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

| In the Matter of the Appeal of:<br><br>**SOUTHERN CALIFORNIA EDISON**<br>**dba SOUTHERN CALIFORNIA EDISON COMPANY**<br>**2244 WALNUT GROVE AVENUE**<br>**ROSEMEAD, CA 91770**<br><br>**Employer** | Inspection No.<br>**1320327**<br><br>**DECISION** |
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## Statement of the Case

Southern California Edison dba Southern California Edison Company (Employer) is a public utility that provides electricity. On June 4, 2018, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Robert Salgado, conducted an accident investigation at Employer's work site located at 794 Bohnert, Rialto, California (the site).

On November 19, 2018, the Division issued Employer citations for six violations. The violations allege: (1) Failure to have an effective communication system for contacting emergency medical services; (2) Failure to ensure that a qualified electrical worker remain in close proximity to the work location; (3) Failure to eliminate all possible sources of backfeed voltages; (4) Failure to use hazardous energy control procedures during a shift change; (5) Failure to use protective coverings or devices, adequate barriers, or isolation methods when working on exposed energized equipment; and (6) Failure to ensure that supervisory employees and their assigned crew comply with safe and healthy work practices.

Employer filed timely appeals of all citations, contesting the existence of all violations, the classification of all violations except for Citation 1, the time allowed to abate all violations, the required changes to abate all violations, and the reasonableness of all proposed penalties. Employer asserted a series of affirmative defenses.[1]

This matter was heard by Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Board), in Riverside, California on September 12 and December 3, 2019. Lisa Prince, Attorney, of Walter & Prince, LLP,

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[1] Except as otherwise noted, 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); see also *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

represented Employer. William Cregar, Staff Counsel, represented the Division. This matter was submitted for decision on February 26, 2020.

## **Issues**

1. Did Employer fail to have an effective communication system for contacting emergency medical services?

2. Did Employer fail to have a qualified electrical worker (QEW) or employee in training remain in close proximity to the work location?

3. Did Employer fail to eliminate all possible sources of backfeed voltages?

4. Did Employer fail to use procedures during a personnel change to ensure the continuity of lockout or tagout protection?

5. Did Employer fail to use protective devices, adequate barriers, or isolation methods when employees worked on exposed energized equipment?

6. Did Employer fail to ensure that supervisory employees and their assigned crew complied with safe and healthy work practices?

7. Did Employer establish the *Newbery* defense?

8. Did the Division establish that Citations 2, 3, 4, and 5 were properly classified as Serious?

9. Did Employer rebut the presumption that Citations 2, 3, 4, and 5 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

10. Did the Division establish that Citations 3, 4, and 5 were properly characterized as Accident-Related?

11. Were the proposed penalties reasonable?

12. Are the abatement requirements reasonable?

## Findings of Fact

1. Beginning June 4, 2018, Senior Safety Engineer Robert Salgado (Salgado) began an inspection of an electrical accident that occurred on May 25, 2018, at the site.

2. On May 25, 2018, Foreman Luis Chavez (Chavez), an employee of Employer, was injured at the site while coiling cable on top of an energized Buried Underground Residential Distribution (BURD) transformer.

3. A four-man electrical crew was assigned to replace bad underground cable between a riser pole and the BURD transformer. Previously, two crews had removed the bad cable and installed a generator that back fed the transformer. The previous crew had pulled new cable through and out of the BURD in preparation to safe-end the end of the cable. After completing that work, two linemen left for the day.

4. Chavez, as Foreman, requested two replacement linemen. At that time, Chavez was aware that the transformer was energized through back feed and he was aware that the cable was live and needed to be safe-ended.

5. While waiting for the replacement linemen, Chavez and Groundman Anton Savchenko (Savchenko) made up a dummy elbow for the end of the cable lying outside the BURD. The purpose of the dummy elbow was to safe-end the cable. After making up the elbow, Chavez started to coil the cable, then climbed inside the BURD to continue coiling the cable. Chavez finished coiling the new cable and decided to move the old concentric cables from transformer.

6. While inside the BURD, Chavez made inadvertent electrical contact at approximately 3:45 p.m. because the dummy elbow came off. Chavez did not use any protective device, barrier, or isolation method.

7. Savchenko did not watch Chavez while he worked inside the BURD. Savchenko was behind the truck putting tools away when he heard a noise. The noise was Chavez calling for help after Chavez made electrical contact.

8. Neither Chavez nor Savchenko examined Chavez's injuries. Savchenko did not activate the emergency response system on Employer's radio because Chavez called him back.

