

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

In the Matter of the Appeal of:

**HAMPTON TEDDER ELECTRIC
4571 STATE STREET
MONTCLAIR, CA 91763**

Employer

Inspection No.
1233597

DECISION

Statement of the Case

Hampton Tedder Electric (Employer) provides high-voltage electrical utility services. Beginning May 18, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Matthew Zylowski, conducted an inspection arising from an injury at 12932 Glynn Ave, in Downey, California (the site).

On November 17, 2017, the Division issued four citations to Employer alleging violations of California Code of Regulations, title 8.¹ The Division alleges Employer failed to ensure: an observer was present where work was performed on equipment connected to high-voltage systems; employees used protective equipment for high-voltage work; wires were tested and grounded prior to work; and employees remained a specific distance from exposed energized parts unless protected.

Employer filed timely appeals of the citations, contesting the existence of the violations, their classifications, and the reasonableness of the proposed penalties. Employer asserted numerous affirmative defenses including the defense of independent employee action as to all citations.²

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on April 18, 19, and 20, 2023. ALJ Avelar conducted the hearing with the parties and witnesses appearing remotely via the Zoom video platform. Manuel M. Melgoza of Donnell, Melgoza & Scates, LLP, represented Employer. Kathryn Woods, Staff Counsel, represented the Division. The matter was submitted on September 21, 2023.

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

² Except as otherwise noted in the Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did Employer fail to ensure an observer was present where work was performed on exposed high-voltage wires?
2. Did Employer fail to ensure employees used protective equipment for high-voltage work?
3. Did Employer fail to test conductors for de-energization?
4. Did Employer fail to ensure employees remained a specific distance from exposed energized parts unless protected?
5. Did Employer establish the Independent Employee Action Defense as to any of the citations?
6. Did Employer establish the *Newbery* defense as to any of the citations?
7. Did the Division properly classify Citations 1, 2, and 3 as Serious?
8. Did Employer rebut the presumptions that Citations 1, 2, and 3 were Serious?
9. Are the proposed penalties reasonable?

Findings of Fact

1. Raymond Salvador (Salvador), a journeyman lineman, worked on a crew of five (the crew) which included his foreman William Roer (Roer).
2. The crew needed to replace exposed wires that carried 4,000 volts of electricity between two poles. Trees in the area complicated the replacement process.
3. The crew agreed upon a method to replace the wires. They agreed to connect the replacement wires to the existing wires, and then pull on the old wires to draw the new wires into position over the trees.
4. Their plan required three crew members to climb the first pole, de-energize it, and remain aloft to pull the old wires when the new wires were connected. At the same time, the other two crew members advanced to the second pole to prepare and then connect the new wires after de-energization.

5. Climbing and de-energizing the first “source” pole would take the team of three approximately four minutes, while positioning a bucket truck, preparing equipment, and ascending the second “distribution” pole would take the team of two approximately 15 minutes.
6. Groundman Alonzo Trevino (Trevino) watched Salvador’s first ascent, wire connection, and descent at the distribution pole. Trevino handed Salvador a second wire but left his post before Salvador’s second ascent.
7. Salvador expected a de-energized environment at the distribution pole and did not use insulated gloves or sleeves.
8. The crew agreed that testing or grounding would not take place and they did not unload, prepare, or use testing and grounding tools.
9. Salvador’s distance from the two energized wires is unknown.
10. Roer agreed to and coordinated all the steps for the replacement process.
11. Roer permitted the common practice of relying on visual confirmation of de-energization, instead of testing, when working with three spans of wires or less.
12. Roer did not enforce electricians’ protocol, which requires four workers when ascending an energized pole.
13. Roer did not enforce electricians’ protocol, which requires identification of an individual to signal when de-energization occurs.
14. Salvador did not deliberately undertake working on exposed energized lines without an observer, insulated gear, or testing.
15. The meeting notes did not reflect the crew’s plan.
16. Roer divided the crew and overlapped procedures to save time.
17. Roer knew that the crew did not unload, prepare, or stage the testing and grounding tools and that Salvador would expect the wires to be de-energized.
18. The wires crossed only one span between poles.

19. Roer knew the crew relied on visual confirmation of de-energization for fewer than three spans.
20. Ascent in a bucket lift toward high-voltage lines in trees without an observer may realistically result in serious injuries from collision or falls.
21. Working on or near energized high-voltage wires without insulated gear may realistically result in electrocution, permanent disfigurement, or death.
22. Salvador's injuries from working with the high-voltage wires included amputation and severe burns requiring several weeks of hospitalization.
23. The proposed penalties are calculated in accordance with Division policies and procedures.

Analysis

1. Did Employer fail to ensure an observer was present where work was performed on exposed high-voltage wires?

Citation 1 alleges a Serious violation of section 2940, subdivision (d), which requires:

- (d) Observers. During the time work is being done on any exposed conductors or exposed parts of equipment connected to high-voltage systems, a qualified electrical worker, or an employee in training, shall be in close proximity at each work location to:
 - (1) act primarily as an observer for the purpose of preventing an accident, and
 - (2) render immediate assistance in the event of an accident. Such observer will not be required in connection with work on overhead trolley distribution circuits not exceeding 1,500 volts D.C. where there is no conductor of opposite polarity less than 4 feet there from, or where such work is performed from suitable tower platforms or other similar structures.

