BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: OC COMMUNICATIONS, INC. 2204 Kausen Drive, Suite 100 Elk Grove, CA 95758 Employer	Dockets. 14-R2D2-0120, 0166 & 0340 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken OC Communications, Inc.'s (Employer) petition for reconsideration under submission, renders the following decision after reconsideration.

JURISDICTION

Employer installs cable at residential dwellings. Commencing on September 24, 2013, the Division of Occupational Safety and Health, through Associate Safety Engineer Ronald Aruejo (Aruejo), conducted an accident inspection at a place of employment located at 1943 Elinora Dr., Pleasant Hill, California.

On January 9 and February 3, 2014, the Division issued citations to Employer alleging violations of workplace safety and health standards codified in the California Code of Regulations, Title 8, and proposed civil penalties.[1] Citation 1, Item 1 alleged a general violation of section 3395, subdivision (f)(1) [failure to provide effective training on topics related to heat illness]. Citation 2, Item 1 alleged a serious violation of section 3203, subdivision (a)(4)(C) [failure to conduct an inspection to identify and evaluate hazards when employer is made aware of a new or previously unrecognized hazard]. Citation 3, Item 1 alleged a serious violation of section 8602, subdivision (i) [failure to discontinue work from a structure when adverse weather conditions make the work unsafe].

Employer filed timely appeals contesting each of the citations and raised affirmative defenses. Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the

[1] Unless otherwise specified, all references are to California Code of Regulations, Title 8.

Board. At the hearing, Employer withdrew its appeal of Citation 1, Item 1. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on November 4, 2015. The Decision denied Employer's appeal and affirmed a serious violation of Citation 2, Item 1 and a general violation of Citation 3, Item 1, but vacated the penalty as to the latter citation.

Employer filed a Petition for Reconsideration. The Board took the petition under submission. The Division filed an Answer to the petition.

ISSUES

1. Did the ALJ properly affirm Citation 2, Item 1, asserting a serious violation of section 3203, subdivision (a)(4)(C) [failure to conduct an inspection to identify and evaluate hazards when employer is aware of a new or previously unrecognized hazard]?

2. Did the ALJ properly affirm Citation 3, Item 1, asserting a general violation of section 8602, subdivision (i) [failure to discontinue work from a structure when adverse weather conditions make the work unsafe]?

FINDINGS OF FACT

1. Employer installs cable services at residential dwellings.

2. On September 21, 2013, Daniel Volek (Volek) was an employee of Employer.[2] He began working for Employer in approximately June of 2013.

3. Volek was employed as a Residential Cable Services Technician. His duties included hooking up cable at residential dwellings.

4. Volek's job required, on occasion, that he install cable via an aerial feed. An aerial feed is where the installation of cable requires a technician to run a line from a cable feed at the top of a utility pole (located approximately 20' to 25' feet above the ground) to a residential dwelling.

5. On September 21, 2013, Volek was assigned by Employer to install cable at 1943 Elinora Dr., Pleasant Hill, California (the "worksite"). The installation required an aerial feed. The cable feed was located at the top of a wooden utility pole near the worksite.

[2] The parties stipulated to, and the record supports, the finding that Volek was an employee of Employer.

6. Rain and wind existed at the worksite that day, which intermittently shifted in intensity.

7. Employer never provided Volek any instruction or training on conducting aerial feeds in wind or rain, and Volek had never previously done an aerial feed in windy or rainy conditions.

8. Prior to climbing the pole to perform the aerial feed, Volek called his supervisor, Jesus Sanchez (Sanchez). The call was made at approximately 1:30 p.m.

9. During the phone call with Sanchez, Volek reported that there was rain and wind at the worksite, asked what Employer's policies were with respect to working in such conditions, and advised Sanchez that he did not feel safe or comfortable. In response, Sanchez asked him how long he had worked for Employer. Volek responded that he had worked for Employer for four months. Sanchez then stated "you won't get the other jobs done that day, just get it done", or words to that effect. Sanchez did not offer to help him, nor did he inspect or evaluate the worksite. No person from Employer inspected or evaluated conditions at the worksite.