9. Two new linemen arrived at approximately 4:00 p.m. and applied first aid. They did not call 911.

10. Employer had a written Illness and Injury Prevention Plan (IIPP) and an Accident Prevention Manual at all relevant times. Employees were directed to call 911 in the event of a medical emergency. Both Chavez and Savchenko had been trained in Employer's emergency procedures, but did not follow them.

11. Field Supervisor Daniel Chenault (Chenault) arrived 15 to 20 minutes after the accident. He asked to see Chavez's injuries. When he saw Chavez's injuries, he called 911.

12. Chavez was taken to the emergency room at approximately 4:30 p.m. As a result of his injuries, he was admitted to the hospital, then transported to a different hospital with a burn unit. He was hospitalized approximately one month for treatment.

## Analysis

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*C.C. Myers, Inc.*, Cal/OSHA App. 00-008, Decision After Reconsideration (Apr. 13, 2001); *Cambro Manufacturing,* Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted 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 types of evidence. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, rev. denied.)

### 1. Did Employer fail to have an effective communication system for contacting emergency medical services?

California Code of Regulations, title 8[2], section 3400, subdivision (f)(1), provides:

> (f) Effective provisions shall be made in advance for prompt medical treatment in the event of serious injury or illness. This shall be accomplished by one or a combination of the following that will avoid unnecessary delay in treatment:
>
> (1) A communication system for contacting a doctor or emergency medical service, such as access to 911 or equivalent telephone system. The communication system or employees using the system shall have the ability to direct emergency services to the location of the injured or ill employee.

[2] All references are to California Code of Regulations, title 8, unless otherwise indicated.

> (2) Readily accessible and available on-site treatment facilities suitable for treatment of reasonably anticipated injury or illness.
>
> (3) Proper equipment for prompt medical transport when transportation of injured or ill employees is necessary and appropriate.

Note: Medical services and first aid provisions for electrical workers shall also comply with Sections 2320.10 (Low-Voltage) and 2940.10 (High-Voltage) as applicable.

The Alleged Violation Description (AVD) for Citation 1, Item 1, alleges:

> Prior to and during the course of the investigation, including but not limited to May 25, 2018, the Employers communication system for contacting emergency medical services, as outlined in its APM Rule P14a (Referenced in SCEs 2009 TBDU Other Confined Space Manual, p.38), was not effective in that SCE personnel including but not limited to an SCE Groundman, SCE Electrical Crew Foreman, SCE Field Supervisor, and an SCE Operations Supervisor failed to immediately call 911 to ensure prompt medical treatment, resulting in unnecessary delay in treatment to an employee who sustained a serious injury.

While an employer may have a system for contacting emergency personnel, the Division may still demonstrate that it is not effective by showing that the employer failed to implement the plan. (See *HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) Proof of implementation requires evidence of actual responses. (See *National Distribution Center, LP, Tri-State Staffing,* Cal/OSHA App. 12-0378, Decision After Reconsideration (Oct. 5, 2015).) An employer cannot abrogate its responsibilities to employee safety or health by pleading ignorance in the face of easily discernable hazards and remedies. (*FMC Corporation, Food Processing Machinery Division*, Cal/OSHA App. 77-498, Decision After Reconsideration (Aug. 28, 1979).)

Here, Employer had a written plan. Employer's April 27, 2018, Safety Bulletin stated:

> In the event of an emergency requiring EMS [Emergency Medical Services], supervisors or responding employees must call for medical assistance using available communication devices … The caller should dial 911 … The caller should be prepared to give the following information:
>
> (a) Name, nature of emergency,
> (b) Address, nearest cross street, and city,

(c) Phone number you are calling from.
(d) The caller should stay on the line until information is confirmed.

Employer supplied each employee with a radio with a red button. Pushing this button cleared all communication and all channels permitting the transmitter to inform the office of the location and nature of the emergency. Employees were also trained to call 911.

On May 25, 2018, Foreman Chavez experienced a severe electrical shock resulting in major burns to his hands, right arm and right leg and hospitalization for more than 24 hours. Groundman[3] Savchenko was present when Chavez was burned. Neither called 911. Savchenko pressed the red button on the radio, but did not speak into it. Neither Savchenko nor Chavez looked at Chavez's injuries. Chavez called the office. The two linesmen who arrived before the supervisors arrived did not call 911.

Employer's supervisors, Victor Young and Chenault, responded immediately after learning of the incident. Their office was about 15 minutes away. It took Chenault approximately 20 minutes after the accident to arrive. When Chenault saw Chavez's injuries, he called 911. The 911 responders arrived shortly after.