In Citation 1, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to May 18, 2017, the employer failed to ensure that during the time work was being done on any exposed conductors or exposed parts of equipment connected to high voltage systems a qualified electrical worker was in close proximity at each work location to act as an observer for the purpose of preventing an accident and render immediate assistance in the event of an accident.

The Division has the burden of proving an alleged violation by a preponderance of the evidence. (*Guy F. Atkinson Construction, LLC*, Cal/OSHA App. 1332867, Decision After Reconsideration (Jul. 13, 2022).) “‘Preponderance of the evidence’ is usually defined in terms of probability of truth, or of evidence that[,] when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence.” (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Application

The safety order applies if the Division establishes that work was being done on an exposed conductor or exposed parts of equipment connected to high-voltage systems. Section 2700 defines the relevant terms as follows:

Conductor. A wire, cable, or other conducting material suitable for carrying current.

Exposed (as applied to energized parts). Energized parts that can be inadvertently touched or approached nearer than a safe distance by a person. Parts not suitably guarded, isolated, or insulated.

High-Voltage System. Associated electrical conductors and equipment operating at or intended to operate at a sustained voltage of more than 600 volts between conductors.

Qualified Electrical Worker. A qualified person who by reason of a minimum of two years of training and experience with high-voltage circuits and equipment and who has demonstrated by performance familiarity with the work to be performed and the hazards involved.

Salvador testified that he was a journeyman lineman and was working on connecting wires that were part of a 4,000-volt circuit. He testified that he used a bucket truck to raise himself approximately 37 feet to connect a new neutral wire to an existing neutral wire on a distribution pole.³ Salvador’s last memory was being in the bucket ready to ascend and fellow employee, Trevino, handing him the new neutral wire to connect. He then remembers waking up in a hospital.

It is undisputed that Salvador blacked out and suffered burns because the circuit he was working on was energized. It is thus found that the safety order applies.

³ Salvador explained, a neutral wire returns electricity to the ground. It carries a current but does not shock when touched. A phase wire supplies power and its current will shock when touched.

Violation

An employee engaged in another task cannot be considered an observer. (*Southern California Edison*, Cal/OSHA App. 96-3205, Decision After Reconsideration (Apr. 2, 2001).)

Salvador testified that he was assigned to a crew of five, including their foreman, Roer, on the day of his injury. The crew's job involved two transmission poles. They had to de-energize a "source" pole before rewiring a "distribution" pole. Photographic evidence shows that the source pole was in a residential backyard and the distribution pole was in the front, near the road. Salvador estimated the poles to be 100 feet apart.

Salvador testified that Roer broke the crew into two teams. The crew had agreed that the one team consisting of three members of the crew, including Roer, were to de-energize the source pole. While the source pole team worked, the other team, consisting of Salvador and Trevino, could prepare and, then upon de-energization, connect new wires to the existing wires on the distribution pole. Salvador was to ascend in the bucket and Trevino, a groundman, was to serve as an observer. While the three in the backyard prepared to work on the source pole, Salvador and Trevino proceeded to the distribution pole on the street. Salvador and Trevino prepared the new neutral and phase wires, laying them flat on the ground, then Salvador entered the bucket lift and Trevino handed him the neutral wire.

Trevino's abrupt absence from the distribution pole is undisputed. Clifford Ryan (Ryan), Employer's Director of Environmental Health and Safety, testified that the first person to help Salvador was an employee on another crew working up the street. Ryan testified that Matt King, an employee on a different crew, saw Salvador in distress, ran down the street, and used the truck controls to lower the bucket. Based on the evidence presented, it is found (1) that Trevino was not acting primarily as an observer to prevent an accident, and (2) that he was not in close enough proximity to render immediate assistance.⁴

Therefore, based on the above, the Division established a violation of section 2940, subdivision (d), by a preponderance of the evidence.

⁴ As mentioned above, Salvador suffered memory loss as a result of his injuries. He testified that he was told the following events occurred after Trevino handed him the neutral wire. After connecting the neutral wire, Salvador lowered his bucket for Trevino to hand him the phase wire. Trevino handed Salvador the second wire but did not stay to watch him ascend. Instead, Trevino walked away, announcing he was going to re-fuel a generator for a residence where a customer in hospice needed running power. Salvador ascended alone, got shocked, and was rendered unconscious in the bucket.

Salvador did not cite any source for the events that apparently took place between his last memory and waking up in the hospital, and no percipient witnesses were presented to corroborate or refute this narrative. He appeared to adopt this account of the events, testifying that neutral wires are always attached first. He accepted that he ascended twice, and that Trevino left his post to refuel a generator after handing him the phase wire.

2. Did Employer fail to ensure employees used protective equipment for high-voltage work?

Citation 2 alleges a Serious violation of section 2940.6, subdivision (a), which at the time required:

(a) Insulating Equipment.

