

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

*In the Matter of the Appeal of:*

**DAVEY TREE SURGERY CO.  
PO Box 5015  
Livermore, CA 95402**

*Employer*

**DOCKETS 13-R2D3-1018  
through 1021**

**DECISION**

**Statement of the Case**

Davey Tree Surgery Co. (Employer) does line-clearance on high voltage lines and tree trimming for business and residential sites. Beginning September 27, 2012, the Division of Occupational Safety and Health (Division) through Associate Safety Engineer John Wendland (Wendland) conducted an accident inspection at a place of employment maintained by Employer at Clear Creek Road, PG&E Tower 3-69, Chester, California (the site). On March 6, 2013, the Division cited Employer for violation of California Code of Regulations, title 8<sup>1</sup> for failure to identify and evaluate work place hazards in a burnt forest,<sup>2</sup> failure to ensure employees were trained and instructed in the hazards involving job assignments, including falling burnt trees,<sup>3</sup> failure to use a notch and backcut in felling a tree over 10 inches in diameter,<sup>4</sup> failure to insure employees worked in a work area that had been cleared to permit safe working conditions and an escape route which is planned before any cutting is started.<sup>5</sup>

Employer filed a timely appeal contesting the existence of the alleged violations, their classification, the reasonableness of the abatement requirements and the reasonableness of the proposed penalties. Employer withdrew appeal of the classification of Citation 1, Item 1 at the hearing and alleged multiple affirmative defenses, including Independent Employee Action Defense.<sup>6</sup>

---

<sup>1</sup> Unless otherwise specified, all section references are to California Code of Regulations, title 8.

<sup>2</sup> Citation 1, Item 1 alleges a violation of section 3203, subdivision (a)(4), general.

<sup>3</sup> Citation 2, Item 1 alleges a violation of section 3421, subdivision (c), serious.

<sup>4</sup> Citation 3, Item 1 alleges a violation of section 3427, subdivision (c)(2), serious. The citation contains a typographical error, by citing subdivision (c)(2), rather than (c)(3), but quotes the correct safety order, (c)(3). (See footnote 18.)

<sup>5</sup> Citation 4, Item 1 alleges a violation of section 3427, subdivision (c)(1), accident-related serious.

<sup>6</sup> Employer did not present evidence which satisfies *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980) or discuss the IEAD in its closing brief or

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Redding, California on March 19 and 20, 2015. Eric Bellafronto, Esq., Littler Mendelson represented the Employer. Cynthia Perez, Esq., Staff Counsel represented the Division. The matter was submitted on May 1, 2015.<sup>7</sup> The Administrative Law Judge extended the submission date to November 30, 2015.

### Issues

- A. Did employer violate section 3203, subdivision (a)(4) by failing to conduct an evaluation of the hazardous conditions in a burned forest area?**
- B. Did employer fail to train employees regarding the hazards of working in a burned forest area in violation of section 3421, subdivision (c)?**
- C. Did the Division correctly classify Citation 2, Item 1 as serious?**
- D. Did the employer establish that it did not know and could not with the exercise of reasonable diligence have known about the hazards in a burnt forest, so as to rebut the presumption that the violation was properly classified as serious?**
- E. Did the Division establish that Employer's employees failed to use a notch and backcut on a tree which was over ten inches in diameter, in violation of section 3427, subdivision (c)(3)?**
- F. Did employer clear the work area before any cutting was started in violation of section 3427, subdivision (c)(1)?**
- G. Did the Division correctly classify Citation 4, Item 1 as serious?**
- H. Did employer establish that it did not know and could not with the exercise of reasonable diligence have known about the hazard of failing to clear the work area, so as to rebut the presumption that the violation properly classified as serious?**
- I. Did the Division establish that the failure to plan an escape route before any cutting is started was the cause of the accident?**

---

reply brief. For example, it offered no evidence that Curiel caused a safety infraction which he knew was contrary to the employer's safety requirements.

<sup>7</sup> The parties' briefs filed after the record was closed on May 1, 2015 were not considered, as no motion to file reply briefs after the submission date was filed by either party.