Employer's procedures were not followed. Savchenko did not provide the necessary information when he pressed the red button. Chavez said he was okay, but one look at his injuries made it obvious to a lay person that they were serious and might require hospitalization. (Exhibit 10A – 10F). It was Chavez's supervisor who ultimately called 911 when he saw the injuries.

Based on the above, the Division established that Employer had provisions for prompt medical treatment in an emergency, but the plan was not effectively implemented. Chavez did not received prompt medical care for his serious disfiguring electrical burns.

Therefore, the Division established a violation of section 3400, subdivision (f)(1).

Employer did not appeal the classification of the violation as general. Therefore, it is established by law. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017); see also *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

[3] A Groundman is a helper whose job is to assist the Linemen by obtaining materials when needed.

**2. Did Employer fail to have a qualified electrical worker or employee in training remain in close proximity to the work location?**

Section 2940, subdivision (d), provides:

(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.

The AVD for Citation 2 alleges:

> Prior to and during the course of the investigation, including but not limited to May 25, 2018, the employer failed to ensure that a qualified electrical worker (QEW) remained in close proximity to the work location (BURD structure) to act primarily as an observer for the purpose of preventing an accident or initiate a rescue operation in the event of an emergency. On or about May 25, 2018, an Electric Crew Foreman who became incapacitated when he contacted energized parts of a 6.9kV transformer, had to yell for help because his groundman was standing approximately 30 feet away with his back turned to the work location (BURD structure).

In order to establish a violation of section 2940, subdivision (d), the Division must establish that the work being done was work done on an exposed conductor or work done on exposed parts of equipment connected to high voltage systems. Section 2700 defines the relevant terms as follows:

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

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).)

The evidence was undisputed that when Chavez was working on the live BURD, creating and placing a dummy elbow, then coiling cable on top of the BURD, there was no qualified electrical worker (QEW) at the site. The only other worker at the site at that time was Savchenko. Savchenko was a groundman, or helper. He was new, having been employed by Employer for less than one year. Arguably, he was an employee in training, but he was busy putting tools away on the truck at the time of the accident. He may have seen Chavez enter the BURD, but he did not watch him, and did not remain close enough to clearly hear him when he cried for help.

Employer argued that no work was being done on exposed parts of equipment connected to high-voltage systems because Chavez was coiling a de-energized cable. However, Chavez was standing on top of the energized BURD. The cable was connected to the BURD, which was energized at 6.9 kilovolts (kV). The cable was energized because the insulating elbow had been dislodged. The voltage was over 600 volts, so it was high voltage for the purposes of section 2940, subdivision (d).

The evidence shows that energization occurred because the insulating elbow was inadvertently dislodged. However, the safety order does not require intentional energization. To the contrary, the safety order is intended to help protect employees when accidental energization occurs. "When there is more than one possible interpretation of a safety order, the Board's directive from the California Supreme Court is to adopt an interpretation that is most protective of workers. The Board applies a liberal interpretation to regulations for the purpose of achieving a safe, healthful working environment." (*Walsh/Shea Corridor Constructors*, Cal/OSHA App. 1093606, Decision After Reconsideration (Feb. 9, 2018), citing *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303.) Statutory rules of construction and interpretation also apply to the interpretation of administrative regulations. (*Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d 1510, 1516, *citing California Drive-in Restaurant Ass'n. v. Clark* (1943) 22 Cal .2d 287, 292.)

Savchenko testified that when Chavez entered the BURD, Savchenko was 15 to 20 feet away, and had a clear view of the work. It is not clear what Savchenko was doing when the accident occurred, but the evidence adduced at hearing does not support a finding that he was watching Chavez. Chavez had to yell to get Savchenko's attention after Chavez was burned. The Division alleged that Savchenko was approximately 30 feet away and had his back turned, which is more consistent with Savchenko's lack of attention to Chavez's accident. Under these circumstances, it cannot be found either (1) that Savchenko was acting primarily as an observer to prevent an accident, or (2) that he was in close enough proximity to render immediate assistance.

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

3. **Did Employer fail to eliminate all possible sources of backfeed voltages?**

Section 2940.9 provides:

> Before contacting the high voltage side of a deenergized transformer(s), or conductor(s) connected thereto, all possible sources of backfeed shall be eliminated by:
>
> (a) disconnecting or grounding the high voltage side, or
> (b) disconnecting or short circuiting the low voltage side.