- (1) Insulating equipment designed for the voltage levels to be encountered shall be provided and the employer shall ensure that they are used by employees as required by this section. This equipment shall meet the electrical and physical requirements contained in the standards shown in Appendix C.
- (2) Whenever rubber gloves are used, they shall be protected by outer canvas or leather gloves. This equipment shall meet the electrical physical requirements contained in the standards shown in Appendix C.
- (3) Insulating equipment fabricated of material other than rubber shall provide electrical and mechanical protection at least equal to that of rubber equipment.
- (4) The employer is responsible for the periodic visual and electrical re-testing of all insulating gloves, sleeves and blankets. The following maximum re-testing intervals for the items covered by the listed ASTM standards shall apply:

GLOVES, SLEEVES, BLANKETS, AND OTHER INSULATING EQUIPMENT, (In-service Care), ELECTRICAL TEST INTERVALS	
ASTM STANDARD	MONTHS
Standard Specification for In-Service Care of Insulating Gloves and Sleeves, ASTM F 496-02a	*6 months for gloves *12 months for sleeves
Standard Specification for In-Service Care of Insulating Blankets, ASTM F 479-06	*12 months for blankets
Standard Specification for In-Service Care of insulating Line Hose and Covers, ASTM F 478-92 (Reapproved 1999)	For line hose and covers (When found to be damaged or defective)

*Gloves, sleeves, and blankets that have been electrically tested but not issued for service shall not be placed into service unless they have been electrically tested within the previous twelve months.

- (5) Gloves, sleeves and blankets shall be marked to indicate compliance with the re-test schedule and shall be marked with either the date tested, or the date the next test is due.
- (6) When not being used, insulating gloves and sleeves shall be stored in glove bags or suitable containers. Insulating blankets shall be stored in a canister or other means that offers equivalent protection.
- (7) Insulating equipment shall be stored away from direct sunlight, steampipes, radiators and other sources of excessive heat and shall be protected from physical damage. Gloves, sleeves and blankets shall not be folded while in storage; however, blankets shall be permitted to be rolled for storage.

- (8) Insulating equipment shall be visually inspected for defects and damage and shall be cleaned prior to use each day.
- (9) Rubber gloves shall be air and water tested at the beginning of each work period and at any other time when the glove's condition is in doubt. The gloves shall:
 - (A) Be visually examined over their entire inner and outer surface for any defects, i.e., burns, cuts, cracks, punctures and weak spots; and
 - (B) Have the cuff stretched to detect abrasions and weak spots.
- (10) Insulating equipment found to be defective or damaged shall be immediately removed from service.

In Citation, 2, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to May 18, 2017, the employer failed to ensure that protective equipment was used by employees as required by this section. This equipment shall meet the electrical and physical requirements contained in the standards shown in Appendix C.

Application

As discussed above, the wires at the distribution pole carried 4,000 volts of electricity. As such, Employer was required to ensure Salvador used appropriately rated insulated equipment.

Violation

Salvador testified that, after leaving the source pole team and before entering the bucket, he selected and donned what he believed to be the appropriate safety gear. He specifically confirmed he did not wear rubber gloves or sleeves, or use an insulated blanket or canvas, because Roer agreed to the crew's plan to have the source pole de-energized. Salvador testified that he wore a hardhat, fire retardant shirt and britches, goggles, and leather gloves because he did not need to protect himself from high-voltage wires in a de-energized environment. The wires were not, in fact, de-energized, and so Employer was required to ensure Salvador was using protective equipment designed for 4,000 volts of electricity.

Based on the foregoing evidence, the Division established a violation of section 2940.6, subdivision (a).

3. Did Employer fail to test conductors for de-energization?

Citation 3 alleges a Serious violation of section 2941, subdivision (h)(4), which at the time required:

(h) Grounding De-Energized Conductors or Equipment. Any exposed ungrounded conductors or equipment not worked upon in accordance with the provisions of subsections (f) above, shall not be worked upon until the following provisions are complied with.

[...]

(4) A test has been conducted to insure [*sic*] that conductors or equipment have been de-energized.

For reference, subdivision (f), referenced in subdivision (h)(4), applies to working on wires that carry 600 or more volts. It prohibits employees from touching or working on exposed wires unless they wear suitably insulated gloves, exposed energized items are barricaded, appropriate tools are used, and a trained observer with access to controls is present if working with rubber gloves from an aerial lift.

In Citation 3, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to May 18, 2017, the employer failed to ensure that during the time work was being done a test has been conducted to insure [*sic*] that conductors or equipment has been de-energized.

Application

It is undisputed that the exposed distribution pole wires were energized to 4,000 volts and Salvador was working from an aerial bucket without rubber gloves. Therefore, testing for de-energization was required prior to working on the wires.

Violation

Salvador clearly testified that his last memory was ascending in the bucket with the neutral wire. He could not recall whether he tested and grounded the wires, but he believes that he did not. He remembered only events prior to his ascent. Salvador further explained that the crew did not intend to test and ground wires because it was simply one single span between two poles, and the lifted “tap,” which connects the wire to power, would be clearly visible. He testified that, under such circumstances, reenergization would not occur and there would be no need to test or ground. Salvador testified that the crew, including Roer, discussed and decided that testing and grounding would not occur, and, as a result, they did not remove testing and grounding tools from the truck.