10. After the phone call with Sanchez, Volek climbed the utility pole in order to perform the aerial feed. He set up a ladder at the base of the pole and climbed up the ladder until he could reach pegs embedded in the pole. He then transferred to the pegs embedded in the pole and climbed the pegs until he reached the top of the pole. The wet conditions made the pole pegs slippery or slick.

11. It was raining when he reached the top of the pole and the wind was strong enough to cause the pole to shift slightly. The weather could be described as adverse.

12. At the top of the pole, Volek attempted to attach his harness, but he lost his footing and fell from the pole. He fell approximately twenty to twenty-five feet from the pole to the ground below.

13. At approximately 1:48 p.m., emergency responders were notified and dispatched to the site where they found Volek lying face up in the street. (Exhibit A.) Volek was subsequently taken to the hospital where he was admitted for inpatient hospitalization for a period exceeding 24 hours. Volek received treatment for his injuries at the hospital. Volek was found to have broken three vertebrae among other injuries.

14. Prior to Volek's fall from the pole that day, no person from OC Communications came out to inspect or evaluate conditions at the worksite.

15. There is a realistic possibility that death or serious physical harm[3] could result when a person fails to conduct an inspection to identify and evaluate new or previously unrecognized hazards of the type that existed at this worksite, particularly where the hazard may involve a fall from a height of 20 to 25 feet above ground.

DECISION AFTER RECONSIDERATION

The Board has independently reviewed and considered the entire record in this matter. In making this decision, the Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration and the Division's answer to it.

1. Did the ALJ properly affirm Citation 2, Item 1, asserting a serious violation of section 3203, subdivision (a)(4)(C) [failure to conduct an inspection to identify and evaluate hazards when employer is aware of a new or previously unrecognized hazard]?

The Division cited Employer with a violation of section 3203, subdivision (a)(4)(C), which states:

> [E]very employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program)[4]. The Program shall be in writing and, shall, at a minimum:
> …
>
> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
> ….
>
> (C) Whenever the employer is made aware of a new or previously unrecognized hazard.

Citation 2, Item 1 alleges as follows:

> On 9/21/2013, the employer did not evaluate the workplace hazard and unsafe condition that was reported by an employee.

[3] Serious physical harm is defined in Labor Code section 6432, subdivision (e).
[4] The Injury and Illness Prevention Program is also known, and shall be referred to herein, as an IIPP.

> An employee (EE1) was seriously injured when he fell 25 feet to the ground while about to replace a CATV drop line during a strong wind and strong rain weather condition for a residence located at 1943 Elinora Drive, Pleasant Hill, CA 94523. EE1 was confined at a hospital for more than 24 hours for treatment of his injuries.

Section 3203, subdivision (a)(4)(C) requires, pertinent here, that "[i]nspections shall be made to identify and evaluate hazards…[w]henever the employer is made aware of a new or previously unrecognized hazard." In order to demonstrate a violation of section 3203, subdivision (a)(4)(C), the Division must demonstrate (1) that an employer was made aware of a "new or previously unrecognized hazard", and (2) that the employer failed to conduct an inspection to identify and evaluate that hazard.[5]

Was Employer Made Aware of A New or Previously Unrecognized Hazard?

Applying the standards discussed above, we now determine that Employer was made aware of a new or previously unrecognized hazard. Volek testified that on September 21, 2013 he went to the worksite, where he realized he would be required to conduct an aerial feed (also referred to as a drop line). The aerial feed required Volek to run a line from a cable feed at the top of a utility pole (located approximately 20' to 25' feet above the ground) to a residential dwelling.

Volek testified that it was raining and windy at the worksite that day. He testified that the rain would intermittently intensify from a drizzle (or a mist) to a "sprinkler" that was heavy enough to soak you through your clothes. Volek also testified that the wind would blow in bursts.[6] The weather was unpredictable.

Volek testified that he had never done an aerial feed in wind or rain, nor had he received training on conducting aerial feeds in such conditions. He had only worked for Employer since approximately June of 2013.

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[5] While an employer may have a comprehensive IIPP, the Division may still demonstrate an IIPP violation by showing that the employer failed to implement that plan— in this case, through failing to inspect, identify and evaluate a new or previously unrecognized hazard. (*See e.g., HHS Construction*, Cal/OSHA App., 12-0492, Decision After Reconsideration (Feb 26, 2015), *citing, BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).)