The AVD for Citation 3 alleges:

> Prior to and during the course of the investigation, including, but not limited to May 25, 2018, the employer failed to ensure that a supervisory employee (Electric Crew Foreman) eliminated all possible sources of backfeed voltages on a 6.9kV transformer (being backfed by a generator), by effectively disconnecting or grounding the high voltage side, or disconnecting or short circuiting the low voltage side. As a result, an employee while attempting to remove an old ground wire came in contact with an energized section of the transformer and suffered serious injuries.

In this case, Employer anticipated that the transformer was going to be off for a large amount of time, so it supplied the surrounding residences with electricity using a portable generator to pick up the customer load. The generator "back fed" (supplied) voltage to the low side of the transformer. Although insulated elbows and safe stops had been placed on the cable

connected to the transformer, these actions fell short of the safety order requirements. Employer did not take steps to disconnect or ground the high voltage side or to disconnect or short circuit that low voltage side, as required by the safety order.

Employer's investigation report (Exhibit 11) states that the previous crew connected a generator to secondary cables and allowed it to back feed to the primary cable going to the transformer. Employer further stated that although the transformer did not need to be back fed, it was an accepted practice (not the best practice) to connect the generator to the low voltage side of the safe ended terminals instead of isolating the primary and secondary cables. Employer found that if the secondary cables had been isolated from the transformer, Chavez would not have made electrical contact with the elbow/terminals. (Exhibit 11, pp. 7-8.)

Accepted industry practice is not a defense to a violation. (*Ekedal Concrete, Inc*., Cal/OSHA Ap. 13-0131, Decision After Reconsideration (Mar. 28, 2016).) Employer did not argue that it disconnected or grounded the high voltage side or that it disconnected or short circuited the low voltage side, as required by the safety order.

Therefore, the Division established a violation of section 2940.9 by a preponderance of the evidence.

**4. Did Employer fail to use procedures during a personnel change to ensure the continuity of lockout or tagout protection?**

Section 2940.13, subdivision (*l*), provides:

> (*l*) Shift or Personnel Changes. Procedures shall be used during all shift or personnel changes to ensure the continuity of lockout or tagout protection, including provision for the orderly transfer or lockout or tagout device protection between off-going and on-coming employees, to minimize their exposure to hazards from the unexpected energizing or start-up of the machine or equipment or from the release of stored energy.

The AVD for Citation 4 alleges:

> Prior to and during the course of the investigation, including but not limited to May 25, 2018, the employer failed to ensure that a supervisory employee (Electric Crew Foreman) utilized hazardous energy control procedures during a shift or personnel change to ensure the continuity of lockout or tagout protection, including but

> not limited to provisions for the orderly transfer of lockout or tagout device protection between off-going and on-coming employees, to minimize their exposure to energized parts of a 6.9kV transformer located in a BURD structure. As a result, an employee while attempting to remove an old ground wire came in contact with an energized section of the transformer and suffered serious injuries.

Chavez's accident occurred during a shift change. During this time, the transformer was energized, but repairs were incomplete. Two of the four-man electrical crew had left at the end of their shifts. Before they left, the energized parts were safe ended.

There was a gap in time before replacement crew arrived where Chavez and Savchenko were the only crew members. An orderly shift change would have allowed time for the entire four-man crew to examine and analyze the appropriate and safest course of action to ensure continuity of the provisions to prevent contact with energized parts. QEWs could have prevented Chavez from entering the BURD with the energized transformer, safe ends, and dummy elbows that Chavez made. Employer did not permit employees to go on top of a BURD. The two replacement crew members, if present, may have realized the electrocution and shock hazards and recommended turning off and locking the generator out. Savchenko, being new, was not aware of the hazard. It was not discussed at the tailboard meeting that morning. (Exhibit I.)

In the instant case, no action whatsoever was taken for the orderly transfer or lockout device protection between off-going and on-coming employees, to minimize employee exposure to hazards from the unexpected energizing of the machine or equipment. Significantly, in this case, unexpected energizing occurred. Although the two lineman who left made sure the transformer was protected from inadvertent electrical contact, Chavez did not provide an opportunity for the new linemen to be advised of the protection that had been provided. Instead, Chavez went ahead and worked before the new crewmembers came. Chavez thereby eliminated the possibility of an orderly transfer or the possibility of lockout device protection between off-going and on-coming employees.

Therefore, based on the above, a violation of section 2940.13, subdivision (*l*), was established by a preponderance of the evidence.

