

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
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6 CHIEF ADMINISTRATIVE OFFICER
7 OF THE OCCUPATIONAL SAFETY AND
8 HEALTH ADMINISTRATION, DIVISION
9 OF INDUSTRIAL RELATIONS OF THE
10 DEPARTMENT OF BUSINESS AND
11 INDUSTRY,

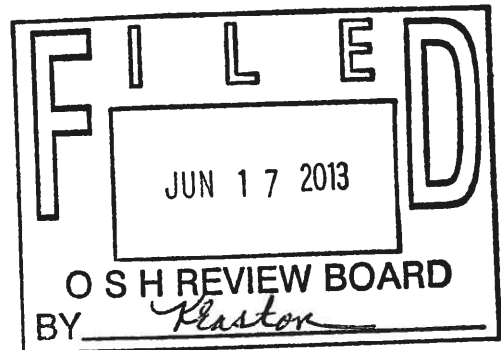
Docket No. LV 13-1631

Complainant,

vs.

12 SUNLAND, INC. - ASPHALT & SEALCOATING
13 dba SUNLAND ASPHALT,

Respondent.



14 _____/
15 **DECISION**

16 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
17 **HEALTH REVIEW BOARD** at a hearing commenced on the 8th day of May, 2013,
18 in furtherance of notice duly provided according to law, MR. MICHAEL
19 TANCHEK, ESQ., counsel appearing on behalf of the Complainant, **Chief**
20 **Administrative Officer of the Occupational Safety and Health**
21 **Administration, Division of Industrial Relations (OSHA)**; and MR. CHARLES
22 P. KELLER, ESQ., appearing on behalf of Respondent, **Sunland, Inc. -**
23 **Asphalt & Sealcoating dba Sunland Asphalt**; the **NEVADA OCCUPATIONAL**
24 **SAFETY AND HEALTH REVIEW BOARD** finds as follows:

25 Jurisdiction in this matter has been conferred in accordance with
26 Nevada Revised Statute 618.315.

27 The complaint filed by the OSHA sets forth allegations of violation
28 of Nevada Revised Statutes as referenced in Exhibit "A", attached

1 thereto. The alleged violations in Citation 1, Items 1 through 8
2 reference, respectively, 29 CFR 1910.23(c)(1), 29 CFR 1910.146(c)(1),
3 29 CFR 1910.146(c)(2), 29 CFR 1910.146(c)(4), 29 CFR 1910.146(d)(5)(i),
4 29 CFR 1910.146(d)(6), 29 CFR 1910.146(d)(9), and 29 CFR 1910.146(g)(1).

5 Complainant withdrew Citation 1, Items 1, 5, 6 and 7.

6 Complainant and respondent counsel stipulated to the admission of
7 the complainant evidence packet, specifically Exhibits 1, 2, 3, 4, 5 and
8 6. Counsel further stipulated to admission of respondent documentary
9 evidence identified as Exhibits R1-19, subject to reservation for
10 objections. Counsel also stipulated the **facts** of violation at Citation
11 1, Item 4, would not be contested by respondent but the **applicability**
12 of the standard and the violation would remain in contest.

13 At Citation 1, Item 2, referenced 29 CFR 1910.146(c)(1). The
14 employer was charged with failure to evaluate the workplace to determine
15 existence of any permit-required confined spaces. Complainant alleged
16 the employer maintained several storage tanks, which contained asphalt
17 seal coatings periodically entered by employees for cleaning. The
18 violation was classified as "serious" and a penalty proposed in the
19 amount of \$2,677.00.

20 Citation 1, Item 3, referenced 29 CFR 1910.146(c)(2). The employer
21 was charged with failure to inform exposed employees of workplace permit
22 spaces by posting danger signs or other equally effective means of the
23 existence and location of the dangers of permit spaces. The violation
24 was classified as "serious" and a penalty proposed in the amount of
25 \$2,677.00.

26 Citation 1, Item 4, referenced 29 CFR 1910.146(c)(4). The employer
27 was charged with a failure to develop and implement a written permit
28 space program after deciding its employees will periodically enter

1 permit-required confined spaces and further failed to implement a
2 written permit space program in compliance with 29 CFR 1910.146. The
3 violation was classified as "serious" and a penalty proposed in the
4 amount of \$2,677.00.

5 Citation 1, Item 8, referenced 29 CFR 1910.146(g) (1). The employer
6 was charged with a failure to provide training for employees whose work
7 is governed by this section requiring the employees acquire the
8 understanding, knowledge and skills necessary for the safe performance
9 of duties assigned. The violation was classified as "serious" and
10 penalty proposed in the amount of \$2,677.00.

11 Complainant counsel introduced testimony and evidence through
12 Certified Safety and Health Officer (CSHO) Bob Harris. Mr. Harris
13 described his background, experience and confined space training. He
14 referred to the exhibits in evidence, particularly Exhibit 1, his
15 narrative report, observations, interviews and determinations made as
16 to each of the violations subject of contest. He identified Exhibit 2,
17 photographs 1-5.