[6] The Petition points out that the ALJ's Decision used descriptions of the weather, and accounts of the weather, that are not necessarily supported by the record, e.g. "*severe* wind" and "*heavy* rain." (Emphasis added.) We do observe that the ALJ may have, at times, used imprecise descriptions of the weather conditions. For instance, the testimony of Volek does not necessarily demonstrate the existence of "severe wind." However, for the reasons stated herein, we conclude that these errors were harmless. Notwithstanding the occasional imprecise descriptions of the weather in the Decision, the Board has independently reviewed the record and concludes (for the reasons stated herein) that the evidence supports the existence of a violation of the cited section.

Prior to climbing the pole, Volek testified that he called his supervisor, Jesus Sanchez (Sanchez). While it was only drizzly when Volek called Sanchez, Volek testified that he was concerned for his safety because of the wind and everything being wet—he was afraid of slipping. His call to Sanchez occurred at approximately 1:30 p.m.

Volek's testimony, to paraphrase, demonstrated that during his phone call with Sanchez, he reported that there was rain and wind at the worksite, he asked what Employer's policies were with respect to working in such conditions, and informed Sanchez that he did not feel safe nor comfortable performing this particular assignment. In response, Sanchez did not offer to help him, nor did he inspect or evaluate the worksite. Sanchez merely directed Volek to complete the assignment. Volek provided the Division the following account of his conversation with Sanchez, which he authenticated and corroborated at the hearing:

> Prior to performing the work, EE1 called a supervisor "Mr. Jose" [Sanchez], I am not feeling too safe for this it is windy & raining, what are our policies for working in this weather[?] Mr. Jose asked EE1, how long did EE1 worked for the company. When EE1 told Mr. Jose 4 mos., Mr. Jose replied "you won't get the other jobs done that day, just get it done". Then Jose hung up. (Exhibits 5 and J)

After Volek's phone call with Sanchez, Volek proceeded with the aerial feed. As Volek began his ascent, he testified that the rain got heavier and it got windier. Volek testified it started to get as bad as it got that day; "it got nastier." He also testified that the pegs on the pole were slick (which was corroborated by other portions of the record, including through other witnesses such as Jacob Carpenter). The weather did not change significantly while he was climbing. When he reached the top of the pole, the wind was blowing strongly enough to shift the pole slightly and the rain was like a "sprinkler." Volek indicated that the rain was spraying hard enough to get your clothes wet. Volek attempted to attach his harness when he got to the top, but he lost his footing and fell from the pole. He fell approximately twenty to twenty-five feet from the pole to the ground below.

At approximately 1:48 p.m., emergency responders were notified and dispatched to the site where they found Volek laying face up in the street. (Exhibit A.) Volek was subsequently taken to the hospital where he was admitted for inpatient hospitalization for a period exceeding 24 hours. Volek received treatment for his injuries at the hospital. Volek credibly testified that he broke three vertebrae and suffered other injuries.

These facts, and particularly the testimony of Volek, credibly demonstrate that employer was aware of the existence of a new and unrecognized hazard. This new hazard was demonstrated by the following combination of events: the specific weather conditions that day (as testified to by Volek); the specific location of the worksite; Volek's lack of experience and training with respect to working in such weather conditions, and Volek's call to his supervisor wherein he reported his concerns.

At the hearing and within its Petition, Employer attempted to demonstrate that the wind and rain were insignificant while Volek worked at the worksite. Employer offered weather reports (including Exhibits N and O) to show that there was little, if any, rain and wind during the relevant time periods. Employer also offered the testimony of several employees and former employees to demonstrate that the wind and the rain were insignificant, and not unsafe, during the pertinent time periods. Employer also attempted to show that Volek's testimony was not credible.[7] However, after independently reviewing the record, we accept, and agree with, the ALJ's determination that Volek testified credibly. Volek's description of weather conditions is credited, as is his description of his conversation with Sanchez. We observe that Volek was the only witness to offer any evidence as to the actual weather conditions at the worksite at the time he climbed the pole. None of Employer's witnesses were at the worksite in the moments prior to the accident. We also observe that Sanchez did not testify to contradict Volek as to the contents of their conversation. Volek's testimony is given more weight than the contrary evidence presented by the Employer.[8]

