

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

*In the Matter of the Appeal of:*

**EVANS BROTHERS INC**  
**7589 National Drive**  
**Livermore, CA 94550**

Employer

**DOCKET 15-R5D1-0182**

**DECISION**

**Statement of the Case**

Evans Brothers Inc (Employer) is a construction materials producer. Beginning August 21, 2014, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Rich Brockman, conducted an inspection at a place of employment maintained by Employer at 1 Old Quarry Road, Brisbane, California (the site). On October 10, 2014, the Division cited Employer for a violation of California Code of Regulations, title 8, section 5157, subdivision (c)(1).<sup>1</sup>

Employer filed a timely appeal of the citation, contesting the existence of the violation and the classification. The undersigned granted Employer's unopposed motion to amend its appeal to also contest the reasonableness of the proposed penalty.

This matter was heard by Kevin J. Reedy, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Oakland, California, on October 14, 2015. Ron Medeiros, Attorney, of the Robert D. Peterson Law Corporation, represented Employer. Douglas Patterson, District Manager, represented the Division. The ALJ, on his own motion, extended the submission date to April 4, 2016.

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<sup>1</sup> Unless otherwise specified, all references are to sections of California Code of Regulations, title 8. Only Citation 2 is under appeal.

## **Issues**

1. Did Employer fail to evaluate the asphalt plant baghouse<sup>2</sup> to determine if it was a permit-required confined space?
2. Did Employer demonstrate that a different safety order applied to the work activity that was the subject of the citation, and did Employer establish that it was in compliance with that other safety order?
3. Did the Division establish a rebuttable presumption that the violation was serious?
4. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?
5. Was the proposed penalty reasonable?

## **Findings of Fact**

1. Cal/OSHA Associate Safety Engineer Rich Brockman (Brockman) opened the inspection at 1 Old Quarry Road, Brisbane, California, on August 21, 2014.
2. The asphalt plant baghouse at issue is large enough and so configured that an employee can bodily enter and perform assigned work; it has limited or restricted means for entry or exit; and it is not designed for continuous employee occupancy.
3. The asphalt plant baghouse at issue had a potential to contain a hazardous atmosphere during an oxygen acetylene torch cutting operation.
4. On the day of the inspection there was no sign posted indicating that the asphalt plant baghouse was a permit-required confined space.
5. On August 21, 2014, Ray Vargas (Vargas), an employee of Evans Brothers Inc, was inside the asphalt plant baghouse using an

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<sup>2</sup> The baghouse is a dust collector, where aggregate rock is processed for sale to the public as asphalt or as aggregate rock.

oxygen acetylene torch to cut bolts on the auger drive at the time of Brockman's inspection.

6. Oxygen and acetylene supply hoses ran into the baghouse during the repair operation. Alfredo Deleon (Deleon), Employer's Safety Manager, had not inspected the hoses for leaks on the day of the inspection.
7. Vargas was not in possession of a gas meter or radio, nor was there another co-worker nearby at the time of the inspection. There was no rescue equipment nearby.
8. The use of an oxygen and acetylene cutting torch by Vargas in the baghouse created a potential for an environment of oxygen deprivation; or an oxygen-enriched environment where a spark could have ignited a flammable explosive atmosphere.
9. Tom Mankins (Mankins), Quarry Manager for Employer, was responsible for employee safety at the site, and was aware that Vargas was working on the auger drive in the baghouse on the day of the inspection.
10. The asphalt plant baghouse is a confined space requiring a permit.
11. On the day of the inspection, in the baghouse confined space, there existed a hazard of a potentially explosive atmosphere. On that same day, in the baghouse, there existed a hazard of a potential lack of oxygen needed to sustain Vargas.
12. The penalty associated with the citation was calculated in accordance with the Division's policies and procedures.

### **Analysis**

#### **1. Did Employer fail to evaluate the asphalt plant baghouse to determine if it was a permit-required confined space?**

Section 5157, subdivision (c)(1), under "Permit-Required Confined Spaces," provides the following:

(c) General requirements.

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

Section 5157, subdivision (b), defines the characteristics of a confined space as follows:

Confined space means a space that:

- (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
- (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 employee occupancy.

Section 5157, subdivision (b), defines a permit-required confined space as follows:

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.

In the citation, the Division alleges the following:

The employer had not evaluated the asphalt plant baghouse to determine if that workplace was a permit-required confined space prior to allowing an employee to enter and perform work on August 21, 2014.