Based on the foregoing evidence, the Division established that Employer violated section 2941, subdivision (h)(4).

4. Did Employer fail to ensure employees remained a specific distance from exposed energized parts unless protected?

The Division cited Employer for a Serious, Accident-Related, violation under section 2940.2, subdivision (a), which at the time required:

- (a) No employee shall be permitted to approach or take any conductive object without an approved insulating handle closer to exposed energized parts than shown in Table 2940.2-1 through Table 2940.2-3 unless:
 - (1) The employee is insulated or guarded from the energized part (gloves or gloves with sleeves rated for the voltage involved shall be considered insulation of the employee from the energized part), or
 - (2) The energized part is insulated or guarded from the employee and any other conductive object at a different potential.

Citation 4 alleges:

Prior to and during the course of the inspection, including, but not limited to May 18, 2017, the employer failed to ensure no employee was permitted to approach or take any conductive object without an approved insulating handle closer to exposed energized parts than shown in Table 2930.2-1 through Table 2940.2-3. As a result, an employee suffered serious burns when he was exposed to and came in contact with exposed energized parts.

Section 2940.2, subdivision (a), requires certain clearances to be met when energized conductors are exposed. (*Pouk & Steinle, Inc.*, Cal/OSHA App. 09-0491, Decision After Reconsideration (Oct. 26, 2012).)

As discussed previously, the wires on the distribution pole were energized and Salvador did not wear rubber gloves or sleeves. Salvador testified he kept his tools on his tool board inside the bucket. He could not recall which tools he used, and he surmised that he used his uninsulated tools because he expected the distribution pole to be de-energized. Salvador testified that among his injuries was a burn on his neck where the new wire had been draped.

Salvador testified that the neutral wire on the distribution pole was 37 feet above the ground, but neither party provided evidence showing where Salvador was in relation to either the neutral or phase wires. Further, the Division did not provide calculations based on Table 2930.2-1 through Table 2940.2-3 to establish a defined distance for 4,000-volt wires.

Salvador did not wear insulated gloves or sleeves, but he did have a conductive object draped behind his neck as he ascended toward energized wires. He suffered an electric shock, but no evidence shows whether he was within a proscribed distance. He testified that he would have had to snake the bucket lift through trees to reach the top of the distribution pole. While it may be

reasonably assumed he was within some proximity to the wires, there is no evidence to show he crossed any prohibited threshold distance. The only other reference to distance provided in the record was Ryan's testimony that the crossbeams of the poles were approximately 40 feet above ground. There is no evidence showing how far the bucket lift extended. Nor were any actual or estimated distances between Salvador and the wires provided.

The evidence is thus insufficient to establish a violation of section 2940.2, subdivision (a).

5. Did Employer establish the Independent Employee Action Defense as to any of the citations?

Employer declined to present a case in chief. It did file a post-hearing brief, which mentions the Independent Employee Action Defense (IEAD) in passing. Employer asserted that IEAD should apply in the instant matter to all the citations. In support of its claim, Employer provides one sentence in a footnote. Employer relies on Salvador's journeyman status and argues that he knew the safety requirements but chose to make assumptions and act on his own, noting that Salvador admitted the crew elected to break safety rules.

In *Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932, citing *FedEx Freight Inc.*, Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018), the Appeals Board explained there are five elements to the IEAD, all of which must be shown by an employer for the defense to succeed:

- (1) The employee was experienced in the job being performed;
- (2) The employer has a well-devised safety program;
- (3) The employer effectively enforces the safety program;
- (4) The employer has a policy of sanctions which it enforces against employees who violate the safety program; and
- (5) The employee caused the safety violation which he knew was contrary to employer's safety rules.

The IEAD is an affirmative defense, thus Employer bears the burden of proof and must establish that all five elements of the IEAD are present by a preponderance of the evidence. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.) As Employer must prove all elements, it is only necessary to discuss elements three and five below because those elements most clearly demonstrate Employer's shortcomings in meeting its burden of proof to establish the IEAD.

Element three: Did Employer effectively enforce its safety program?

Providing a level of supervision reasonably necessary to detect and correct hazardous conditions and practices is essential to effective enforcement, and the adequacy of supervision is

a fact-intensive inquiry that requires a case-by-case determination. (*Fed Ex Ground, Inc.*, Cal/OSHA App. 1199473, Decision After Reconsideration (Apr. 20, 2020).) While it may be true that one-to-one supervision is neither practical nor required, supervision must be adequate. (*Signal Energy, LLC*, Cal/OSHA App. 1155042, Decision After Reconsideration (Aug. 19, 2022).)

Salvador testified Roer was present and a part of the tailboard, as well as a member of the source pole crew. A tailboard refers to both the meeting in which procedures and hazards are discussed prior to starting a job, as well as to the notes taken at such a meeting. He testified that, according to electricians' protocol, the source pole team required four members because the pole was energized. However, Roer divided the crew leaving only three at the source pole. Salvador testified that Roer participated in the crew's discussions and agreement to allocate three crew members to the source pole team.