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[7] For example, Employer offered Volek's former deposition testimony wherein he purportedly made an inconsistent statement regarding his training, offered evidence that Volek filed a serious and willful petition with the workers compensation appeals board, and offered evidence (although largely hearsay) disputing the contents of Volek's conversation with Sanchez. Employer also attempted to identify several other inconsistencies during the hearing. But, like the ALJ, we were not persuaded by Employer's attempts to discredit Volek in this proceeding. Employer's attempts to discredit Volek were not of persuasive significance when his testimony was viewed as a whole.

[8] The ALJ determined that Volek testified credibly with regard to the weather conditions that existed that day and regarding his conversation with Sanchez. The Board typically will not disturb an ALJ's credibility determination on reconsideration, and we find no reason to do so here. (*See e.g., Bellingham Marine Industries, Inc.,* Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014.) We give considerable weight to the ALJ's determination that Volek testified credibly. "[A]n ALJ's credibility determinations are due great weight because she is present to observe the witness' demeanor on the stand." (*General Truss Co., Inc.*, Cal/OSHA App. 06-0782, Decision After Reconsideration (Nov. 15, 2011), citing, *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 312, 318-19 [other citations omitted].) Volek's testimony was also corroborated in places by some of the exhibits, including Exhibits 10, 11, and 13 (see also Exhibit R) all of which indicate that there was some rain that day. Volek's testimony was also corroborated in places by Ronald Aruejo, Associate Safety Engineer. We also observe that while Employer offered some evidence contradicting Volek's account of the weather conditions, Employer's evidence was not as strong as the testimony of Volek. None of Employer's witness's accounts of the weather concerned the exact worksite at issue here. Volek was the only person that was physically present to observe and experience the weather at this exact worksite during

Employer also argues that rain and wind were not new or unrecognized hazards. In support of its position, Employer offered the job description for Volek's position (Exhibit D), which states that a technicians' duties included working "outdoors in all kinds of weather," and "they work and travel in inclement weather." Employer presented the testimony of multiple witnesses showing that its employees routinely worked in such weather. Employer also offered evidence showing that they had multiple employees working in the same geographic area as Volek on September 21, 2013 without incident. However, Employer's arguments do not sufficiently demonstrate the absence of a new or unrecognized hazard. The new or unrecognized hazard that existed here was not simply the presence of intermittent wind and rain at the worksite, or inclement weather. It was the existence of those weather conditions at the specific worksite in conjunction with Volek's lack of experience and training and Volek's call to his supervisor wherein he reported concerns for his safety.

Thus, the Division demonstrated the existence of a "new or previously unrecognized hazard."

Did Employer Fail To Conduct An Inspection To Identify and Evaluate the Hazard?

Here, we also conclude that Employer failed to conduct an inspection to identify and evaluate the new or previously unrecognized hazard. The evidence, including the testimony of Volek, demonstrates that after Volek called Sanchez and reported his concerns, no person from Employer came out to inspect or evaluate the worksite. No person from Employer offered Volek any assistance.

Within its Petition, Employer argued that it previously evaluated, or considered, the hazard of wind and rain and determined that no new training or procedures were required. Employer offered witnesses, including Vice President Larry Wray that testified that the methods and techniques used to climb poles were the same irrespective of the weather conditions. However, Employer's purported previous evaluative efforts do not demonstrate that Employer evaluated the specific hazard presented here. The hazard that existed here was not simply the existence of intermittent wind and rain. It was those weather conditions at this specific worksite coupled with Volek's lack of experience, his lack of training, and Volek's call to his supervisor wherein he reported concerns for his safety, and wherein he reported discomfort with his

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the relevant time periods, i.e. when climbing the pole prior to the accident. Indeed, even Albert Maas, the homeowner, corroborated that it rained that day. He testified that he went inside (or stepped away) at times because he did not want to be in the rain. Maas's testimony also corroborated the fact that Volek felt uncomfortable installing the line in such weather. We also note that neither the Employer nor the Division laid a strong foundation establishing the reliability or accuracy for any weather reports such as Exhibits N or O.

assignment. Thus, the Division demonstrated that Employer failed to conduct an inspection, at a minimum, to evaluate the specific hazard at hand here.