**5. Did Employer fail to use protective devices, adequate barriers, or isolation methods when employees worked on exposed energized equipment?**

Section 2943, subdivision (h)(3) provides:

> (h) Working on Cables, Conductors or Equipment Energized at 7,500 Volts or Less.
>
> (3) Suitable rubber gloves with protectors and protective clothing in accordance with Section 2940.11 shall be worn when work working on exposed conductors or equipment energized at 7,500 volts or less. Other exposed energized or grounded conductors or equipment in the work area, with which contact can readily be made, shall be covered with adequate protective devices, barricaded or otherwise isolated.

The AVD for Citation 5 alleges:

> Prior to and during the course of the investigation, including but not limited to May 25, 2018, the employer failed to ensure that a supervisory employee (Electric Crew Foreman) utilized protective coverings or devices, adequate barriers, or isolation methods while working on exposed underground cables, concentric ground wires, or conductors including but not limited to, equipment or parts of an energized transformer (located within a BURD structure having a working space of less than 36”), with an operating voltage of 6.9kV. As a result, an employee while attempting to remove an old ground wire come in contact with an energized section of the transformer and suffered serious injuries.

Chavez, a supervisor, was not wearing gloves or other protective equipment. He incorrectly assumed that he was safe from high voltage exposure because the elbow, an insulated component, was present and apparently secure. Employer identified four possible causes for the elbow to become dislodged due to the nature of the elbow or Chavez’s actions when he was attempting to route the cable in the BURD and around the transformer. (Exhibit 11)

The Tailboard Form completed before the job states that the Foreman was to do all de-energizing, followed by testing to determine if the circuit was de-energized. (Exhibit G.) Chavez testified that he did not de-energize the transformer, wear gloves, or use any other protective device, barrier or isolation method. No evidence rebutted his testimony.

Therefore, based on the above, the Division established a violation of section 2943, subdivision (h)(3), by a preponderance of the evidence.

**6. Did Employer fail to ensure that supervisory employees and their assigned crew complied with safe and healthy work practices?**

Section 3203, subdivision (a)(2) provides:

> (a) Effective July 1, 1991, every employer shall establish, implement, and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum: …
>
> (2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.

The AVD for Citation 6 alleges:

> Prior to and during the course of the investigation, including but not limited to May 25, 2018, the employer failed to establish, implement and maintain an effective system for ensuring that supervisory employees (Electric Crew Foremen) and their assigned groundmen comply with safe and healthy work practices including but not limited to, rescue operations involving electrical events in a BURD structures (other confined space). On or about May 25, 2018, an Electric Crew Foreman who became incapacitated when he contacted energized parts of a 6.9kV transformer, yelled for help and then instructed his groundman, who was not considered a qualified electrical worker (QEW), to get him out of the BURD structure prior to shutting down the generator and calling 911.

Violations of Employer's safety rules is not relevant to the existence of a violation of section 3202, subdivision (a)(2). (*Marine Terminals Corp. dba Evergreen* Terminals, Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013).)

In order to show a violation of section 3203, subsection (a)(2), the Division must demonstrate that the Employer violated one of the four listed methods. (*Coast Waste*

*Management Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016); *Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013).) Because the safety order is written in the disjunctive, the Employer's demonstration that it has met one of the methods described is enough to show compliance. (*ABM Facility Services*, Cal/OSHA App. 12-3406, Decision After Reconsideration (Dec. 24, 2015).)

The four listed methods of compliance with the safety order are: (1) recognition of employees who follow safe and healthful work practices, (2) training and retraining programs, (3) disciplinary actions, or (4) any other such means that ensures employee compliance with safe and healthful work practices.

Employer presented evidence that it had trained and retrained Chavez, which is the second listed method. Exhibit H is a list of classes Chavez had attended while employed by Employer. These classes included multiple classes on the Accident Prevention Manual (Exhibits H, I, J) and classes on Rescue Procedures (Exhibits H, K) Exhibit F is a list of classes Savchenko took, which included Accident Prevention Manual and Lock Out/Tag Out training.

That morning, the crew held a Tailboard Meeting. Among other things, they reviewed the job hazards and rescue procedures (Exhibit G). Arguably, this fell within the fourth practice, a means to ensure compliance with safe and healthful work practices.

Further, Chenault testified that Employer's methods to ensure employee compliance also included weekly meetings with review of safety rules, field audits by supervisors, counseling and discipline for safety violations, recognition of good safety practices and a Craft Driven Safety Program. Employer issued bulletins, safety alerts, and held weekly conference calls with supervisors. These measures are required in Employer's written IIPP for the area. (Exhibit D)

Therefore, the Division has not established that Employer failed to comply with any of the methods described in section 3203, subdivision (a)(2). Employer showed compliance with at least one of the four listed methods.