In order to establish a violation of section 5157, subdivision (b), we first address whether a permit-required confined space existed at the site. Brockman testified that Vargas was performing a repair operation in the baghouse (depicted in Exhibit 3) when he arrived for his inspection. The requirement that the confined space is large enough and so configured that an employee can bodily enter and perform assigned work has been satisfied. Brockman further testified that the baghouse had an opening from which Vargas entered and exited the baghouse, and that the bottom of this opening was approximately 28 inches up from the bottom of the baghouse. Exhibit 3 shows what appear to be two other openings, smaller in size than the opening

Vargas used to access the baghouse, as depicted in Exhibit 5. Thus, the requirement that the confined space has a limited or restricted means for entry or exit is satisfied. Finally, Brockman testified that the baghouse was designed for processing aggregate rock, which would exclude employee occupancy during that process. The requirement that the confined space not be designed for continuous occupancy is satisfied. Therefore, the Division established that the baghouse is confined space as defined in section 5157, subdivision (b).

In order to establish that the baghouse is a permit-required confined space, as defined section 5157, subdivision (b), the Division must establish that one or more of four characteristics required by that section. The Division presented evidence to establish that the baghouse had a potential to contain a hazardous atmosphere. Brockman testified that Vargas, while using an oxygen acetylene cutting torch in the baghouse, created the potential of an oxygen-deprived environment, caused by the consumption of oxygen during the torch cutting operation. In the alternative, the potential of an oxygen-enriched environment, caused by oxygen leaks from potentially defective hoses or from a potentially defective cutting torch head, could have created a condition where a spark could have ignited a flammable explosive atmosphere. Brockman testified that when he peered into the dark baghouse, he could feel no air flow.<sup>3</sup> Brockman testified that there was no ventilation fan in operation, and that Vargas did not have a gas meter at the location. The Division established that the baghouse had the potential to contain a hazardous atmosphere, and therefore it meets the requirements necessary to characterize it as a permit-required confined space.<sup>4</sup>

Deleon could not identify any confined work spaces at the site, when asked by Brockman. Deleon told Brockman that the baghouse had not been evaluated to determine if it was a permit-required confined space. Mankins told Brockman that he was unaware whether the baghouse had been evaluated to determine whether a permit is required. Brockman testified that on the day of the inspection there was no sign posted indicating that the asphalt plant baghouse was a permit-required confined space. Therefore, the Division established that Employer was not aware that the baghouse was a permit-required confined space.

Employer failed to evaluate the asphalt plant baghouse to determine if it was a permit-required confined space. The evidence demonstrates that the baghouse is a permit-required confined space, that the baghouse had not been

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<sup>3</sup> Brockman indicated that air flow moving at less than 50 feet per minute is hard to feel.

<sup>4</sup> An analysis of the other three possible characteristics of a permit-required confined space is not necessary here as only one or more of those defined characteristics is necessary to establish that a confined space is a permit space.

evaluated, and that an employee was allowed to work in the baghouse, where he was exposed to a space which had the potential to contain a hazardous atmosphere. As such, the Division has met its burden of proof, and the violation of section 5157, subdivision (c)(1), is established.

**2. Did Employer demonstrate that a different safety order applied to the work activity that was the subject of the citation, and did Employer establish that it was in compliance with that other safety order?**

“If a different safety order applies to the work activity other than, or in addition to the one cited, an employer may only be relieved of a citation if it establishes that another safety order is more applicable, and that it also complied with that safety order.” (See *Vernon Melvin Antonsen & Colleen K. Antonsen, individually and dba Antonsen Construction*, Cal/OSHA App. 06-1272, Decision After Reconsideration (July 19, 2012), citing *Gal Concrete Construction Co.*, Cal/OSHA App. 91-271, Decision After Reconsideration (Feb. 28, 1992).)<sup>5</sup>

The Appeals Board has long recognized that the fact that one safety order may be more specific or more particular to a given set of facts than another is immaterial; only when an actual conflict between them exists will the more specific safety order control over the general. (See *Vernon Melvin Antonsen & Colleen K. Antonsen*, supra, and *Pacific Gas and Electric Company*, Cal/OSHA App. 82-1102, Decision After Reconsideration (Dec. 24, 1986).)

"When an employer has failed to comply with the safety order it asserts is more particular or appropriate, it cannot argue the inappropriateness of the cited safety order as a defense." (*Sheedy Drayage*, Cal/OSHA App. 84-0518, Decision After Reconsideration (Dec. 24, 1986), citing *California Erectors, Bay Area, Inc.*, Cal/OSHA App. 84-1254, Decision After Reconsideration (Sept. 30, 1986) and *Pacific Gas & Electric Co.*, supra.) (See also *Davis Brothers Framing*, Cal/OSHA App. 03-0114, Decision After Reconsideration (June 10, 2010).)

Section 1502, “Application,” of the Construction Safety Orders provides the following:

- (a) These Orders establish minimum safety standards whenever employment exists in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts. These

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<sup>5</sup> Employer raised as an affirmative defense that the wrong safety order was cited. Therefore, the burden is on Employer to establish this defense.