In sum, for the reasons stated herein, the Division has demonstrated a violation of section 3203, subdivision (a)(4)(C).[9] We also do not accept Employer's argument that the citation should be dismissed as a single, isolated failure to implement a detail within an otherwise effective program. The Board has held that an IIPP violation can be proved on the ground of one deficiency if that deficiency is shown to be essential to the overall program. (*See e.g.*, *Mountain Cascade, Inc.*, Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003).) Here, we conclude that an Employer's duty to inspect and evaluate hazards when made aware of a new and unrecognized hazard is essential to the overall program, particularly where the hazard, in part, involves climbing a pole more than twenty feet above the ground.[10] Indeed, Employer demonstrated that it understood the importance of inspecting and evaluating new or unrecognized hazards. Within its Petition (and within the underlying record), Employer observes that an important portion of its safety program is that "if an employee reports a safety concern to a supervisor, that supervisor must determine what the hazard is and to do something to address it." (Petition at p. 18.) The Petition goes on to state that it was "*Company Policy* for supervisors to visit a technician's worksite to address a condition if the technician report feeling unsafe or uncomfortable climbing." (Petition, p. 18). While we certainly do not uphold the violation based on the fact that Employer violated its own company policy, we observe that the policy is analogous in nature to section 3203, subdivision (a)(4)(C), and Employer's policy exemplifies the importance of that subsection. Had Employer followed its own rules it is quite possible the accident may have been avoided and this case may have never arisen.

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[9] In affirming the citation, the Board does depart from certain portions of the ALJ's analysis. The Decision noted that Employer's IIPP "does not define 'inclement weather' and lacks provisions for evaluating workplace hazards related to weather conditions. Employer's written policies did not say how weather conditions would be evaluated to determine whether they were severe enough to be considered 'hazardous.'" The Decision additionally stated "Because no criteria for assessing the hazard of 'inclement weather' were in the employer's written rules, they are a 'new and previously unrecognized hazard.'" However, while we concur that a new or previously unrecognized hazard existed (for the reasons stated herein), we observe that "Section 3203(a)(4) contains no requirement for an employer to have a written procedure for each hazardous operation it undertakes. What is required is for Employer to have procedures in place for identifying and evaluating workplace hazards, and these procedures are to include 'scheduled periodic inspections.'" (
After Reconsideration (Oct. 11, 2013).) We also observe that a violation of section 3203, subdivision (a)(4)(C) could occur irrespective of the written contents of Employer's IIPP.

[10] We are not persuaded by Employer's references to *Marine Terminals Corp. dba Evergreen Terminals,* Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013), nor *O.C. Jones & Sons, Inc.*, Cal/OSHA App. 13-310, Decision After Reconsideration (Nov. 20, 2014). These cases are inapposite based on both the law and the facts. Neither of these cases discussed section 3203, subdivision (a)(4)(C)'s requirement, pertinent here, that "[i]nspections shall be made to identify and evaluate hazards…[w]henever the employer is made aware of a new or previously unrecognized hazard."

After independently reviewing the record, including the stipulations of the parties, we also conclude that the evidence supports the ALJ's affirmance of the serious classification of the violation.[11]

2. Did the ALJ properly affirm Citation 3, Item 1, asserting a violation of section 8602, subdivision (i) [failure to discontinue work from structure when adverse weather conditions make the work unsafe]?

The Division also cited Employer with a violation of section 8602, subdivision (i) of the Telecommunication Safety Orders, which states:

> Inclement Weather. Work from structures shall be discontinued when adverse weather such as high winds, ice on structures, or progress of an electrical storm in the immediate vicinity, makes the work unsafe.

Citation 3, Item 1 alleges as follows:

> On 9/21/2013, the employer did not evaluate the workplace hazard and unsafe condition that was reported by an employee. An employee (EE1) was seriously injured when he fell 25 feet to the ground while about to replace a CATV drop line during a strong wind and strong rain weather condition for a residence located at 1943 Elinora Drive, Pleasant Hill, CA 94523. EE1 was confined at a hospital for more than 24 hours for treatment of his injuries.