18 CSHO Harris testified that he conducted an investigation and
19 inspection of the respondent worksite at 5805 Emerald Avenue in Las
20 Vegas, Nevada, on July 28, 2012, after an employee accident was reported
21 to NVOSHA. He determined that employee James Wright was injured while
22 cleaning out the inside of a steel sealant containment tank utilized for
23 storage and mixing of an asphalt sealant product. The steel tanks
24 observed on the respondent premises are depicted in Exhibit 2,
25 photographs 1, 3, 4 and 5. The tank at Exhibit 2, photograph 1, had a
26 5,000 gallon capacity and measured approximately 10 feet deep and 12
27 feet across (diameter). There was a hatch/port opening at the top of
28 the tank which measured approximately 2-1/2 feet in width.

1 Employee Wright utilized a ladder on the outside of the tank to
2 access the top hatch/port cover and entered inside with a water hose to
3 perform the cleaning operations he understood to be subject of his
4 supervisors instructions. Mr. Harris was informed by employee Wright
5 that he received no training or instructions for working in any
6 restrictive or confined areas. Mr. Harris requested but was provided
7 no evidence of any evaluation or analysis for the existence of any
8 permit-required confined space, nor any plan, training or warning signs
9 as required by the standards when employees may work in areas defined
10 as permit-required confined spaces.

11 Mr. Harris testified he obtained information during interviews that
12 the tanks were cleaned by employees periodically, usually in the winter
13 off season. He also confirmed that Mr. Wright was instructed by his
14 supervisor Les Swain to clean the containment tank in July where he was
15 injured. The winter cleaning process was performed by multiple
16 employees while a bottom section of the tank was opened for access and
17 ventilation (Exhibit 2, photograph 5). However respondent provided no
18 evidence to demonstrate any company permit-required confined space
19 evaluation, plan for working inside the tanks, nor training records to
20 address either the employee Wright cleaning accident in July or the
21 normal tank cleaning operations during the winter off season.

22 Mr. Harris explained the distinctions as defined by OSHA standards
23 between a **confined space** (aka CS) and **permit-required confined space**
24 (aka **PRCS**). He testified that a **confined space** is defined as not
25 designed for continuous human occupancy, accessible to the inside by an
26 employee to perform work and a limited means to get out. He testified
27 that all three elements are required to meet the definition. He also
28 explained the four criteria required for a **permit-required confined**

1 **space**. He noted that only **one** of the elements need be found to meet the
2 definition in accordance with the applicable standards. The **permit-**
3 **required confined space** elements include - containing or with the
4 potential to contain a hazardous atmosphere, containing a material that
5 has a potential for engulfing an employee who enters, has an internal
6 configuration such that an employee could be trapped or asphyxiated
7 inside, or contains any other recognized safety or health hazard. He
8 testified that the employer must evaluate the workplace to determine if
9 any restrictive employee work areas are permit-required confined spaces
10 in accordance with 29 CFR 1910.146(c) (1).

11 CSHO Harris testified at Citation 1, Item 2, that the employer
12 failed to evaluate the workplace for permit-required confined space.
13 During his interviews, no one at the worksite appeared aware of the
14 requirement for evaluation and there was no evidence any evaluations had
15 ever been performed. He confirmed from employee interviews and
16 statements that periodic cleaning of the tanks was usually done in the
17 wintertime, which is an off season for the respondent paving operations
18 and a time when cooler weather prevails in Las Vegas.

19 Mr. Harris testified the citations were not predicated on employee
20 Wright entering the tank in July to clean it, but rather based upon the
21 OSHA requirement for the employer to evaluate the premises for a
22 determination whether any permit-required confined spaces existed and
23 then take the proscribed action governed by the standards.

24 CSHO Harris testified on the potential hazard exposure to
25 respondent employees. He explained that without any evaluation or
26 findings for existence of a permit-required confined space, employees
27 would be unprotected from the hazard of working in the dangerous
28 restrictive areas without training, warnings, and a safe work plan. An

1 employee could inadvertently enter a dangerous permit-required confined
2 space while performing other work or during cleaning, and not understand
3 or be aware that it is a "permit-required confined space" and subject
4 to special safety measures. He explained that employee "entry" into any
5 permit-required confined space is based upon ". . . any part of the body
6 breaking the plane . . . of the space". He testified that even if an
7 employee merely opened the top of the tank and reached in with his arm,
8 that is enough to "break the plane" and constitute work under permit-
9 required confined space standards.

10 CSHO Harris described recognized hazards under the definition of
11 a permit-required confined space to include working in a restrictive
12 area without an exit plan in the event of accident, in an atmosphere
13 with a potential for noxious fumes, lack of danger warning signs to
14 point out risks, or without special training to assure hydration,
15 ventilation, and particularly how to avoid the dangerous high heat
16 elements inside a tank. He further described the need for a rescue plan
17 and assistance of other trained employees who could render support or
18 aid.

19 Mr. Harris testified as to the serious classifications based upon
20 a potential for serious injury or death which could easily occur if an
21 employee became stuck inside a tank through illness or under heat
22 induced conditions while untrained and unaware of escape practices.
23 Both counsel stipulated any penalties, if confirmed were properly
24 calculated in accordance with the operations manual.