Orders also apply to all excavations not covered by other safety orders for a specific industry or operation.

(b) At construction projects, these Orders take precedence over any other general orders that are inconsistent with them, except for Tunnel Safety Orders or the Pressurized Worksite Standards in Article 154 of the General Industry Safety Orders.

(c) Machines, equipment, processes, and operations not specifically covered by these Orders shall be governed by other applicable general Safety Orders.

Section 5156 of the General Industry Safety Orders, "Control of Hazardous Substances, Confined Spaces, Scope, Application and Definitions," in relevant parts, provides the following:

(a) Scope. This Article prescribes minimum standards for preventing employee exposure to confined space hazards, as defined by Section 5156(b), within such spaces as silos, tanks, vats, vessels, boilers, compartments, ducts, sewers, pipelines, vaults, bins, tubs, and pits.

...

(b) Application and definitions.

(1) For operations and industries not identified in subsection (b)(2), the confined space definition along with other definitions and requirements of section 5157, Permit-Required Confined Spaces shall apply.

(2) The confined space definition along with other definitions and requirements of section 5158, Other Confined Space Operations shall apply to:

(A) Construction operations regulated by section 1502;

...

Section 5158 of the General Industry Safety Orders, "Control of Hazardous Substances, Confined Spaces, Other Confined Space Operations," in relevant parts, provides the following:

(a) Scope. For industries and operations specified in section 5156(b)(2) this section prescribes minimum standards for preventing employee exposure to dangerous air contamination, oxygen enrichment and/or oxygen deficiency in confined spaces, as defined in subsection (b).

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Employer, in its closing brief, asserts that the repair operation being conducted by Vargas, pursuant to section 1502, subdivision (a), was subject to requirements of section 5158, and not the requirements of section 5157. Employer maintains that it was not cited for an alleged violation of the safety standard which pertained to this particular set of circumstances. Section 5156, subdivision (b)(2)(A), requires that construction activities related to confined space operations must follow the requirements of section 5158.<sup>6</sup> Pursuant to *Gal Concrete Construction Co.*, supra, Employer has not shown that section 5156 is more applicable or that it complied with section 5158. Thus, Employer has not met its burden of proof to establish this affirmative defense.

**3. Did the Division establish a rebuttable presumption that the violation was serious?**

Labor Code section 6432, in relevant parts, states the following:

(a) There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things: [...]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

A rebuttable presumption of a serious violation exists when the Division establishes that there is "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Labor Code section 6432(a).) The term "realistic possibility" means that that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

Associate Safety Engineer Brockman testified that his division-mandated training is current, except for a module on “unlawful harassment,” which is due to be completed by the end of the year. Brockman has worked for Cal/OSHA for almost 10 years, as an associate safety engineer in the Mining

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<sup>6</sup> It is not necessary to determine whether the repair operation being conducted by Vargas was a construction activity as defined in section 1502, subdivision (a). Even if one were to adopt Employer’s premise that this was a construction activity as set forth in section 1502, subdivision (a), construction activities related to confined space operations, under section 5156, subdivision (b)(2)(A), would have to follow the requirements of section 5158. Employer did not present evidence sufficient to establish its burden that it was, in fact, in compliance with section 5158.

and Tunneling unit. Brockman has conducted 450 mine inspections, many of which included confined spaces summaries. On five previous occasions Brockman had entered baghouses at mining operations. Brockman received at least 24 hours of confined spaces training from the Division, which he described as “pretty intensive training,” lasting over a three to four day period.

Employer violated section 5157, subdivision (c)(1), for failing to evaluate the asphalt plant baghouse to determine if that workplace was a permit-required confined space. The hazard created by the violation is that Vargas was tasked with repairing the auger in the baghouse, which had not been evaluated to determine that it was, in fact, a permit-required confined space. Vargas was using an oxygen and acetylene torch to cut bolts to remove a segment of the auger in the baghouse. Brockman testified that leaking oxygen and acetylene hoses, or a faulty cutting torch, could create an oxygen-rich, and explosive atmosphere. Brockman testified that Vargas, while using an oxygen acetylene cutting torch in the baghouse, created the potential of an oxygen-deprived environment, or the potential of an oxygen-enriched environment where a spark could have ignited a flammable explosive atmosphere.<sup>7</sup> Brockman testified that Vargas had no gas meter, no radio, no rescue equipment nearby, and no other co-worker nearby when he, Vargas, was in the baghouse. Deleon told Brockman the he had not inspected the hoses for leaks on the day of the inspection. Brockman testified that he classified the violation as serious because there was a realistic possibility that death or serious physical injury could result if an accident occurred in that confined space, where an employee using oxygen and acetylene could have sparked an explosive atmosphere.