In summary, section 8602, subdivision (i) is a Telecommunications Safety Order[12] that requires work to be discontinued if three elements are found to

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[11] The record, including the stipulations of the parties and the testimony of Aruejo, all demonstrate that there is a realistic possibility of serious physical harm as defined in Labor Code section 6432, subdivision (e). Aruejo offered testimony demonstrating that a serious physical harm could occur based on the type of violation that existed here. We also observe that Volek did actually suffer a serious injury. He suffered three broken vertebrae and other injuries, requiring inpatient hospitalization for more than 24 hours of treatment. We also concur with the ALJ's determination that Employer did not rebut the serious classification. In addition, we note that Employer's Petition does not contest the ALJ's findings with respect to how the penalty should be calculated. Therefore, we need not, and do not, address that issue—the issue is waived. (*See,* Labor Code section 6618.)

[12] The Petition does not contend that the Telecommunications Safety Orders do not apply, and therefore that issue is waived. (See, Labor Code section 6618.) In any event, we hold that the ALJ correctly concluded that the subchapter applies. (See, Decision p. 13.) Volek was attempting to install cable at the worksite via an aerial feed, which would fall within the parameters of the subchapter. Section 8600, subdivision (a), discussing the Telecommunications Safety Orders, states: "This article sets forth safety and health standards that apply to the work conditions, practices, means, methods, operations, installations and processes performed at telecommunications centers and at telecommunications field installations, which are located outdoors or in building spaces used for such field installations....."Field" work includes the installation, operation, maintenance, rearrangement, and removal of conductors and other equipment used for telecommunications service, and of

exist: 1) the employee must be working from a structure; 2) the employee must be working in adverse weather conditions; and 3) the adverse weather conditions must render the work unsafe.

Was the Employee Working From A Structure?

The evidence supports, and the parties do not dispute, the ALJ's determination that Volek was working from a "structure" at the time of his accident. The term "structure" is not specifically defined in this subchapter of the safety orders.[13] Where a statutory (or regulatory) term "is not defined, it can be assumed that the Legislature was referring to the conventional definition of that term." (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement,* (2011) 192 Cal. App. 4th 75, 82.) To obtain the ordinary meaning of a word the court may refer to its dictionary definition. (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement,* (2011) 192 Cal. App. 4th 75, 82-83; *see also e.g. Stamm Theatres v. Hartford Casualty Ins. Co.,* (2001) 93 Cal. App. 4th 531, 539.) The Merriam Webster dictionary defines a "structure," pertinent here, as "something (such as a house, tower, bridge, etc.) that is built by putting parts together and that usually stands on its own."[14] Here, Volek climbed a utility pole, with wires and other affixtures attached to it, in order to conduct an aerial feed. The conventional definition of the term "structure" may be construed to include the instant utility pole.

Did Adverse Weather Conditions Exist?

The evidence also supports the finding that adverse weather existed at the worksite. The term "adverse weather" is not defined in the safety order; therefore we apply the conventional definition of the term. Adverse means "acting or serving to oppose…Contrary to one's interest or welfare; harmful or unfavorable…" (American Heritage Dictionary Online[15]), "acting against or in a contrary direction:… <hindered by adverse winds>" (Merriam-Webster[16]) or "going against something…" (Cambridge Online Dictionaries[17]). Here, Volek's testimony, as discussed above, demonstrates that when he worked at the worksite rain and wind existed, which intermittently shifted in intensity.

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their supporting or containing structures, overhead or underground, on public or private rights of way, including buildings or other structures."

[13] We do observe that a definition for the word structure does exist in the Construction Safety Orders. Section 1504 defines a "structure" as "That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner." We conclude that the pole in this matter constitutes a structure under this definition.

[14] www.merriam-webster.com/dictionary

[15] www.ahdictionary.com

[16] www.merriam-webster.com/dictionary

[17] http://dictionary.cambridge.org/us/dictionary

Applying the foregoing definitions, the weather conditions, as described by Volek, may properly be found to be "adverse."[18]

Did the Adverse Weather Conditions Make the Work Unsafe, Requiring That It Be Discontinued?

Finally, the evidence supports the finding, under the particular circumstances of this case that the adverse weather conditions rendered the work unsafe, requiring that the work be discontinued.