25 At Citation 1, Item 3, Mr. Harris testified he cited the employer
26 for a failure to inform employees by signage or other effective means
27 of the dangers of permit-required confined spaces. He saw no warning
28 signs or equivalent means to notify the employees, and no respondent

1 representative could provide him with any evidence to the contrary.
2 Exhibit 2, photograph 5 depicts a warning sign placed on a tank after
3 the inspection.

4 At Citation 1, Item 4, Mr. Harris testified the employer failed to
5 develop any written confined space program in compliance with 29 cFR
6 1910.146. He noted that respondent counsel stipulated there was no
7 written space program in existence. Mr. Harris testified that even if
8 employees generally entered and cleaned the tank interior spaces only
9 in the wintertime through the described opened bottom hatch section, the
10 company still needed a written plan to comply with the OSHA standards
11 because the tanks met the definition of a permit-required confined
12 space.

13 At Citation 1, Item 8, Mr. Harris testified the employer failed to
14 provide training to employees who enter or potentially could enter a
15 permit-required confined space tank interior area. He explained that
16 employees must be trained so they could understand whether any
17 restricted areas or confined space could be safely worked in or how to
18 make it safe enough for work. At Exhibit R-15, identified as minutes
19 of a tailgate meeting, he testified the exhibit fails to adequately
20 address the cited permit required confined space issues. This and the
21 other employer training documentation was very generic and contained
22 nothing on, for example, how to ventilate a permit-required confined
23 space or satisfy other relevant criteria to demonstrate effective
24 employee training. Mr. Harris testified the respondent safety director
25 told him that no training was done because he (the director) was new on
26 the job and had not yet implemented same.

27 On cross-examination Mr. Harris testified that signs identifying
28 a space as a permit-required confined space are required only if there

1 are "exposed employees". His interview of supervisory employee Les
2 Swain reflected that he, Mr. Swain, was adamant that he told employee
3 Wright not to enter inside the tank to clean it. Mr. Harris testified
4 that Mr. Swain and other employer supervisory representatives did not
5 consider the tanks to be "permit-required confined spaces". He again
6 reviewed the criteria subject of direct examination for evaluation and
7 determination of a confined space and a permit-required confined space.
8 He testified superintendent Swain admitted he instructed Mr. Wright to
9 clean the tank, but provided him no training or direct supervision. The
10 employer did not produce any information of employee training or a tank
11 cleaning plan. He testified that 29 CFR 1910.146(c)(1) was the
12 applicable standard because employee Wright and other respondent
13 employees were engaged in general industry activity which included tank
14 cleaning and the employer failed to identify the tank(s) as a permit-
15 required confined space or evaluate the work place for any permit-
16 required confined spaces.

17 Mr. Harris further testified that he had no evidence of the
18 respondent procedures when it usually cleaned the tanks in the
19 wintertime, but was told the employer opened an approximate 20 inch
20 section hatch which required the removal of approximately 30 bolts from
21 the bottom of the tank.

22 Mr. Harris responded to questioning from counsel that he did not
23 interview employee Mitchell, who employee Wright identified as an
24 individual who knew he was told to enter the tank, nor did he interview
25 respondent employee Basilio who Mr. Wright testified knew he was
26 entering the tank. He further testified that he did not find Mr. Swain
27 to be credible.

28 Counsel for the complainant introduced testimony and evidence from

1 witness Mr. James Wright, who identified himself as a former employee
2 of respondent and the individual who filed a complaint with Nevada OSHA.
3 He testified that he was instructed by his supervisor, Mr. Les Swain,
4 to enter into an asphalt sealant containment tank to perform cleaning
5 duties. He described his supervisor instructions to ". . . hose out and
6 clean the inside of the tank . . .". Mr. Wright identified supervisors
7 Les Swain and Sal Basilio as the respondent representatives who
8 instructed him to enter the tank. Mr. Wright described his need to
9 climb a ladder on the outside of the tank to access the inside of the
10 structure from the top. While inside the tank for 20-30 minutes he
11 ". . . became . . . dizzy from heat and tried to climb out . . . but
12 slipped on a bar/step inside, then fell and struck his head on the side
13 and bottom of the tank . . ." Mr. Wright testified he ". . . had no
14 real training . . . just to watch out . . . and stay hydrated . . .".
15 Mr. Wright also testified that everybody in the yard has had to clean
16 tanks before, but mostly in the wintertime when it's cooler and when no
17 paving related work is underway. He testified other employees had
18 previously performed the tank cleaning duties. He does not remember
19 seeing any MSDS posted, and ". . . never had any confined space training
20 . . .".

21 On cross-examination, Mr. Wright testified that he was given a copy
22 of the company safety manual when he commenced work and identified
23 Exhibits R-12, 13 and 14. He acknowledged his signature appeared at the
24 bottom of each to confirm his having read same. He also identified
25 Exhibit R-11 as the company safety manual and admitted at page 47 it
26 prohibited an employee from entering into a confined space. He further
27 testified that he ". . . does not recall reading this but could have
28 . . .". Mr. Wright identified Mr. Les Swain as his supervisor and

1 testified he was told by Mr. Swain on July 27 to ". . . go into the tank
2 and clean it . . .". He explained that he was also told to drain and
3 rinse the tank. Mr. Wright denied that Mr. Swain instructed him not to
4 enter the tank, and further denied he was told he needed ventilation
5 before entering a tank, or another employee outside the tank if anyone
6 was to ever enter into same. He further testified that no one saw him
7 either in personal protective clothing or enter into the tank. He also
8 testified there was no ladder inside to climb down into the tank, so he
9 had to lower himself through the top opening, into the bottom and stand
10 on a horizontal bar to hose out the inside of the tank.