The realistic possibility of serious physical harm or death, combined with the existence of the actual hazard caused by Employer’s failure to evaluate the asphalt plant baghouse to determine if it was a permit-required confined space, establishes a rebuttable presumption that the violation was properly classified as a serious violation.

**4. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?**

Employer appealed the serious classification of the violation.

Section 6432, subdivision (c), provides as follows:

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<sup>7</sup> Brockman testified that he was aware of an instance in a separate matter where an employee was burned to death in an oxygen-enriched environment.

If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

A hazard that could have been discovered through periodic safety inspections is deemed discoverable through reasonable diligence. (See *Anheuser-Busch, Inc.*, Cal/OSHA App. 84-113, Decision After Reconsideration (July 30, 1987); and *Sturgeon & Son, Inc.*, Cal/OSHA App. 91-1025, Decision After Reconsideration (July 19, 1994).)

Reasonable diligence includes the obligation by foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. Employers have a duty to know the applicable safety orders; reasonable diligence requires them to do so. (See *A. A. Portanova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986).) Lack of knowledge of the applicable safety orders is not an excuse for lack of compliance. (See *EZ-Mix, Inc.*, Cal/OSHA App. 08-1898, Decision After Reconsideration (Nov. 26, 2013), citing *Jerlane, Inc. dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344, Decision After Reconsideration (Aug 20, 2007).)

Failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (See *Davis Development*

*Company*, Cal/OSHA App. 10-3360, Decision After Reconsideration (Sept. 20, 2011).)

Whether foremen/supervisors know the condition is unlawful is immaterial, since ignorance of the specific safety order's mandates is no defense. (*McKee Electric Company*, Cal/OSHA App. 81-0001, Decision After Reconsideration (May 29, 1981); and *Southwest Metals Company*, Cal/OSHA App. 80-068, Decision After Reconsideration (May 22, 1985).) (See also *EZ-Mix, Inc.*, supra.)

Employer presented no evidence related to inspections at the work site. Employer provided its Confined Spaces Program to the Division pursuant to a discovery request (Exhibit 6). There was insufficient evidence so show that employer evaluated the workplace for confined spaces that would require a permit. Employer, with the exercise of reasonable diligence, could have discovered through periodic safety inspections that the baghouse was a permit-required confined space. (See *Anheuser-Busch, Inc.*, supra).

Employer provided no evidence that Vargas has received permit-required confined spaces training. This lack of permit space training is tantamount to failure to supervise. As in *Davis Development Company*, supra, Employer's failure to adequately supervise Vargas to ensure his safety was equivalent to failing to exercise reasonable diligence, and does not excuse a violation on a claim of lack of employer knowledge.

As such, Employer failed to demonstrate that it did not, and could not, with the exercise of reasonable diligence, have known the violation which existed at the time of the inspection. Employer failed to meet its burden to rebut the presumption that the violation was properly classified as serious. As such, the serious classification is sustained.

## **5. Was the proposed penalty reasonable?**

At the hearing, Employer stipulated that the penalty associated with the citation was calculated in accordance with the Division's policies and procedures.<sup>8</sup> Therefore, the \$2,700 proposed penalty is found to be reasonable.

### **Conclusions**

The evidence supports a finding that Employer violated section 5157 subdivision (c)(1), by failing to evaluate the asphalt plant baghouse to determine if that workplace was a permit-required confined space prior to

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<sup>8</sup> Exhibit 4, "Proposed Penalty Worksheet."

allowing an employee to enter and perform work. The Division established the serious classification of the violation. The assessed penalty is reasonable and correctly calculated.

**ORDER**

It is hereby ordered that Citation 2 is upheld and the associated penalty of \$2,700 is sustained as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalty indicated above and set forth in the attached Summary Table be assessed.

Dated: May 03, 2016  
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**KEVIN J. REEDY**  
**Administrative Law Judge**

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration.

Your petition for reconsideration must fully comply with the requirements of Labor Code Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

**For further information, call: (916) 274-5751.**

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD**

**EVANS BROTHERS INC**

**DOCKET 15-R5D1-0182**

**Date of Hearing: October 14, 2015**

**Division's Exhibits**

<b>Exh. No.</b>	<b><u>Exhibit Description</u></b>	
1	Jurisdictional documents	<b>ADMITTED</b>
2	Training Records for R. Brockman	<b>NOT ADMITTED</b>
3	Photo of lower portion of Bag House	<b>ADMITTED</b>
4	Proposed Penalty Worksheet	<b>ADMITTED</b>
5	Photo of Vargas Exiting Bag House	<b>ADMITTED</b>
6	Employer's Confined Spaces Program	<b>ADMITTED</b>

**Employer's Exhibits**

None

**Witnesses Testifying at Hearing**

Rich Brockman  
William Evans

**CERTIFICATION OF RECORDING**

*I, **Kevin J. Reedy**, 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.*

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date