**J. Were the proposed penalties for Citation 1, Item 1, Citation 2, Item 1 and Citation 4, Item 1, reasonable?**

**Findings of Fact**

- 1) Employer had an Injury and Illness Prevention Program which required it to identify and evaluate the workplace hazards. Employer failed to conduct an evaluation of the hazardous conditions in a burned forest at the worksite in the Chip Fire Area at Tower 3-69.
- 2) Employer did not document any inspection or hazard assessment done at the worksite prior to the fatality on September 27, 2012, and did not turn over documentation to the Division upon request.
- 3) General training as Line Clearance Tree Trimmer Trainees was provided to Maldonado and Curiel, but this training contained no topics related to their job assignment involving working in a burnt forest area.
- 4) A stand-up "Safety Meeting" was held on September 11, 2012. The meeting was held in a parking lot and in the forest, but there was no assessment of the employees, no written tests, no in-depth discussions, no demonstrative materials and Employer failed to document the training or certify that the employees satisfactorily completed the training program prior to performing the job assignment.
- 5) On September 27, 2012, Curiel was struck and killed by a 92 foot pine tree, estimated to weigh 2000 pounds, which broke off, snapped in his direction and fell on him, when the tree was hit and debarked by the tree he was felling.
- 6) Employer failed to clear the work area to permit safe working conditions by creating an escape route before any cutting was started.
- 7) Curiel was killed by the 92 foot pine tree because of the absence of a clear escape path.
- 8) Penalties for Citation 1, Item 1, Citation 2, Item 1 and Citation 4, Item 1 were calculated in accordance with the regulations.

**Analysis**

**A. Did employer violate section 3203, subdivision (a)(4) by failing to conduct an evaluation of the hazardous conditions in a burned forest area?**

The Division cited Employer for a violation of section 3203, subdivision (a)(4), which provides as follows:

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:  
(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.

Citation 1, Item 1 alleges as follows:

On September 27, 2012, Davey Tree Surgery Co. located at Clear Creek Road, PG&E tower 3-69 in Chester, CA, did not identify nor evaluate the work place hazards in the burned forest area. The employer did not include periodic inspections to identify unsafe conditions and work practices. Inspections were not made to identify and evaluate the hazards associated in working in a burned forest.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

In order to prove a violation of section 3203, subdivision (a)(4), the Division must establish 1) Employer was required to have an IIPP which required it to identify and evaluate the work place hazards and 2) Employer failed to maintain and implement its IIPP by failing to inspect the work place for hazards involving a burned forest area.

Merely having a written Injury and Illness Prevention Program (IIPP) is insufficient to establish implementation. (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).) An IIPP can be proved not effectively maintained on the ground of one deficiency, if that deficiency is shown to be essential to the overall program. (*Mountain Cascade, Inc.*, Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003); *Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).) Procedures to ensure compliance with safe and healthy work practices and procedures for correcting unsafe or unhealthy conditions, including imminent hazards, are essential to the overall program. (See *GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, dba Fisher Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).)

Wendland was assigned to investigate a fatality involving Rene Curiel (Curiel) which occurred on September 27, 2012, in the Chip Fire Area at Tower 3-69.<sup>8</sup> On September 28, 2012, Wendland gave a document request to Michael A.

---

<sup>8</sup> Official Notice is taken of the fact that the "Chips Fire" in Plumas County, California was first reported on July 29, 2012. [Accurate as of Nov. 20, 2015, <http://www.earthobservatory>.

Santos (Santos), Employer's Utility Safety Coordinator. It specifically requested the IIPP and the IIPP inspection records for the area surrounding Tower 3-69 to determine whether employer conducted an inspection of the worksite. (Exhibit 3, p. 1.) At the end of the closing conference, Employer's attorney, Eric Bellafronto (Bellafronto) requested that all document requests go through him.

On October 24, 2012, after reviewing the documents sent to him by the Employer, Wendland sent an email to Bellafronto, reiterating his request for a copy of the IIPP, including the IIPP inspection records for the area surrounding Tower 3-69, and Employer's response to the I-B-Y letter, as these documents had not been provided to the Division. (Exhibit 3, p. 2-4.) On December 4, 2012, Wendland requested employers written procedures on performing work (line clearance) on burnt trees that were involved in a forest fire and the tailgate documentation on the day of the incident, September 27, 2012. Eric Bellafronto responded in an email on January 14, 2013, which stated "Hi John: I am not sure if there are any additional documents to send. We are still looking, but it appears you may have everything. I will confirm this and let you know. Thanks. Eric". (Exhibit 3, p. 5.) Employer sent the IIPP to the Division, but no inspection records.

