indicate that no investigation was done in November 2013, December 2013, January 2014 and February 2014 for Plant AC 1. The only monthly inspection report for Plant AC 1 was done in October 2013, wherein four issues were noted, with hazard ratings of 1, 2, 3, and 4, and all four were shown as repaired.

⁴ Section 3203, subdivision (c) provides:

Employers who elect to use a labor/management safety and health committee to comply with the communication requirements of subsection (a)(3) of this section shall be presumed to be in substantial compliance with subsection (a)(3) if the committee:

(3) Reviews results of the periodic, scheduled worksite inspections;

⁵ Section 3203, subdivision (a)(3) provides:

Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

(3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.

⁶ A conflict must exist between the cited GISO and an industry specific Safety Order in order to avoid the applicability of the GISO." (*Teichert Aggregates*, Cal/OSHA App. 04-2982, Decision After Reconsideration (January 21, 2011), citing, *Los Angeles City Fire Department*, Cal/OSHA App. 03-3960, Decision After Reconsideration (Jul. 26, 2010).) The employer could elect to use a labor/management safety and health committee and could comply with the requirements of section 6964, subdivision (a).

The Appeals Board is without authority to change the clear terms of a safety order. (*Kenneth L. Poole, Inc.*, Cal/OSHA App. 90-278, Decision After Reconsideration (April 18, 1991).) Section 6954, subdivision (b) clearly states that the Mine Safety Orders take precedence over other safety orders, if they are inconsistent and subdivision (c) provides that the GISO applies only when the situation is not covered by the Mine Safety Orders. It is not possible to incorporate section 3203, subdivision (a)(3) into the Mine Safety Orders where the Mine Safety Orders are applicable. To the extent that there is an inconsistency, the language in the Mine Safety Orders and not the GISO are the operative regulation.

The parties dispute the meaning of the term “committee” and each submitted dictionary definitions which purport to support their respective positions.⁷ Employer argues that section 6964, subdivision (a) is “vague and ambiguous”. Division interprets the definition of “committee” to require all members of Employer’s safety committee to inspect all of the Employer’s plants. Division does not claim that the Employer failed to provide evidence of a “detailed inspection”, but rather that the monthly inspections were not completed in the presence of the entire safety committee. There is no specific requirement in section 6964, subdivision (a) which requires the safety committee to stay together as a group during the monthly inspections and one cannot be implied, based on incorporating requirements in the General Industry Safety Orders. Division’s interpretation is not supported by the language of the safety order and an expansion to incorporate the requirements of section 3203, subdivision (c)(3) is not possible, given the language in section 6954, subdivision (b).

⁷ Division submitted Exhibit 5, the definition of “committee” from www.Merriam-Webster.com:

1. Archaic: a person to whom a charge or trust is committed.
2. a: a body of persons delegated to consider, investigate, take action on, or report on some matter, especially: a group of fellow legislators chosen by a legislative body to give consideration to legislative matters. b: a self-constituted organization for the promotion of a common object.

Employer submitted Exhibit E, the definition of “committee” from www.thelawdictionary.com:

An assembly or board of persons to whom the consideration or management of any matter is committed or referred by some court. *Lloyd v Hart*, 2 Pa. 473, 45 Am. Dec. 012; *Farrar v. Eastman*, 5 Me. 345. An individual or body to whom others have delegated or committed a particular duty, or who have taken on themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or act for. 15 Mees. & W. 529. The term is especially applied to the person or persons who are invested, by order of the proper court, with the guardianship of the person and estate of one who has been adjudged a lunatic.

Both definitions imply that a committee could be one person or a group of persons. The dictionary definitions are not helpful in interpreting the regulation at issue here.

Conclusion

Based on the foregoing, it must be found that there is no express requirement that the entire safety committee must conduct the monthly inspections of all plants with all members of the committee present at each inspection. Syar Industries conducted monthly inspections. The Division did not prove the alleged violation of section 6964, subdivision (a).

Decision

It is hereby ordered that Employer's appeal is granted.

Dated: August 05, 2015

MARY DRYOVAGE
Administrative Law Judge

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
SYAR INDUSTRIES, INC.
Docket 14-R5D1-1761**

Date of Hearing: April 30, 2015

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Proposed Penalty Worksheet	Yes
3	U.S. DOL OSHA History for Syar Industries – 4/27/2005 to 4/27/2015	Yes
4	Definition of “committee” – Merriam-Webster dictionary	Yes
5	OSHA -1 Inspection Report for Syar Industries (Napa), April 17, 2014	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Historical WC MOD Factor for Syar Industries Inc., 2000 to 2015 and Workers' Compensation Experience Rating Form issued 1/31/2015	Yes
B	Napa Quarry Mobile Equipment Inspections dated 3/18/2013; 3/19/2013; hand written note; 9/20/2013; 1/22/2014; 2/20/2014 (6 pages)	Yes
C	Syar Industries, Inc. (Napa Quarry) Monthly Plant Inspections September 2013, October 2013, December 2014, January 2014 and February 2014 (54 pages)	Yes
D	Plant Fire Extinguisher Inspections for September 2013 and November 2013 (2 pages)	Yes
E	Definition of “committee” – The Law Dictionary	Yes

Witnesses Testifying at Hearing

1. Rich Brockman, DOSH Associate Safety Engineer
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CERTIFICATION OF RECORDING

I, Mary Dryovage, 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.

MARY DRYOVAGE
Signature

August 05, 2015
Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**SYAR INDUSTRIES INC
DOCKET 14-R5D1-1761**

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

Site: 2301 Napa Vallejo Hwy, Napa, CA 94558

Date of Inspection: 03/17/14 – 04/17/14

Date of Citation: 04/25/14

IMIS No. 317133775

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	AFFIRMED	VOID	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R5D1-1761	1	1	2375.18	G	[Failure to conduct detailed monthly inspection of all working places and equipment as required.] ALJ vacated violation.	X		\$335	\$335	\$335
		4	6964(a)	G	[Failure to conduct detailed monthly inspections of all working places and equipment as a committee.] ALJ granted employer's appeal.		X	\$560	\$0	\$0
Sub-Total								\$895	\$335	\$335
Total Amount Due*										\$335

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board.

ALL penalty payments must be made to:

Accounting Office (OSH)
Department of Industrial Relations
PO Box 420603
San Francisco, CA 94142
(415) 703-4291, (415) 703-4308 (payment plans)

*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:MD
POS: 08/05/15**