11 At the conclusion of complainant's case, respondent presented
12 witness testimony and evidence. Mr. Steve Musegades identified himself
13 as the respondent division manager. He explained the subject tank being
14 cleaned by Mr. Harris was not in service at the time as the seal coat
15 material had been pumped out a few days before. He never heard of
16 anyone ever being assigned the duty to enter a tank and rinse it out in
17 the summertime, because the company practice is to never clean the tanks
18 in the summer due to the heat and the need for them to remain
19 serviceable for paving jobs during the season. He testified the hatch
20 on the top was only for visual inspection to observe fluid levels and
21 never for access by an employee. He said it was not designed nor
22 configured for entry, therefore there is no ladder inside, no way to
23 lower ones self in nor a means to exit.

24 On cross-examination Mr. Musegades testified that if supervisory
25 employee Swain would have told employee Wright to enter into the tank
26 that day he would have been terminated because that was not the
27 company's practice nor policy. He further testified that he had never
28 heard of anyone spraying a hose in the tank to clean it out.

1 Mr. Musegades testified that no employee was ever directed to enter
2 a tank to clean in so there was no need to evaluate the tank for any
3 permit-required confined space purposes. He said no respondent
4 employees were ever working in a permit-required confined space, so
5 there was never a program nor any evaluation required because the
6 company practice was to only clean the tanks in the winter with the
7 bottom section removed, thereby making the tank simply a confined space
8 and not a permit-required confined space to trigger applicability of the
9 cited standards. He further testified that no employer supervisor or
10 management official ever gave employee Wright authority or instructions
11 to enter a containment tank. Whenever tanks are cleaned the company
12 policy is to conduct a special meeting, because it is performed only
13 once each year. He concluded his testimony stating that Mr. Wright had
14 been a good employee.

15 Respondent presented testimony from Mr. Les Swain, the former
16 sealcoat superintendent employee of the respondent. He testified that
17 he had a good relationship with Mr. Wright, and believed him to be a
18 responsible employee. Mr. Swain testified that while he told Mr. Wright
19 to hose out the tank, he never gave him authority or instructions to
20 enter into a tank, and specifically did not instruct him to enter into
21 the tank on the date of the accident. He testified that winter tank
22 cleaning is the company policy when the tank is out of service and
23 opened for ventilation and can dry out and allow employees to safely
24 work in the tank by rotating them one to one-half hours each. He
25 testified that a safety meeting was conducted on the winter cleaning
26 process and reaffirmed that tanks were never cleaned in the summer. He
27 testified the tanks were not designed for top access entry. He never
28 ordered training for employees to enter a "permit-required confined

1 space" because neither he nor anyone else in the company believed the
2 respondent tanks were so qualified. Mr. Swain testified that he told
3 employee Wright to hose out the tank, which he said required Mr. Wright
4 to ". . . reach in the top opening with the hose and spray down the
5 sides . . .".

6 Further testimony was presented from respondent employee witnesses
7 Anthony Mitchell and Sal Basilio. Mr. Mitchell testified that he was
8 a foreman of respondent at the time of the accident and never heard of
9 anyone entering the top of a tank, except Mr. Wright. He testified that
10 he had never cleaned a tank of this type in the summer, and it was never
11 done by any of the other Las Vegas Paving companies at that time of
12 year. He testified he saw employee Wright in the morning of the
13 accident who told him he was going into the tank based on instructions
14 of Mr. Swain. Mr. Mitchell testified that he told employee Wright, that
15 you never go into a tank alone; it takes two people and you never go
16 from the top so needed to telephone the next level of supervisor to
17 recheck to determine what he was actually supposed to do. He further
18 testified he told Mr. Wright that he must refuse to go into the tank
19 even if instructed to do so.

20 Witness Basilio testified that neither he nor the company ever
21 cleaned tanks in the summer; he only rinsed them, and never heard of
22 anyone ever entering inside the tank. He testified the tanks could be
23 rinsed from the top port by spraying the inside walls with a hose while
24 standing on a ladder outside the tank. He testified Mr. Wright was the
25 only person he had ever known to have entered a tank through the top
26 port, because there is no ladder inside to safely enter or exit. He
27 testified that he only spoke to Mr. Wright about not entering the tank
28 but Mr. Wright never told him that he was going to enter the tank.

1 At the conclusion of evidence and testimony counsel presented
2 closing argument.

3 Complainant argued that regardless of the initial cause of the
4 investigation and inspection involving Mr. Wright's entry and accident
5 inside the tank, violation of the citations in contest were established
6 through satisfaction of the burden of proof. Each violation was
7 independent of the accident. He argued that employees must be warned
8 away from entering into permit-required confined spaces and any confined
9 spaces, so whether Mr. Wright entered at his supervisor's instructions
10 is immaterial to the evidence of confirming the cited violations. He
11 argued the Citation 1 items apply and were proven because they dealt
12 with failures to evaluate the workplace for permit-required confined
13 spaces, inform employees who were exposed or could be exposed, and
14 failure to train, develop and implement a program in accordance with the
15 standards. Had Mr. Wright been trained as required by the standards,
16 he would have known better than to enter the tank whether instructed by
17 a supervisor or not.