Exhibit E, Employer's IIPP, requires periodic inspections. Page 5 (B) states:

Scheduled Periodic Inspections

1. Office inspection shall be conducted quarterly.
2. Shop and warehouse safety inspections shall be conducted monthly.
3. Vehicle and job site inspections shall be conducted biweekly.

Page 4 (V) states:

Monitoring and Correcting Identified Potential Safety and Health Concerns

A list of identified work place hazards, as well as the methods to be followed to control such hazards for office, repair shop and warehouse is attached at the end of this written program (Appendix A). Documentation relating to hazard identification shall be maintained in the Livermore office not less than five years.

Appendix A, pages 10 – 13, contains checklists to be used when conducting the scheduled periodic inspections focusing on its fire prevention plan, specifically "identified workplace hazards and methods for controlling them (office, shop and

---

nasa.gov/NaturalHazards/view.php?id=79105.] The accident investigation did not occur until Sept. 28, 2012, because the accident was not reported to the Division until 3:00 p.m. Sept. 28, 2012. Due to the remote location of the site, it would have been dark by the time the investigators could get to the site. (Wendland)

warehouse)”. No specific hazards were identified for jobsites; jobsites which are in forests were not referred to at all.

The IIPP was deficient in a number of areas. Appendix A did not list identified work place hazards or methods to be followed to control such hazards specific to outdoor workplaces, much less hazards specific to working in a burned forest.

The *implementation* of Employer's existing written procedures was also problematic. Employer failed to introduce any documentary evidence that an inspection was done of the area surrounding Tower 3-69 prior to the accident. There was no documentation regarding whether employer identified and evaluated specific hazards involved the burned forest area where the accident occurred. Documentation was required by the IIPP.

Alan Finocchio (Finocchio), employer's Regional Vice President, assigned to Northern California testified that an inspection of the site was done at some point prior to the accident, but there was no documentation of that inspection or a hazard assessment of the worksite. Since these events occurred three years before the hearing, were not documented, and no specifics were provided, this testimony is viewed with distrust. He was not able to describe what type of hazard assessment was done and gave no explanation regarding why there was no documentation of the inspection. Finocchio's testimony regarding what steps were taken prior to the accident is not credited, based on his demeanor, lack of detail and lack of corroboration by documents, reports or eye-witnesses.

Employer failed to have effective procedures for identifying work place hazards in a burnt forest, failed to conduct an inspection which satisfies the safety order, and failed to implement Employer's existing written procedures by documenting the alleged inspection in the Chip Fire Area at Tower 3-69 prior to beginning the work. Based on these deficiencies which were shown to be essential to the overall program, the Division established a general<sup>9</sup> violation of section 3203, subdivision (a)(4).

**B. Did employer fail to train employees regarding the hazards of working in a burned forest area in violation of section 3421, subdivision (c)?**

---

<sup>9</sup> A violation is classified as general when the violation has a relationship to occupational safety and health of employees. (*California Dairies, Inc.*, Cal/OSHA App. 07-2080, Denial of Decision After Reconsideration (June 25, 2009), citing *A. Teichert & Sons, Inc.* Cal/OSHA App. 97-2733 (Dec. 11, 1998).) Employer waived classification as an issue regarding Citation 1, Item 1 at the outset of the hearing, but raises the issue in its closing argument. Contrary to Employer's contention, the Division did not err by classifying the violation of Section 3203, subdivision (a)(4) as a general, rather than a regulatory violation. The cited safety order requires Employer to conduct scheduled periodic inspections to identify and evaluate unsafe conditions and work practices. Lack of effective periodic inspections to detect unsafe conditions and work practices bears a direct relationship upon employee safety and health. (§ 332.1(1).)

The Division cited Employer for a violation of section 3421, subdivision (c),<sup>10</sup> which provides as follows:

Employees shall be trained and instructed in the hazards involved in their job assignments, including the proper use of all equipment utilized in tree work, maintenance or removal operations. Such training shall be documented by the employer to certify that the employee has satisfactorily completed the training program prior to performing the job assignment.