Salvador testified that the crew decided to de-energize the source pole, the only source of energy for the distribution pole, so they did not remove grounding and testing tools from the work vehicle. As discussed above, the wires crossed only one span between the source and distribution poles. Salvador explained that employees typically rely on visual confirmation of de-energization within such short distances instead of testing. He testified, "We do this all the time. And anybody who says we don't do that, they're not being forthcoming with the truth because as long as we can see it's open on the overhead like that two or three spans, we won't take the tester out and ground it." Employer provided no evidence to contradict the occurrence of this practice or show that Roer took steps to correct the plan and ensure testing and grounding would take place.

Salvador testified that protocol requires someone at the source pole to signal that the de-energization was completed. He testified that the crew did not discuss who would send a signal from the source crew to indicate completed de-energization. He recalled that he did not watch or wait for a signal from the foreman or a designated crew member because it was not discussed. Roer was present for these discussions amongst the crew members, and Employer provided no evidence to refute the necessity, or show that Roer ensured this required role was filled.

Salvador's testimony is credited. There is no evidence showing that Employer provided adequate supervision to detect or correct the unsafe practices identified. For the foregoing reasons, Employer did not establish the third element of the IEAD as to Citations 1, 2, or 3.

Element five: Did Salvador intentionally violate Employer's safety requirements?

In *Synergy Tree Trimming, Inc.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017), the Appeals Board explained:

The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements.

[Citation.] In *Macco Constructors, Inc.* Cal/OSHA App. 83-147, Decision After Reconsideration (Oct. 2, 1987), the Board describes the purpose of the IEAD as follows:

The independent employee action defense is designed to relieve an employer from the consequences of willful or intentional violation of one of its safety rules by non-supervisory employees, when specified criteria are met. See *Mercury Service, Inc.*, [Cal/OSHA App.] 77-1133, Decision After Reconsideration (Oct. 16, 1980).

[...]

Whether an action was inadvertent or constituted a conscious disregard of a safety rule is a question that must be examined in each case, in light of all facts and circumstances.

The Appeals Board has held that inadvertence or an error in judgment is insufficient to demonstrate a knowing violation of an employer's safety program. (*Synergy Tree Trimming, Inc., supra*, Cal/OSHA App. 317253953.) In *Paso Robles Tank, Inc.*, Cal/OSHA App. 08-4711, Denial of Petition for Reconsideration (Nov. 2, 2009), the Appeals Board found that the injured employee did not know he was taking an action in violation of the safety program, given his testimony that he had taken that same action on numerous occasions.

Salvador admitted that he left the source pole team, ascended without demanding that his observer stay, did not test or ground, did not use insulated equipment, and worked near exposed energized wires without looking first at the source pole to check if its tap was open (a visible physical break that shows it is de-energized). Salvador acknowledged that he and the crew broke safety rules, but credibly asserted that he followed their plans and general practice.

Employer suggests that Salvador intentionally circumvented the tailboard. Both parties discussed the handwritten contents of the tailboard. (Exhibit 14.) Salvador testified that the last three lines of handwritten content were not present when he signed the tailboard with the other crew members before starting the tasks. The last three lines describe a method of replacing the wires, stating that wires would be dropped. Salvador explained "dropping" is allowing wires to fall to the ground.

Salvador stressed that, aside from looking out of place, these three lines of written text conflicted with the crew's actual decisions and plans.⁵ The existing wires were above trees. He

⁵ Salvador claimed that the composition of the last three lines of text was not appropriate for a tailboard. Salvador testified that tailboards broadly outline a job, not the minutia of each procedure, and the three lines were excessively detailed. He noted that the ink, insertions, and penmanship differ from the preceding text. Salvador suspected that these three lines were added after his injury to cover up. Ryan's testimony later in the hearing causes further distrust of the provenance of these three lines. In that testimony, Ryan took pains to carefully craft his responses to avoid admission of any awareness that citations may affect Employer's ability secure utility contracts.

testified that the crew rejected a plan to lower them to the ground because the trees made reinstallation difficult. Salvador testified that the crew chose to connect the new wires to the old wires at the distribution pole and thread them back over the top of the trees for placement. He explained that the source pole team members were to remain on their pole so that they could pull the old wires in by hand and thereby draw the new wires into position above the trees. He testified that he informed Roer, who was one of the three source pole team members, that he was going with Trevino to the distribution pole to lay out the new wires on the ground and ascend in the bucket, and that they agreed to this plan. Salvador's testimony is credited.

Salvador unequivocally maintained that all his actions were consistent with and dependent on the crew's unanimous decisions. His testimony establishes that he believed that he was performing tasks as his crew decided, and his foreman instructed, in the manner they were regularly performed. Salvador testified that he did not don protective gear or use insulated tools or blankets because he relied on the crew to de-energize the source pole. He estimated that the source pole team needed just two minutes to climb the source pole, and two more minutes to lift the tap and de-energize the distribution pole. Salvador calculated for himself what he considered an appropriate delay, taking approximately fifteen minutes from laying out the wires on the ground to having the neutral wire handed to him to connect before ascent.