18 Respondent argued the burden of proof first requires the criteria
19 be met as a threshold to find that a permit-required confined space
20 existed on the worksite. He asserted the standards did not apply unless
21 the evidence established the worksite contained "permit-required
22 confined spaces". He argued there was no proof the steel containment
23 tanks satisfied the criteria to be classified as a permit-required
24 confined space. He argued the evidence showed that only employee Wright
25 ever entered a tank and that no supervisor or employer had any knowledge
26 he (Wright) did so. He argued there was substantial and corroborated
27 testimonial evidence from respondent employees that no one was ever
28 required to enter a tank through the top port section in the summer and

1 without the hatch bolts removed and the tank opened at the bottom, which
2 is only done in the winter off season. He further argued witness
3 Mitchell testified he told Mr. Wright not to enter into the tank and
4 that he should refuse to do so, even if instructed by a supervisor.
5 Counsel concluded by arguing that, at best the tanks were simply a
6 "confined space" but not a "permit-required confined space" so the
7 standards are simply not applicable and the violations must be
8 dismissed. He submitted there were no permit-required confined space
9 hazards in the winter off season when the tank was opened and the annual
10 cleaning process conducted as testified by the respondent witnesses.
11 Because the tank did not qualify as a permit-required confined space,
12 there was no reason to comply with the standards requiring evaluation,
13 information, training and a permit-required confined space program. He
14 argued that employee Wright acted on his own and without employer
15 knowledge, direct or constructive, so even if the burden of proof were
16 satisfied the elements for the defense of employee misconduct were met
17 to rebut any findings of violation.

18 The board in reviewing the facts, documents and testimony in
19 evidence must measure same against the established law developed under
20 the Occupational Safety & Health Act, Code of Federal Regulations (CFR)
21 and Nevada Revised Statutes (NRS).

22 In all proceedings commenced by the filing of a
23 notice of contest, the burden of proof rests with
the Administrator. N.A.C. 618.788(1).

24 All facts forming the basis of a complaint must be
25 proved by a preponderance of the evidence. *Armor*
Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958
26 (1973).

27 To prove a violation of a standard, the Secretary
28 must establish (1) the **applicability** of the
standard, (2) the existence of **noncomplying**
conditions, (3) **employee exposure or access**, and

1 (4) that the **employer knew or with the exercise of**
2 **reasonable diligence could have known of the**
3 **violative condition.** See *Belger Cartage Service,*
4 *Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
5 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
6 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC
7 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
8 (No. 76-1408, 1979); *American Wrecking Corp. v.*
9 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
10 2003). (emphasis added)

11 A respondent may rebut allegations by showing:

- 12 1. The standard was inapplicable to the situation
13 at issue;
- 14 2. The situation was in compliance; or lack of access to a
15 hazard. See *Anning-Johnson Co.*, 4 OSHC 1193, 1975-1976
16 OSHD ¶ 20,690 (1976).

17 A "serious" violation is established upon a preponderance of
18 evidence in accordance with NRS 618.625(2) which provides in pertinent
19 part:

20 . . . a serious violation exists in a place of
21 employment if there is a **substantial probability**
22 **that death or serious physical harm could result**
23 from a condition which exists or from one or more
24 practices, means, methods, operations or processes
25 which have been adopted or are in use at that place
26 of employment unless the employer did not and could
27 not, with the exercise of reasonable diligence,
28 know the presence of the violation. (emphasis
added)

A 'confined space' is defined as:

' . . . large enough and so configured that an
employee can bodily enter and perform assigned work
and has limited or restricted means for entry or
exit . . . and is not designed for continuous
employee occupancy.'

A 'permit-required confined space' is defined as:

if it has **one** or more of the following: 'Contains
or has a **potential** to contain a hazardous
atmosphere; contains a material that has the
potential for engulfing an entrant; 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 contains **any other**

1 **recognized safety or health hazard."** The employer
2 **must evaluate the workplace to determine if any**
3 **confined spaces are permit-required spaces.** See 29
 CFR § 1910.146(b)(c). (emphasis added)

4 The board finds the testimonial and documentary evidence presented
5 by and through CSHO Harris credible and established violations at
6 Citation 1, Items 2, 3, 4 and 8.