Citation 2, Item 1 alleges as follows:

On September 27, 2012, Davey Tree Surgery Co., located at Clear Creek Road, PG&E tower 3-69 in Chester, CA, did not ensure that the employees were trained and instructed in the hazards involved in their job assignments including but not limited to falling burnt trees. Such training was not documented by the employer Employee was allowed to work in a burnt forest area without receiving any training.

In order to establish a violation of section 3421, subdivision (c), the Division must show 1) the work at issue is within the scope of the safety order, 2) the employer failed to train employees in the hazards involved in their job assignments, and 3) employer failed to document the training to certify that the employee has satisfactorily completed the training program prior to performing the job assignment. Simply warning employees about general hazards of a job cannot be equated with training an employee how to address such hazards. (*Susanville Construction Co.*, OSHAB 79-1401, Decision After Reconsideration (Nov. 24, 1981).) Failure to train an employee about a specific hazard may be a serious violation if there is a substantial probability that the specific hazard presented by the job assignment could result in serious physical harm or death to the employee. (*California Cascade Industries*, Cal/OSH App. 79-183, Decision After Reconsideration (Feb. 27, 1981).)

1. Does tree removal work in the Chip Fire Area fall within the scope of the safety order?

The work must be shown to fall within Section 3420. Under the cited Safety Order's "scope" provisions, section 3420, section 3421 applies to "work performed and equipment used in tree maintenance and removal." The crew were engaged in cutting down trees. Unrefuted testimony shows that the work Curiel performed in the Chips Fire area for Employer falls within the scope of these provisions.

2. Did employer fail to train employees in job hazards involving burnt forests?

---

<sup>10</sup> Section 3421, subdivision (c) was amended on September 25, 2012 and the amendment was effective on October 25, 2012, a month after the accident. (Register 2012, No. 39.) Employer's argument that the Division should have cited subdivision (c) and (d) of the current version of the safety order is rejected as that safety order was not in effect at the time of the accident.

Wendland requested IIPP training records for Curiel from Employer on September 28, 2012, October 24, 2012, and December 4, 2012 as described above. (Exhibit 3.) Employer's IIPP did not contain written procedures on performing work (line clearance) on burnt trees that were involved in a forest fire. Wendland pointed out that the general training provided to Maldonado and Curiel contained no topics related to working in a burnt forest area. He testified that there are different hazards in a burnt forest which are not present in a forest. For example a burnt forest may have more "widow makers", trees which are leaning or more brittle, and which potentially can strike someone and kill them. Wendland testified that the training required for the job duties involved here would include how to assess the hazards in a burnt forest, how to determine whether a tree was a fall hazard, how to detect this by examining whether it is hollowed out, whether the lack of vegetation contributes to the likelihood of the tree falling, and other similar topics. The Division established this element.

Employer did not claim that it trained Guadalupe Maldonado (Maldonado) Noe Sanchez (Sanchez) or Rene Curiel (Curiel) on the specific hazards associated with their job duties in a burnt forest. Rather, it defended on the ground that the general training was sufficient. Employer introduced Exhibits G and H, Line Clearance Tree Trimmer Trainee records for Maldonado, covering Oct. 2, 2005 to Sept. 16, 2007, and Curiel, covering August 30, 2009 to Oct. 22, 2011. Both forms were identical except for the employees' names and dates. All substantive comments were redacted from both forms. The first page of both Exhibits G and H is a chart or matrix, identifies six training blocks or clusters, covering six periods of time, each of these three months long. In each cell of the matrix is an indication of the number of hours of training required in the specified category during the specified period of time. Also in each of these matrix cells are a number of small blocks, which are to be filled in to indicate the number of hours of training completed on the specified subjects. The training topics were listed as: General Safety Requirements – PPE, First Aid, etc., and six topics related to electrical hazards.