Initially, we observe that the safety order does not require work to be discontinued merely because inclement or adverse weather conditions exist. It only requires discontinuation of the work when such weather conditions make the work unsafe.

While Employer argues that the weight of the evidence demonstrates that the weather conditions were not unsafe (even if we credit Volek's testimony), Employer oversimplifies the issue. The determination as to whether the adverse weather conditions rendered the work unsafe cannot be made by solely considering the weather conditions in a vacuum. In evaluating whether adverse weather renders the work unsafe, an employer must additionally reasonably consider the impact that existing weather conditions are likely to have on the assigned employee. The employer must consider factors such as the particular work being done, the location of the work, and, the experience, skill, and training of the assigned employee.[19]

While Volek's testimony demonstrates that the adverse weather conditions were perhaps not necessarily unsafe when considered alone and outside of context, the consideration of all relevant factors leads to the conclusion that the adverse weather conditions rendered the work unsafe as to Volek under the circumstances of this particular case. The evidence demonstrates that the rain made the pole pegs slicker and the wind caused the pole to shift. Further, Volek was an inexperienced worker. Volek had only

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[18] Employer argued that the safety order only expressly regulates "high winds, ice on structures, or progress of an electrical storm in the immediate vicinity…" (Section 8602, subdivision (i).) However, the ALJ correctly determined that regulation use of the term "such as" preceding those expressed items indicates that they were illustrative rather than exhaustive.

[19] The Employer's Petition solely focuses on the weather conditions without considering the other relevant factors mentioned above. In doing so, Employer advances an overly narrow construction of the cited safety order. In establishing an employer's duty to maintain a safe working environment the relevant Labor Code provisions speak in the broadest terms, and the terms of such legislation, and the terms of relevant safety orders, are to be given a liberal interpretation for the purpose of achieving a safe working environment. (*See e.g.*, *Carmona v. Division of Industrial Safety*, (1975) 13 Cal. 3d 303, 313.) Employer's narrow construction would not further the purposes of the Occupational Safety and Health Act. "The goal of the Occupational Safety and Health Program in California remains preventive in nature, that is, to prevent an injury from ever taking place." (*Underground Construction Co., Inc.*, Cal/OSHA App. 98-4105, Decision After Reconsideration (Oct. 30, 2001.)

worked for Employer for a few months and had no experience or training working in rain and wind. These factors operating in conjunction with Volek's call to Sanchez, wherein he expressed concerns for his safety and inquired as to Employer's policies reasonably apprised Employer that the adverse weather conditions rendered the work unsafe as to Volek, requiring discontinuation of the work. Consequently, the Division established a violation of section 8602, subdivision (i) because Employer failed to discontinue work at the worksite when adverse weather conditions rendered the work unsafe.[20]

Lastly, Employer argues that the safety order is void for vagueness, since it does not define terms like "adverse weather" or "unsafe." However, the argument is unavailing for the reasons discussed herein. In *Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal. App. 4th 883, 890-891, the Appellate Court noted, when considering a vagueness challenge to an administrative regulation, that we are not to review the regulation in the abstract; rather, we are consider whether it is vague when applied to the complaining party's conduct in light of the specific facts of the particular case. "If it can be given a reasonable and practical construction that is consistent with probable legislative intent and encompasses the conduct of the complaining party, the regulation must be upheld." (*Ibid.*) Under the principles espoused in *Teichert Construction,* supra, we decline to find that the safety order is unconstitutionally vague as it has been applied to Employer's conduct under the specific facts of this case.

DECISION

Citation 2, Item 1 asserting a serious violation of section 3203, subdivision (a)(4)(C) is affirmed with a penalty of $6,750. Citation 3, Item 1 asserting a violation of section 8602, subdivision (i) is also affirmed as a general violation, but the penalty is vacated for the reasons asserted in the ALJ's decision.

ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAR 28, 2016

[20] Although we harbor some uncertainty regarding the ALJ's decision to vacate the serious classification with regard to Citation 3, we observe that the Division has not filed a petition for reconsideration regarding this issue; therefore, we need not, and do not, reconsider the issue. We also do not reconsider the ALJ's decision to vacate the penalty with regard to Citation 3.