7 29 CFR 1910.146(c)(1) Citation 1 imposes a **threshold requirement**
8 for an employer evaluation of a workplace to first determine if there
9 are any **permit-required confined spaces** on the worksite. The steel
10 tanks on the worksite premises were admitted by respondent witnesses to
11 have been subject of periodic cleaning by employees entering inside
12 usually during the winter off season. Mr. Wright testified he was
13 instructed and did in fact attempt to clean the inside of a tank in July
14 during the summer. There was no evidence that any **evaluation** was ever
15 made by respondent to determine if the tanks were **permit-required**
16 **confined spaces.** Mr. Musegades, the respondent division manager,
17 testified the tanks were not evaluated because they were considered
18 **confined spaces** and not **permit-required confined spaces.**

19 At least once each year during the winter season, respondent
20 employees entered the interior tank spaces. The testimonial evidence
21 demonstrated that certain procedures were implemented during the annual
22 cleanings, which included removing approximately 30 bolts and opening
23 the bottom portion of the tank. Removing the plate cover created an
24 approximate two (2) to three (3) foot square opening for employee entry
25 to the inside of the tank. The company practices for working in the
26 interior space required employees work in rotational intervals of one
27 to two hours, remain very hydrated, and work only in the presence of
28 other employees who could observe and assist for rescue and provide

1 other safety measures. The respondent cleaning procedures corroborated
2 the finding by CSHO Harris that the tank interiors were **recognized** as
3 **permit-required confined spaces**. However, there was no evidence of any
4 permit-required confined space evaluation, warning signs, a specific
5 work plan or employee training as required by the standard. There was
6 only testimony that a special meeting was conducted amongst the
7 employees one time each year prior to the usual cleaning.

8 The weight of credible testimony and documentary evidence in the
9 record demonstrated the tanks on the premises were at the very least
10 **"recognized as safety or health hazards"** and satisfied the definition
11 of a **permit-required confined space** subject to the strict and detailed
12 OSHA standards and regulations governing entry into such spaces to
13 protect employees from permit-required confined space hazards. The
14 recognized hazard exposure to not only employee Wright but also the
15 other employees of respondent satisfied the proof elements and the
16 recognition of the dangers associated with same. The violation of 29 CFR
17 1910.146(c)(1) at Citation 1, Item 2 is supported by the weight of
18 credible evidence and must be confirmed.

19 Under OSHA, before employees may enter on a permit-
20 required confined space, an evaluation is required.
21 The employer must, among other things and as set
22 forth in great detail by such regulations, (1)
23 develop and implement a written permit-required
24 confined space program; (2) provide adequate
25 training to entrants and entry supervisors to make
26 them aware of the hazards of entry into the space
27 and enable them to safely perform their duties; (3)
28 certify in writing that the required training has
been provided; (4) identify and evaluate hazards
prior to entry; (5) develop procedures and
practices for safe permit space entry such as
isolating permit space, eliminating or controlling
atmospheric hazards and verifying that conditions
in the space are acceptable for entry throughout
the duration of the work; (6) test and monitor
atmospheric hazards prior to an during entry; (7)
provide equipment necessary for safe entry and

1 rescue, including testing, monitoring, ventilating,
2 communications, rescue and emergency equipment; (8)
3 designate an authorized attendant to monitor the
4 authorized entry into the space; (9) designate an
5 entry supervisor responsible for determining if
6 acceptable entry conditions are present, overseeing
7 entry operations, and terminating entry; (10)
8 consult and coordinate entry operations with third-
9 party contractors; (11) provide or designate
10 qualified rescue and emergency services; and (12)
11 execute a written policy that controls and
12 authorizes entry into permit spaces. *State v. Far
13 West Water & Sewer Inc.*, 228 P.2d 909 (Ariz. App.,
14 2010)

15 It is critical that there be a written program
16 which is taught to the workers and that testing,
17 discussion and training occur to make sure they
18 have learned it and then there must be a
19 responsible provision to make sure they actually do
20 what the program required. See *State v. Far West
21 Water & Sewer Inc.*, *supra*.

22 At Citation 1, Item 3, the evidence is unrefuted that no warning
23 or danger signs were posted on the tanks as required by the standard.
24 Further there was no evidence of any ". . . other equally effective
25 means . . ." to inform employees of the dangers of the space. The
26 direct evidence and reasonable inferences demonstrated that Mr. Wright,
27 an untrained confined space employee, faced with **no warnings posted** nor
28 informed by **other equally effective means** as the space danger, entered
inside a tank in the summer and sustained the type of injuries
recognized from working inside a dangerously restricted space. He may
have understood his supervisor instructions to "clean out the inside of
the tank" meant he should or could enter inside the tank to do so.
Further, he may simply have been an ambitious employee who thought he
might be able to do a better job. He had been a "good employee" in the
opinion of the respondent supervisory employee witnesses. It may be he
was merely attempting to garner some favor. The violation must be
confirmed.

1 At Citation 1, Item 4, the facts of violations were admitted. The
2 evidence there was no written permit space program was unrefuted. The
3 standard was applicable and the violation confirmed.

4 At Citation 1, Item 8, the weight of credible evidence established
5 that respondent provided no training for work in permit-required
6 confined space. Mr. Wright was instructed to clean or hose out a tank
7 by the respondent supervisor Les Swain.

8 The evidence warrants reasonable inference that had employee Mr.
9 Wright been trained on the dangers of entering the tank, a very
10 restricted area which qualified as a permit-required confined space, or
11 if prominent warning signs had been posted on the tank or equivalent
12 means, to warn off entry, then the safeguards contemplated by the
13 standard would have been in place to deter him or stop any other
14 employee from entering the tank on his own, through misunderstanding the
15 cleaning or rinsing process, zealous conduct or error.