Employer attempted to establish that the "Safety Meeting" held on September 11, 2012, in the parking lot of the Best Western in Chester, California and in the forest was a "training". Finocchio's testimony contains a number of inconsistencies and was not credible.<sup>11</sup> Finocchio testified that no written tests,

---

<sup>11</sup> Finocchio disputed the information provided in Employer's own Safety Meeting report in which he wrote that the length of the training was fifteen minutes in length. (Exhibit J-1 and J-2) Finocchio initially referred to the meeting as a "stand up meeting". He testified that it took 40 minutes, not fifteen minutes. Then he said that it took two hours, but conceded that that estimate included travel time to the work site. His explanation for changing the length of the safety meeting - that he filled out that portion of the report before the meeting started, does not ring true. The second page of the Safety Meeting Report was filled out by Foreman Stansbury, was signed at the end of the meeting, and stated that the meeting took fifteen minutes, not 40 minutes or two hours. Finocchio testified that Maldonado provided Spanish language translation during the meeting. He then claimed that there was more than one interpreter, due to the large number of Spanish speaking employees who attended this meeting. There was no documentation of which employees used the interpreter, who the other interpreters were, or evidence that they were certified interpreters or trainers.

in depth discussions or demonstrative materials regarding the hazards in a burnt forest were used in the Safety Meeting, and there was no assessment of the employees in the form of verbal or written tests.<sup>12</sup> Maldonado, foreman and supervisor, Noe Sanchez (Sanchez) and Gonzalez were not called to testify by either party regarding the specific training provided to them and Curiel is deceased.<sup>13</sup>

Wendland testified that the “Safety Meeting” held on September 11, 2012, does not satisfy the requirement of training employees in the specific hazards of their job.<sup>14</sup> This “Safety Meeting” was not a “training”, but rather, a tailgate safety meeting at the beginning of a project in which the supervisor or foreman lays out what tasks are going to be done, who is going to be doing what and what equipment will be needed.<sup>15</sup> (Finocchio)

Employer failed to document that training was given to the employees on the crew on the hazards involved in a burnt forest or that they satisfactorily completed the training prior to performing the job. There was no document showing the date of the training, the employees who attended, or the certification that they completed the training. Division established a violation of section 3421, subdivision (c).

### **C. Did Division correctly classify Citation 2, Item 1 as serious?**

To sustain a serious violation of Labor Code section 6432, subdivision (a) provides:

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

---

<sup>12</sup> Exhibit 21 is an example of the regular Safety & Training Tailgate meetings Employer conducts. It discussed the six steps in a Precision Tree Felling Plan, which includes height assessment, risk assessment, lean assessment, and escape routes. This handout does not discuss the specific hazards of working in a burnt forest.

<sup>13</sup> Maldonado and Sanchez were subpoenaed by the Division and available to testify at the hearing in Redding, but were not called by either party. Gonzalez, who was also a member of Employer’s crew, was not subpoenaed to testify. No documentation of the training of Sanchez or Gonzalez was made part of the record.

<sup>14</sup> Exhibit E, Davey’s Safety and Operations Manual, page 13, provides: “Field, shop warehouse and yard crews will have a weekly five to ten minute safety (tail gate) meeting.” “Tailgate” and “stand-up” were used interchangeably to refer to “safety meetings”.

<sup>15</sup> Exhibit J-1 and J-2, the “Safety Meeting” Report for September 11, 2012 contained the names and signatures of the employees in attendance at the tailgate stand-up meeting, including the subjects discussed at the meeting:

CHIPS Fire: Wild Fire Hazards, hazard trees, felling operations, all trees being felled shall have a rope in it. Strike zone/danger zone stay 1 ½ times away. Notching – no by pass, leave stumps at 12 inches high – top limbs to 18 inches.  
Remote Location Procedures, EMS – Chester or call 911.

there is a realistic possibility that death or serious physical harm<sup>16</sup> 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.

Division classified the violation as “serious”. It must present evidence to show 1) a realistic possibility that death or serious physical harm, 2) could result from the actual hazard created by the violation and 3) in a place of employment, in order to create a rebuttable presumption that the citation was correctly classified as serious. The employer has the statutory right to contradict or rebut the evidence that a serious violation was established.

The term “realistic possibility” means that it is within the bounds of reason, and not purely speculative. (*International Paper Co.*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015), citing *Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).) In *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).) “Conjecture as to what would happen if an accident occurred is sufficient to sustain (a violation) of the existence of unsafe working conditions if such a prediction is clearly within the bounds of human reason, not pure speculation.” This definition was again utilized in *A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (August 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001).