Accordingly, Employer's appeal of Citation 6 is granted.

### 7. Did Employer establish the *Newbery* defense?

Employer asserted the *Newbery* (Foreseeability) defense as to all violations. The defense was created by the Third District Court of Appeals in *Newbery Electric Corp. v. Occupational Safety and Health Appeals Board* (1981) 123 Cal.App.3d 641. Under this defense, a violation is deemed unforeseeable Employer proves that none of the following exist:

(1) The employer knew or should have known of the potential danger to employees.
(2) The employer failed to exercise supervision adequate to ensure safety.
(3) The employer failed to ensure employee compliance with its safety rules.
(4) The violation was foreseeable.

(*Synergy Tree Trimming, Inc.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017); *Gaehwiler v. Occupational Safety and Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045.)

Although the *Newbery* court applied this defense to the actions of a supervisor or foreman, the Board has rejected that application, finding that the knowledge of a supervisor is imputed to the employer; hence, element 1 of the defense is not met. (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 13, 2013); *MCI Worldcom, Inc.*, Cal/OSHA App. 00-440, Decision After Reconsideration (Feb. 13, 2008).)

In this case, Chavez was a foreman or supervisor. He was aware, or should have been aware, of all violations. Additionally, his actions show that employer failed to exercise supervision adequate to ensure safety. Thus, elements 1 and 2 were not met for Citations 1 through 5, as follows:

Citation 1: Chavez was the one who did not promptly respond or ask the groundman to promptly obtain medical services. Chavez should have known of the potential danger of failing to examine his own injuries to determine if calling 911 was warranted.

Citation 2: Chavez was the one who proceeded to work on electrical equipment without having a QEW or trainee remain in close proximity to observe him. Chavez should have been aware of the potential danger.

Citation 3: Chavez knew that a generator was connected to the transformer and that back feed voltages had not been eliminated. Chavez should have been aware of the potential danger.

Citation 4: Chavez chose to work during a shift change and that hazardous energy control procedures were not being used. Chavez should have been aware of the potential danger.

Citation 5: Chavez failed to use personal protective equipment, a barrier, or other protective device when he entered the BURD. Chavez should have been aware of the potential danger.

Based upon the above, the *Newbery* defense fails for all violations.

**8. Did the Division establish that Citations 2, 3, 4, and 5, were properly classified as Serious?**

Labor Code section 6432, subdivision (a), defines a Serious violation as follows:

> There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that

> there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things:
> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

Labor Code section 6432, subdivision (e), defines "serious physical harm" as "any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any 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.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

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.

Salgado testified that his Division mandated training was current, and, therefore, he is deemed competent to offer his opinions regarding each element of a Serious violation.

*a. Citation 2*

The hazard created by the violation is that a preventable accident would not be avoided or that an employee could not get help in the event of an accident. Here, the presence of a QEW or knowledgeable trainee in close proximity may have prevented the accident by preventing Chavez from standing on the BURD, which was a contradiction to Employer's safety rules. Here, Chavez needed help to exit from the BURD after his accident. Contact with electricity caused burns which resulted in hospitalization and a serious degree of permanent disfigurement. Chavez's serious injuries demonstrate that there was a realistic possibility or serious physical harm as a result of the violation. Therefore, the Division established a presumption that Citation 2 was properly classified as Serious.

*b. Citation 3*

The actual hazard created by the violation is that the entire transformer, high and low sides, would be energized. This created the hazard that Chavez would come in contact with an energized part. If the backfeed voltages had been eliminated, Chavez would not have been injured. Employer admitted as much in its accident investigation. (Exhibit 11.) Thus, there was a realistic possibility of serious physical harm as a result of the violation. Therefore, the Division established a presumption that Citation 3 was properly classified as Serious.

*c. Citation 4*

The actual hazard created by the violation is that the measures taken to maintain lockout and tagout during a personnel shift change would not be observed, thus exposing an employee to contact with energized parts. Here, that is what happened. The prior crew took measures to ensure that the cables were fully insulated with no exposed energized parts before the two crew members left. Chavez did not ensure that he maintained those measures, i.e., that the elbows remained attached. Again, Chavez's serious injuries show that a realistic possibility of serious physical harm existed due to the violation. Therefore, the Division established a presumption that Citation 4 was properly classified as Serious.

*d. Citation 5*

The actual hazard created by the violation is contact with live electrical parts energized at 7.5 kV or less due to lack of protective equipment, a barrier, or other device. Chavez did not use gloves or any other protective device. Thus, he came into contact with electricity, and suffered serious injuries. As discussed Chavez's serious injuries show that a realistic possibility of a serious physical harm existed due to the violation. Therefore, the Division established a presumption that the Citation 5 was properly classified as Serious.