Salvador testified that he did not recall events after Trevino handed him the neutral wire for his first ascent. Trevino left his post after handing Salvador the phase wire and was about to make his second ascent. Salvador attempted to explain that he continued to ascend the second time and did not call Trevino back to the bucket truck because he believed the wires were de-energized. He stated he did not know why he must not have checked for a lifted tap at the source pole – theorizing he was too focused on what he was doing. Salvador lamented in retrospect that but for setting up the bucket lift and materials in advance, failing to look for the tap, and failing to test, he would be injury-free and working.

Salvador's actions were intentional, but he believed he was entering a de-energized environment. Salvador's admissions and credited testimony establish his intent to take precautions commensurate with the risks he expected based on the trust he placed in his foreman and crewmates to perform their tasks. He anticipated working on de-energized wires, not the high-voltage and energized wires subject to the safety orders. His reliance on Roer and his crew and his mistaken assumption that the distribution pole was de-energized are found to be errors in judgment. It is found that Salvador did not deliberately undertake working on exposed energized lines without an observer, insulated gear, and testing, or knowingly assume the associated risks of such omissions, including grievous bodily harm, debilitating burns, and death.

Ryan testified that he prepared an Incident and Evaluation Report for Southern California Edison, for whom Employer was performing contract work. (Exhibit 19.) It reports Salvador

received a “hot” wire warning, acknowledged it saying, “Yes – still hot,” proceeded to ascend within two minutes, and contacted energized wire. This account does not correspond with Salvador’s testimony that he made two ascents and was handed a different wire to connect each time, with no warnings before either wire or ascent.

Evidence Code section 412 provides, “If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.” Ryan testified that he arrived at the site minutes after the emergency services had arrived and was able to interview employees. Employer provided no percipient witnesses to show Salvador’s testimony about the tailboard meeting or notes, or events prior to his memory lapse were unreliable, or that his actions were inconsistent with the crew’s plans.

In determining what inferences to draw from the evidence in the case against a party, the trier of fact may consider, among other things, the party’s failure to explain or deny by its testimony such evidence or facts in the case against it, or its willful suppression of evidence relating thereto, if such be the case. (Evid. Code § 413.) Several crew members and employees at the site were named during the proceedings, but none were called as witnesses to support Employer’s position that Salvador failed to adhere to Roer’s plans. Thus, it is inferred that Salvador’s account is accurate. This inference, in conjunction with Salvador’s unrefuted testimony about general practices, supports the conclusion that he did not intend to violate Employer’s safety policies. Employer thus failed to establish the fifth element of IEAD as to Citations 1, 2, and 3.

As a failure to prove a single element of the IEAD defeats the defense, the defense is not available to Employer for Citations 1, 2, or 3.

6. Did Employer establish the *Newbery* defense as to any of the citations?

In *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd.* (1981) 123 Cal.App.3d 641, the Court of Appeals recognized that where an employee’s violation of a safety order was unforeseeable, the employer was not held responsible for the violation. In *Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045, the elements of the defense recognized in *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd.*, *supra*, 123 Cal.App.3d (*Newbery* defense) were articulated. As explained by the Appeals Board in *Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013):

A violation is deemed unforeseeable, therefore not punishable, if none of the following four criteria exist:

- (1) that the employer knew or should have known of the potential danger to employees;

- (2) that the employer failed to exercise supervision adequate to assure safety;
- (3) that the employer failed to ensure employee compliance with its safety rules; and
- (4) that the violation was foreseeable

However, the *Newbery* defense is unavailable where the violation is caused by a supervisor. The Appeals Board found that the knowledge of a supervisor is imputed to an employer. In *Brunton Enterprises, Inc.*, *supra*, Cal/OSHA App. 08-3445, the Appeals Board explained:

However, an employer cannot utilize the *Newbery* defense when a supervisor commits the violation. (*Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1243 [employer necessarily fails the second prong of the *Newbery* defense when a supervisor violates a safety order].) The Board has also previously considered this issue and denied the *Newbery* defense when a supervisor committed the violation. (See *Hollander Home Fashions*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 13, 2012), citing *MCI Worldcom, Inc.*, Cal/OSHA App. 00-440, Decision After Reconsideration (Feb. 13, 2008) [*Newbery* defense fails since supervisor's knowledge is imputed to employer].)

Roer was the crew's foreman. Ryan testified that a foreman is in charge of a crew and its safety. Ryan testified that other duties of a foreman include filling out the tailboard and articulating an emergency action plan verbally or on the tailboard. Ryan, noting an improvement in Roer's penmanship, recognized the tailboard was written in Roer's handwriting. (Exhibit 14.) Ryan testified that the tailboard suggests that Roer was the author and communicator of the procedures. Roer's authorship of the plan and actual delegation and direction of his crew reflect his authority as a supervisor. As their foreman, Roer had knowledge of the crew's responsibilities and the methods of completion for each task. Roer's knowledge is attributed to Employer.