Here, it is undisputed that Curiel was killed when he was struck by a pine tree, which broke off when it was scraped by the tree he was felling. (Exhibit 12) The “realistic possibility that death or serious harm could result” prong was established. Similarly, prong two and three, that there was an exposure to an actual hazard created by the violation and that the violation occurred in a place of

---

<sup>16</sup> Labor Code section 6432, subdivision (e) provides as follows:

“Serious physical harm” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following:

- (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.

employment were not disputed. Wendland's opinion<sup>17</sup> was that not only was there a realistic possibility of death or serious injury, a fatality actually occurred.

The Division established that there was a realistic possibility of death. The safety order requires training employees on the hazards involved in working in a burnt forest because of the conditions involved in felling trees, such as a tree falling on an employee. The Division established a presumption that the citation was properly classified as "serious", pursuant to Labor Code section 6432.

**D. Did the employer establish that it did not know and could not with the exercise of reasonable diligence have known about the hazards in a burnt forest, so as to rebut the presumption that the violation was properly classified as serious?**

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to the employer to rebut the presumption. (*International Paper Co.*, Cal/OSHA App. 14-1189, Decision After Reconsideration (June, 2015).) Labor Code section 6432, subdivision (c) provides that Employer may rebut the presumption:

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).

---

<sup>17</sup> Wendland's opinion was based upon a reasonable evidentiary foundation consisting of his education, experience and training. At the time of the hearing, he was the Acting District Manager for the Redding District and was current in his Division-mandated training. He worked as an Associate Safety Engineer for the Division for ten years and completed over 1,000 inspections, including over 50 investigations in the tree trimming and logging industry. Of the investigations in the tree trimming and logging industry, 35 to 40 cases involved serious injury or fatalities. Prior to working for the Division, Wendland worked in the construction industry for ten years as superintendent, and before that, he served in the U.S. Army for eight years. Thus, Wendland is competent to give his opinion per Labor Code section 6432, subdivision (g). (See *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

- (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 establish that it 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 (April. 1, 2003).) Reasonable diligence includes the obligation of foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. (*Robert Onweller dba Pacific Hauling & Demolition*, Cal/OSHA App. 14-1087, Decision After Reconsideration (June 15, 2015); *A. A. Portonova & Sons, Inc.* Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986).)

The factors set forth in Labor Code section 6432, subdivision (b)(1) may be used to evaluate whether the Employer established that it did not know and could not, with the exercise of reasonable diligence, have known of the severity of the harm and likelihood of harm involved in failing to train the employees of the hazards specific to working in a burnt-out forest. (*A. Teichert & Son, supra.*)<sup>18</sup>

The record shows that Employer knew that it was required to train employees on job hazards involving their assignment to work in a burnt-out forest, but the stand-up safety meeting did not satisfy the requirement of the safety order for training. As discussed above, Wendland testified that the training given to employees did not contain topics related to the hazards involved in cutting trees in a burnt-out forest. Hazards in a burnt-out forest which are not present in a forest include trees which are leaning or more brittle, which

---

<sup>18</sup> Labor Code section 6432, subdivision (b)(1), mentioned in subdivision (c)(1) above, directs the Division to consider several factors when issuing citations for alleged serious violations, which include:

- (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 programs.
- (E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:
  - (i) The employer's explanation of the circumstances surrounding the alleged violative events.
  - (ii) Why the employer believes a serious violation does not exist.
  - (iii) Why the employer believes its actions related to the alleged violative event were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).
  - (iv) Any other information that the employer wishes to provide.

potentially can scrape against another tree, causing it to strike someone and kill them, as occurred here.

With respect to Employer's procedures for discovering, controlling access to, and correcting the hazard of working in a burnt-out forest, the IIPP mentions hazard assessment, but there was no documentation that a hazard assessment was done, who did it, or what it consisted of.