**9. Did Employer rebut the presumption that the violations alleged in Citations 2, 3, 4, and 5 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?**

Pursuant to Labor Code section 6432, Employer can rebut the presumption of a Serious violation on the following grounds:

> (c) If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:
>
> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).
>
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

To prove that an employer could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (Apr. 1, 2003).)

As previously discussed in connection with the *Newbery* defense, knowledge of a supervisor or foreman is attributed to Employer (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 13, 2013); *MCI Worldcom, Inc.*, Cal/OSHA App.

00-440, Decision After Reconsideration (Feb. 13, 2008).) As further discussed under the *Newbery* defense, Chavez had knowledge of the violations alleged in Citations 2 through 5, but did not take reasonable action to prevent the violations as follows:

Citation 2. It was not reasonable for Chavez to fail to require that an appropriately qualified person watch him.

Citation 3: It was not reasonable for Chavez to fail to eliminate sources of back feed voltages.

Citation 4: It was not reasonable for Chavez to fail to observe energy control procedures during a shift change.

Citation 5: It was not reasonable for Chavez to fail to use protective equipment, a barrier, or other protective device to prevent possible contact with live electricity.

Therefore, Employer has not rebutted the presumption that Citations 2, 3, 4, and 5 were properly classified as Serious.

**10. Did the Division establish that Citations 3, 4, and 5 were properly characterized as Accident-Related?**

In order to establish that a citation is properly classified as Accident-Related, the Division must show a causal nexus between Employer's violation of the safety standard and the employee's serious injury. (*MCM Construction*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016); *HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) The Division must show "the violation more likely than not was a cause of the injury." (*Ibid.)*

"An inference is a deduction about the existence of a fact that may be logically and reasonably drawn from some other fact or group of facts found to exist." (*Barrett Business Services, Inc.*, Cal/OSHA App. 315526582, Decision After Reconsideration (Dec. 14, 2016).) "The Board has previously held that reasonable inferences can be drawn from the evidence introduced at a hearing." (*Morrow Meadows Corporation*, Cal/OSHA App. 12-0717, Decision After Reconsideration (Oct. 5, 2016), citing *Mechanical Asbestos Removal, Inc*., Cal/OSHA App. 86-362, Decision After Reconsideration (Oct. 13, 1987).)

Section 330(h) defines a "serious injury" as, among others, any injury or illness occurring in a place of employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation. Here, Chavez suffered serious injuries (Exhibits 10 A through 10 F) because he was hospitalized for over 24 hours for treatment of his burns received as a result of the accident. Employer did not present any evidence that Chavez's injury was not serious. Therefore, it is found that Chavez suffered serious injuries.

*a. Citation 3*

Employer intended to energize the low voltage side of the transformer, although it was not necessary (Exhibit 11, p.8). According to Chenault and Employer's Apparent Cause Analysis (Exhibit 11), had the secondary cables been isolated from the BURD transformer, and then followed by connection of the generator, Chavez would not have made electrical contact. Therefore, if all sources of back feed had been eliminated per the safety order requirements, Chavez would not have come into contact with electricity, and would not have been injured.

Based on the above, it must be found that there is a causal nexus between the violation and Chavez's injuries. Accordingly, Citation 3 was properly characterized as Accident-Related.

*b. Citation 4*

Chavez did not use hazardous energy control procedures during a shift change. One of the procedures involves working in the presence of a full crew. The Groundman was new and did not have the knowledge or experience to recognize the hazard. The requested linemen had the knowledge and experience to recognize that Chavez was violating Employer's safety practices. Employer has liberal and specific stop work procedures for safety purposes. When any crew member observes another crew member violating safety practices, Employer requires them to stop the work. (Exhibit 11, p.8). This rule applies even if a lineman observes an unsafe practice which his foreman, supervisor, or superior is performing. Employer emphasizes that safety must not be sacrificed for production.

Based on the above, it must be found that there is a causal nexus between the violation and Chavez's injuries. Accordingly, Citation 4 was properly characterized as Accident-Related.

*c. Citation 5*

Chavez did not use any protective coverings or devices, adequate barriers, or isolation methods to perform work on top of an energized BURD; instead, he relied a dummy elbow that failed to stay secured to the end of the live cable. If he had used protective coverings or devices, adequate barriers, or isolation methods to perform the work, he would not have made electrical contact, and would not have been burned.