16 In addition to the foregoing, the evidence demonstrated, through
17 respondent witness Swain and CSHO Harris, that simply "breaking the
18 plane" of the opening on top of the tank with a part of ones body
19 constituted **entry** into the permit-required confined space and violation
20 of the permit-required confined space standards. Even had Mr. Wright
21 not lowered himself into the tank, simply reaching his arm and hand
22 inside the top with a hose as Mr. Swain testified would be the required
23 method to "rinse out" or clean the tank wall under his instructions, was
24 a violation governed by the cited standards. Mr. Swain testified that
25 to clean the tank you open the top, take a garden hose, and reach inside
26 to hose down the side of the walls. Similar testimony was offered by
27 respondent witness Basilio who testified the inside tank wall can be
28 rinsed from the top opening by working off a ladder and using a garden

1 hose.

2 The evidence demonstrates that Mr. Wright had **direct** as well as
3 constructive **access** to the containment tank and without any training,
4 warnings or deterrents in place was **exposed** to the hazards of entry.

5 Under Occupational Safety and Health Law, there
6 need be no showing of **actual** exposure in favor of
7 a rule of **access** based upon reasonable
8 predictability - (1) the zone of danger to be
9 determined by the hazard; (2) access to mean that
10 employees either while **in the course of assigned**
11 **duties**, personal comfort activities on the job, or
12 while in the normal course of ingress-egress will
13 be, are, or have been in the zone of danger; and
14 (3) the **employer knew or could have known** of its
employees' presence so it could have warned the
employees or prevented them from entering the zone
of danger. *Gilles & Cotting, Inc.*, 3 OSHC 2002,
1975-1976 OSHD ¶ 20,448 (1976); *Cornell & Company,*
Inc., 5 OSHC 1736, 1977-1978 OSHD ¶ 22,095 (1977);
Brennan v. OSAHRC and Alesea Lumber Co., 511 F.2d
1139 (9th Cir. 1975); *General Electric Company v.*
OSAHRC and Usery, 540 F.2d 67, 69 (2d Cir. 1976).
(emphasis added)

15 The evidence established there were **recognized hazards** of which the
16 employer had requisite **knowledge** as to employees needing to periodically
17 work inside the large steel tanks with dangerously restricted access.
18 Had the tanks been evaluated, the evidence established they would have
19 met the definition of permit-required confined spaces and **application**
20 of the cited standards. Removing the bolts and the hatch at the bottom
21 of the tank and rotating employees working inside under the conditions
22 described in testimony, demonstrated alone that there were **recognized**
23 **hazards** for working in such confinement making the cited standards
24 applicable.

25 The weight of credible evidence established the respondent employer
26 had the requisite **knowledge** through its **supervisory employees** Musegades,
27 Swain and Basilio who **recognized** the potential hazards of internal tank
28 work and instructed, permitted, or allowed accessible entry by employees

1 at periodic times, during both the regular and off season. The tanks
2 must be considered **permit-required confined spaces**. The off season
3 winter work, while safer, still did not change the elements of the
4 standard as to which can constitute a permit-required confined space nor
5 the requirements for evaluation and the related safeguards as subject
6 of the citation. See, *Danco Const. Co. v. Occupational Safety and Health*
7 *Review Comm'n.*, 586 F.2d 1243, 1246-47; *Omaha Paper Stock Co. v.*
8 *Secretary of Labor*, 304 F.3d 779 (Fed. 8th Cir. 2002); *State v. Far West*
9 *Water & Sewer Inc.*, *supra*.

10 Employee **exposure and employer knowledge** can be based on
11 preponderant evidence of **direct exposure and/or access to a hazard**.

12 **Actual knowledge (of employee exposure to violative**
13 **conditions)** is not required for a finding of a
14 serious violation. **Foreseeability** and
15 **preventability** render a violation serious provided
16 that a reasonably prudent employer, i.e., one who
17 is safety conscious and possesses the technical
18 expertise normally expected in the industry
19 concerned, would know of the danger. *Candler-*
Rusche, Inc., 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723
(1976), appeal filed, No. 76-1645 (D.C. Cir. July
16, 1976); *Rockwell International*, 2 OSHC 1710,
1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d
1283 (6th Cir. 1976); *Mountain States Telephone &*
Telegraph Co., 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365
(1973). (emphasis added)

20 The evidence is clear that Sunland employees entered the subject
21 tanks with **recognized safety and health hazards**, and which satisfied the
22 definition of permit-required confined spaces, on a regular periodic
23 basis during the winter or off season to clean and maintain them. The
24 employees were required to access the tanks through a bottom opening of
25 approximately two (2) to three (3) square feet and work inside.
26 Respondent also required the tank to be "cleaned" during summer months
27 by a hosing or rinsing process. The procedure required an employee to
28 reach into the top port with a hose and rinse the sidewalls. The

1 employer instructed method required the employee to "break the plane"
2 of the opening with his arm and satisfied "entry" into the tank.
3 Respondent supervisor Swain directed employee Wright to clean out the
4 tank in July. The tank met the definition of a permit-required confined
5 space. Respondent had no written permit-required space program, did not
6 inform or train its employees, did not post warning signs to alert
7 employee to confined space issues, and took no other steps as referenced
8 in the citations to protect its employees on permit-required confined
9 space safety requirements under the facts and evidence.