Employer introduced Exhibit E, Davey's Safety and Operations Manual, which includes ANSI Z133.1, C.3, which states: "Direct supervision is when a qualified line-clearance arborist or a qualified arborist supervisor is physically present on the job site." The only evidence regarding the supervision of the crew at the time of the accident was contained in Wendland's notes that he was told by Gonzalez, the crew foreman, that he stood about fifteen feet from Curiel at the time he was hit by the tree. (Exhibit D) Stansbury, the crew supervisor, was working with another crew and was not present when Gonzalez, Curiel and Maldonado were cutting down the tree involved in the accident.

No procedure for communicating to employees was introduced.

Employer was provided an opportunity to explain the circumstances surrounding the allegedly violative events and why it believes a serious violation does not exist. Finocchio, who is an ISA Certified Arborist, testified that his investigation of the accident site confirmed that the trees in that area were scorched. He explained that many of the trees in the burned out forest where the fatality occurred were not damaged, as demonstrated by the fact that the plan was to harvest the trees which could be sold and there were needles on many of the trees. These circumstances do not address the steps taken before the accident to inspect, assess, or supervise the work site in order to prevent the violation. Thus, employer failed to establish lack of employer knowledge or that it took all steps a reasonable and responsible employer should be expected to take.

Employer was required to present evidence to show what corrective action it took to eliminate the exposure to the hazard, after the violation was discovered. Employer maintained there was no violation. It failed to establish that it took corrective action, such as training employees in the hazards involved in working in a burned out forest, as required the section 6432, subdivision (c)(2).

Based on the preponderance of the evidence, it is found that Employer failed to take all of the steps a reasonable and responsible employer in like circumstances should be expected to take, before the fatality occurred or that it took corrective action to eliminate the exposure to the hazard.

**E. Did Division establish that Employer's employees failed to use a notch and backcut on a tree which was over ten inches in diameter, in violation of section 3427, subdivision (c)(3)?**

The Division cited Employer for a violation of section 3427, subdivision (c)<sup>19</sup>, which provides as follows:

(3) A notch and back cut shall be used to establish a hinge when felling trees over 5 inches in diameter.

Citation 3, Item 1 alleges as follows:

On September 27, 2012, Davey Tree Surgery Co., located at Clear Creek Road, PG&E tower 3-69 in Chester, CA, a notch and backcut was not used by an employee in felling a tree over 10 inches in diameter. The employee did a straight cut on an 11 inch diameter tree and left the tree leaning on a fallen tree.

Wendland testified that he observed a tree measured at eleven inches in diameter, which did not have a notch and back cut. (Exhibit 9.) The tree was near the site of the accident and was believed to be one of the five trees cut by Davey's employees. There was fresh saw dust near it. At the hearing, Wendland conceded that the eleven inch wide tree trunk did not have a white mark, which denotes the trees Davey's employees were tasked with cutting. (Exhibit 7.) He did not investigate whether the tree was cut by Employer's employees.

There was circumstantial evidence that trees may have been previously felled by another subcontractor, using a feller buncher, a machine which uses a straight cut. When Finocchio went out to the site the day before the accident, he saw trees staked up close to the location of the trees they were hired to cut. He talked to a PG&E consultant about removing the harvested trees, so they could do the work they were hired to do. Finocchio did not see the feller buncher, but saw hundreds of trees which had been felled in the vicinity before the Davey crew arrived.

The evidence in the record is insufficient to meet the Division's burden of proof that Employer was responsible for cutting the eleven inch wide tree. Accordingly, Employer's appeal of Citation 3 is granted, and the penalty is set aside.

**F. Did employer clear the work area before any cutting was started in violation of section 3427, subdivision (c)(1)?**

---

<sup>19</sup> The citation contains a typographic error, by citing subdivision (c)(2), rather than (c)(3), but quoting the correct safety order, (c)(3). A citation with a *discrepancy* in the description of the alleged violation is not invalidated by due process requirements or the particularity requirement of Labor Code § 6317, unless the discrepancy prevents the cited employer from *understanding the charge* and *preparing a defense*. (*Kaweah Construction Co., Inc.*, Cal/OSHA App. 85-265, Decision After Reconsideration (November 25, 1986); *Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (January 17, 1995).) It cannot be said that Employer was not aware of the Division's contentions.

The Division cited Employer for a violation of section 3427, subdivision (c)(1), which provides as follows:

The work area shall be cleared to permit safe working conditions before any cutting is started.