Salvador stressed that their crew was on a schedule, requiring them to work together with coordinated purpose. The crew's many tasks each included several sequential steps, requiring the whole crew to work closely. For example, as briefly mentioned above, Employer provided a generator for a hospice customer on life support. Salvador testified that, upon arrival at the site, all the crew members helped unspool the new wires. Then, a crew member "opened" the leads of the relevant transformer to eliminate any backfeed from the generator to the wires. The generator itself required two members to lift from one of their trucks and install. Salvador described the importance of working together to stay on schedule – if a process is scheduled for 9:00 a.m., "whether you're ready to start work or not, the company doesn't care ... you're going to open that up." The crew's numerous and progressive tasks clearly required management and organization.

Salvador testified that Roer participated in the crew's tailboard discussions and decisions. Salvador suggested he could prepare the new wires and ascend in the bucket at the distribution

pole while the source pole team climbed and de-energized the source pole. This plan saved time because the source pole team would not need to climb down, wait for Salvador, and climb back up because he would already be in place to connect the wires. Salvador testified that everyone, specifically Roer and journeyman lineman Warren Houze (Houze), agreed to this plan. Salvador testified that Houze and apprentice Edwin Pineda (Pineda) were assigned to the top of the source pole with Pineda to be Houze's pole observer; and Roer was to be their ground observer.

Salvador testified that the crew, including the foreman, intentionally elected to break several safety rules together. Roer, aware of these choices, was thus aware all the violations. Additionally, as discussed in the prior section, Employer failed to exercise supervision adequate to ensure safety. Thus, elements 1 and 2 of the *Newbery* defense are not established for Citations 1, 2, and 3 as follows.

Citation 1. Roer divided his crew, leaving the source pole team understaffed, and the distribution pole team without anyone to spare in case the generator needed maintenance. Roer thus made clear to the crew that time was valuable. Roer should have known that the generator would need fuel. It was foreseeable that crew members would strive to complete the job on time at the expense of safety by spreading themselves even thinner to manage concurrent demands, like completing wire connections while also needing to refuel the life support generator.

Citation 2. Roer knew the crew agreed not to test and ground because the source pole would be de-energized and that they did not unload testing tools. Roer knew that Salvador left the source pole team understanding he would be working on a de-energized distribution pole and would proceed accordingly. It was thus foreseeable that Salvador would rely on Roer's leadership to confidently equip himself for de-energized wires and omit rubber gloves or sleeves.

Citation 3. Salvador compared the simplicity of the crew's task to tying a shoe. He testified that the crew did not intend to use any testing equipment and did not unload the testing or grounding equipment because the wires crossed only one span, a lifted tap would be visible, and re-energization was impossible. Roer participated in the tailboard discussions and decisions, should have seen that no testing or grounding equipment was staged with other unloaded equipment, and should have known that employees would engage in the practice of not testing when only one span is involved. Any of one of these indicators made it foreseeable that testing might not occur, yet several were present.

The violations were foreseeable because Roer, the foreman, participated in tailboard discussions and allowed them to proceed. As such, the *Newbery* defense is not applicable to any of the citations.

7. Did the Division properly classify Citations 1, 2, and 3 as Serious?

Labor Code section 6432, subdivision (a), provides, in relevant part:

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 demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. 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, means, methods, operations, or processes that have been adopted or are in use.

The Appeals Board has defined the term “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.)

“Serious physical harm” is defined as an injury or illness occurring in the place of employment that results in:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code, § 6432, subd. (e).)

Labor Code section 6432, subdivision (g), provides:

A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

When determining whether a citation is properly classified as Serious, Labor Code section 6432 requires application of a burden-shifting analysis. The Division holds the initial burden to

establish “a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.” (Lab. Code, § 6432, subd. (a).) The Division’s initial burden has two parts. First, the Division must demonstrate the existence of an “actual hazard created by the violation.” Second, the Division must demonstrate a “realistic possibility” that death or serious physical harm could result from that actual hazard. (*Shimmick Construction Company*, Cal/OSHA App. 1192534, Decision after Reconsideration (Aug. 26, 2022).) In addition to an inspector’s testimony, circumstantial and direct evidence, as well as common knowledge and human experience, may also support the serious classification. (*Id.*)

The Division’s Senior Safety Engineer, Hien Le (Le), testified that she worked as an inspector with the Division over 20 years. In addition to assisting the District Manager of the office, and having her own case load, she trains new Compliance Safety and Health Officers, and provides guidance for inspectors at all stages of an inspection and its appeal. Le testified that she was current on her Division-mandated training as of the time of the hearing. As such, she was competent to offer testimony regarding the classification of the citations as Serious.

Le testified that some of the actual hazards of failing to have an observer when working on high-voltage poles are collision with objects like the high-voltage lines and delayed help for any injury, resulting in serious injury, or death. She testified that actual hazards of failure to wear or use insulated gear when working on high-voltage lines are contact with the energized lines, resulting in serious physical harm or death. Finally, Le testified that the actual hazard of failure to test wires to ensure de-energization is also contact with energized wires, resulting in serious injury or death.