Based on the above, it must be found that there is a causal nexus between the violation and Chavez's injuries. Accordingly, Citation 5 was properly characterized as Accident-Related.

**11. Were 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. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures will be found to have met its burden of showing the penalties were calculated correctly. (*MI Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014).)

In this matter, the Division introduced its proposed penalty worksheet (Exhibit 8) and asserted that the penalties were calculated according to the Division's policies and procedures. Salgado, the Division's Senior Safety Engineer, testified that the penalty calculations were completed in accordance with the Division's policies and procedures. He offered detailed testimony pertaining to each of the applicable penalty criteria. He prepared and signed the Proposed Penalty Worksheet.

Although Employer challenged the reasonableness of all penalties in its appeal forms, Employer did not present any testimony, documents, or arguments to support its claim that the proposed penalties were unreasonable. Accordingly, Salgado's calculations are accepted. The proposed penalties are found to be reasonable.

**12. Are the abatement requirements reasonable?**

*a. Citation 1*

Citation 1 was corrected during inspection. Accordingly, abatement for Citation 1 is moot.

*b. Citations 2, 3, 4, and 5*

In order to establish that abatement requirements are unreasonable, an employer must show that abatement is not feasible, not practical, or unreasonably expensive. (*The Daily Californian/Caligraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28, 1991).)

The Division does not mandate any specific means of abatement. The Division only requires compliance with the minimum requirements of the safety order in question. An employer may select the least burdensome means of abatement. (*Starcrest Products of California, Inc.*, Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 11, 2004).)

In its appeals, Employer challenged the time allowed to abate and the changes required for abatement. However, Employer did not present any evidence regarding why abatement would not be feasible, not practical, or unreasonably expensive within the time frame allowed.

Therefore, Employer has not met its burden of proof. The time allowed for abatement and the required changes for all violations are found reasonable.

## Conclusions

Citation 1: Employer had a written plan to provide prompt medical treatment in the event of a serious injury, but did not effectively implement the plan. The Division established a general violation of section 3400, subdivision (f)(1). The proposed penalty is reasonable. Citation 1 has been abated.

Citation 2: A QEW or trainee did not remain in close proximity to Chavez's work location when Chavez was working on energized electrical equipment. Serious physical harm was a realistic possibility as a result of the violation. The Division established a Serious violation of section 2940, subdivision (d). The proposed penalty is reasonable.

Citation 3: All possible sources of back feed voltages were not eliminated. Serious physical harm occurred as a result of the violation. The Division established a Serious, Accident-Related violation of section 2940.9. The proposed penalty is reasonable.

Citation 4: Hazardous energy control procedures were not used during a personnel shift change. Serious physical harm occurred as a result of the violation. The Division established a Serious, Accident-Related violation of section 2940.13, subdivision (*l*). The proposed penalty is reasonable.

Citation 5: Chavez did not use personal protective equipment, barriers, or other methods to prevent inadvertent contact with electricity. Serious physical harm occurred as a result of the violation. The Division established a Serious, Accident-Related violation of section 2940, subdivision (h)(3). The proposed penalty is reasonable.

Citation 6: The Division failed to establish that Employer violated section 3203, subdivision (a)(2). Employer had a system for ensuring that employees complied with safe and healthy work practices.

Employer did not establish the *Newbery* defense for Citations 1 through 5.

The time allowed for abating Citations 2 through 5 and the changes required to abate Citations 2 through 5 are found reasonable.

**ORDER**

It is hereby ordered that Citation 1, Item 1, and the $935 penalty be affirmed.

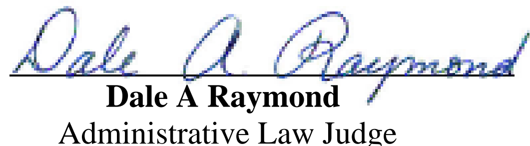
It is hereby ordered that Citation 2, and the $13,500 penalty be affirmed. The time that the Division has allowed to abate Citation 2 and the changes required are affirmed.

It is hereby ordered that Citation 3, and the $22,500 penalty be affirmed. The time that the Division has allowed to abate Citation 3 and the changes required are affirmed.

It is hereby ordered that Citation 4, and the $22,500 penalty be affirmed. The time that the Division has allowed to abate Citation 4 and the changes required are affirmed.

It is hereby ordered that Citation 5, and the $22,500 penalty be affirmed. The time that the Division has allowed to abate Citation 5 and the changes required are affirmed.

It is hereby ordered that Citation 6 be dismissed, and the penalty be vacated.



Dated**:** 02/26/2020

**Dale A Raymond**
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.**