10 Respondent asserted the defense of employee misconduct. However,
11 respondent presented insufficient evidence to establish the recognized
12 defense of **unpreventable employee misconduct**. The employer did not
13 satisfy the legal burden to prove the necessary elements of the defense
14 by a preponderance of evidence. This board relies upon long established
15 Federal and OSHRC case law providing that for an employer to prevail on
16 the defense of unpreventable employee misconduct, it must meet its
17 burden of proof by a preponderance of evidence that despite established
18 safety policies in a safety program which is effectively communicated
19 and enforced, the conduct of its employees in violating the policy was
20 unforeseeable, unpreventable or an isolated event.

21 An employer has the affirmative duty to anticipate
22 and protect against **preventable** hazardous conduct
23 by employees. *Leon Construction Co.*, 3 OSHC 1979,
24 1975-1976 OSHD ¶ 20,387 (1976). **Employee**
25 **misbehavior, standing alone, does not relieve an**
26 **employer**. Where the Secretary shows the existence
27 of violative conditions, an employer may defend by
28 showing that the employee's behavior was a
deviation from a uniformly and **effectively enforced**
work rule, of which deviation the employer had
neither actual **nor constructive** knowledge. *A. J.*
McNulty & Co., Inc., 4 OSHC 1097, 1975-1976 OSHD ¶
20,600 (1976). (emphasis added)

While the employer demonstrated to the inspecting CSHO that

1 respondent maintained general work rules and a safety program, they were
2 not designed to evaluate, limit or prevent permit-required confined
3 space standard violations. Respondent offered no proof of **effective**
4 **enforcement** of safety rules sufficient to avoid these violations.
5 Respondent provided no evidence or testimony that it **adequately**
6 **communicated** safety policies and rules to employees in its work practice
7 for safely carrying out the job tasks of working in confined spaces and
8 specifically permit-required confined spaces. Respondent did not
9 demonstrate that it took **meaningful steps to discover** violations which
10 should have been easily observable by supervisory representatives on the
11 construction site. Mr. Swain sent a relatively new employee Wright to
12 perform recognized dangerous work, without training, or even a clear
13 plan, on what it means to clean or rinse out the inside of a tank safely
14 and gave no supervision or guidance. Employee Wright had legally
15 defined **access** to a permit-required confined space. Mr. Swain knew, as
16 testified, that to do the job he assigned, even without entering the
17 interior, employee Wright would have to open the top of the hatch and
18 break the plane with his arm, and reach in with a garden hose to wash
19 down the sides. The defense of unpreventable employee misconduct must
20 fail because violative conditions were readily **foreseeable**, in plain
21 view and **reasonably preventable**. Adequate communication and
22 **meaningfully enforced** work rules would have prevented the violative
23 conditions and the citations. See *Jensen Construction Co.*, 7 OSHC 1477,
24 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10 OSHC 2128, 1980
25 OSHC 1045 ¶24,174 (1980).

26 . . . cases make clear the existence of an
27 employer's defense for the unforeseeable
28 disobedience of an employee who violates the
specific duty clause. However, the disobedience
defense will fail if the employer does not

1 effectively communicate and conscientiously enforce
2 the safety program at all times. Even when a
3 safety program is thorough and properly conceived,
4 lax administration renders it ineffective. *P.*
5 *Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 110-
6 111 (1st Cir. 1997).

7 Complainant met the statutory burden of proof and established the
8 **serious** classification of the violations at Citation 1, Items 2, 3, 4
9 and 8 by a preponderance of evidence.

10 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
11 **REVIEW BOARD** that a violations of Nevada Revised Statutes did occur as
12 to Citation 1, Item 2, 29 CFR 1910.146(c)(1), Citation 1, Item 3, 29
13 CFR 1910.146(c)(2), Citation 1, Item 4, 29 CFR 1910.146(c)(4), and
14 Citation 1, Item 8, 29 CFR 1910.146(g)(1). The violations, Serious
15 classifications and proposed penalties in the amount of TWO THOUSAND SIX
16 HUNDRED SEVENTY-SEVEN DOLLARS (\$2,677.00) for each violation, for a
17 grand total of TEN THOUSAND SEVEN HUNDRED EIGHT DOLLARS (\$10,708.00),
18 are confirmed and approved.

19 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
20 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION**
21 **OF INDUSTRIAL RELATIONS**, to submit proposed Findings of Fact and
22 Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
23 **BOARD** and serve copies on opposing counsel within twenty (20) days from
24 date of decision. After five (5) days time for filing any objection,
25 the final Findings of Fact and Conclusions of Law shall be submitted to
26 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing
27 counsel. Service of the Findings of Fact and Conclusions of Law signed

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1 by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
2 **BOARD** shall constitute the Final Order of the **BOARD**.

3 DATED: This 17th day of June 2013.

4 NEVADA OCCUPATIONAL SAFETY AND HEALTH
5 REVIEW BOARD

6 By _____ /s/
7 JOE ADAMS, Chairman

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