Salvador testified that the actual hazard of working near high-voltage lines is electrocution resulting in death, or permanent disfigurement. He testified that some of the actual hazards of working on high-voltage lines are obstacles and falling from heights, resulting in crushing injuries, electrocution, and death.

Salvador testified that the injuries he suffered resulted in amputation of his right index finger and part of his thumb, a burn wound to the back of his neck where he draped the replacement wire, and an exit wound burn just below the shoulder that created a scar cavity the size of an aluminum soda can. Salvador testified that he suffered a flash burn to his face, and the flesh on his left palm and tips of three fingers were burned off, requiring skin grafts. He testified that he needed seven weeks of hospitalization and that, even now, several years later, he suffers chronic pain in his hands, jaw, neck, and ear.

There is no dispute that Salvador’s injuries meet the definition of serious physical harm. It is also undisputed that the primary actual hazard of working on or near or on energized high-voltage wires suspended on poles over 30 feet high without an observer, protective insulation, or

testing for de-energization, is electrocution. Electrocution presents the realistic possibility of serious physical harm, and, in fact, did cause serious physical harm in the form of severe burns requiring skin grafts and amputations.

For the foregoing reasons, the Serious classifications are established as to Citations 1, 2, and 3.

8. Did Employer rebut the presumptions that Citations 1, 2, and 3 were Serious?

Labor Code section 6432, subdivision (e), provides that an employer may rebut the presumption that a serious violation exists 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.

In order to satisfactorily rebut the presumption, an employer must demonstrate both:

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

Factors included in Labor Code section 6432, subdivision (b), referenced in subdivision (c)(1) above, include:

- (1) Before issuing a citation alleging that a violation is serious, the division shall make a reasonable effort to determine and consider, among other things, all of the following:
 - (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
 - (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
 - (C) Supervision of employees exposed or potentially exposed to the hazard.
 - (D) Procedures for communicating to employees about the employer's health and safety rules and program.
 - (E) [...]

As discussed above, Employer did not ensure that it provided supervision adequate to detect or correct hazards or unsafe practices. Roer was the foreman and was present for the

decisions his crew made and permitted them to proceed accordingly. As also discussed above, a supervisor's knowledge and actions are imputed to an employer.

A reasonable employer would be aware of common practices and procedures wherein employees bypass safety orders and would remind or redirect a crew to make safer choices during a tailboard. Such an employer would clearly coordinate the sequence of tasks; identify the signals that indicate progression to the next task; ensure equipment like testing tools and protective clothing and tools are available and staged for each step; review the fuel status of the generator; and delegate responsibilities. Such an employer would implement these simple steps considering the severity and likelihood of electrocution while working with high-voltage wires.

Roer divided the crew early and overlapped some procedures, communicating to the crew that Employer favored rapid completion over observance of safety protocol. Employer did not show any evidence that Roer took reasonable or effective action ensure compliance with providing an observer, donning protective gear or using insulated tools, and testing.

Employer presented no evidence to show that it took all the steps a reasonable and responsible employer in like circumstances would take to anticipate and prevent violations considering the severity and likelihood of electrocution while working with high-voltage wires, such as ensuring use of insulated gear and testing.

For these reasons, Employer offered insufficient evidence to rebut the presumptions that Citations 1, 2, and 3 were properly classified as Serious. Accordingly, the Serious classifications are affirmed.

9. Are the proposed penalties reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.)

The Division submitted into evidence the Proposed Penalty Worksheet and Le testified that calculations used to arrive at the proposed penalties were performed in accordance with the penalty-setting regulations. Employer did not present evidence or argument to establish that the penalties were not calculated in accordance with the penalty-setting regulations.

Accordingly, the proposed penalty of \$22,950 each for Citation 1, Citation 2, and Citation 3 is found to be reasonable.

Conclusion

The evidence supports a finding that Employer violated section 2940, subdivision (d), by failing to ensure an observer was present while work was being performed on exposed high-voltage wires. The citation is properly classified as Serious and the proposed penalty is reasonable.

The evidence supports a finding that Employer violated section 2940.6, subdivision (a), by failing to ensure use of protective equipment for high-voltage work. The citation is properly classified as Serious and the proposed penalty is reasonable.

The evidence supports a finding that Employer violated section 2941, subdivision (h)(4), by failing to ensure wires were tested and grounded prior to work on exposed high-voltage wires. The citation is properly classified as Serious and the proposed penalty is reasonable.

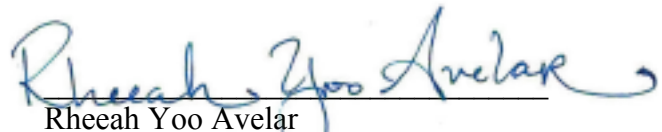
The evidence does not support a finding that Employer violated section 2940.2, subdivision (a), by failing to ensure employees remained a specific distance away from exposed energized parts unless protected.

Order

It is hereby ordered that Citations 1, 2, and 3 are affirmed, and their associated penalties are assessed as set forth in the attached Summary Table.

It is hereby ordered that Citation 4 is vacated, and its associated penalty is set aside.

Dated: 10/03/2023


Rheeah Yoo Avelar
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 sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**