Citation 4, Item 1 alleges as follows:

On September 27, 2012, an employee of Davey Tree Surgery Co., working at Clear Creek Road, PG&E tower 3-69 in Chester, CA, was in a work area that had not been cleared to permit safe working conditions. An escape route was not planned or used before the employee felled a 102 foot pine tree. The employee was fatally injured and this is an accident related citation.

A violation of section 3427, subdivision (c)(1) is established by proving by a preponderance of the evidence that employer failed to 1) clear the work area to permit safe working conditions 2) before any cutting is started. "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." (*Sunrise Growers Frozsun Foods*, Cal/OSHA App. 09-2850, Decision After Reconsideration (Mar. 27, 2014), *citing*, *Lone Pine Nurseries*, Cal/OSHA app. 00-2817, Decision After Reconsideration (Oct. 30, 2001), *Leslie G. v Perry & Associates* (1996) 43 Cal.App.4th 472, 483, rev. denied.)

In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case. (Evidence Code section 413.) 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. (Evidence Code section 600; *Ajaxo Inc. v. E\*Trade Group Inc.*, (2005) 135 Cal. App. 4th 21, 50.)

Wendland investigated the work site on September 28, 2012, the day after the accident. He took numerous photos of the area surrounding the tree which caused the fatality. Wendland took photographs of the forest where the fatality occurred on September 28, 2012, the day after the accident. (Exhibits 4 through 9, 12 through 16, and 19.) The trees in the area were between 80 to 100 feet tall. He examined the area around the worksite and determined that the forest had not been cleared to provide an escape route. Based on Wendland's investigation, Curiel was standing 26 inches from a 92 foot pine tree while he was felling a 102 foot pine tree. (Exhibits 9, 12, 13 and 15.) Carlos Sanchez (Sanchez) was hammering the wedges in while Curiel used a chain saw. When the tree that was being cut began to fall, it scraped against and debarked the 92 foot pine tree, which broke off at twenty feet from the ground. The falling tree came back toward Curiel and struck and killed him. It was estimated to weigh 2000 pounds, based

on the height and girth of the tree. It was evident that the path was not cleared to provide an escape path.

The employees on the crew (Maldonado, Sanchez and Gonzalez) were not present at the worksite to be questioned during the on-site investigation that day.<sup>20</sup> A negative adverse inference that the eye-witnesses testimony would not favor the employer may be drawn from the fact that 1) the employees were allowed to leave the forest, 2) they were not interviewed until over two months later and 3) they did not testify at the hearing. (Evidence Code Sections 412 and 413.)

The Coroner's Report (Exhibit 20) describes the accident, as reported by Maldonado to Investigator Steve Clark on September 27, 2012:

I spoke to Maldonado who was directly uphill from the decedent when the decedent was cutting down a tree. Maldonado said he saw the tree moving and could only see the top half of the decedent's body. Maldonado said the decedent moved to get away from the falling tree, but he was not sure which direction he moved to. Maldonado saw the tree fall, brush against a pine tree and the pine tree broke off approximately twenty feet from the butt. Maldonado said the decedent froze in place while he was standing behind the stump of the tree he just fell. The broken pine tree was flung back towards the decedent with the large end closest to the decedent. Maldonado said he saw the decedent move when the broken tree came back at him but he was unsure if the decedent was hit by the tree or not. ...

Maldonado interpreted a statement and answers to my questions from Carlos Gonzalez who was working with the decedent at the time of the accident. Gonzalez was watching the decedent conduct a back cut at the base of the white fir tree. Gonzalez was on the north side of the tree and the decedent was on the south side. When the tree started to move Gonzalez immediately moved to the north away from the tree. The decedent moved to his left (South) as the tree was falling. The tree brushed against a pine tree that was still standing but downhill (West) from the tree being cut. When the tree being cut hit the pine tree, it snapped and came back toward the decedent. Gonzalez turned away as the pine tree approached. When Gonzalez turned around he saw the decedent lying on the ground under the now suspended broken pine tree.

Exhibit 21, Davey Safety & Training Tailgate Number G217 states:

---

<sup>20</sup> In spite of the Stansbury's promise that the crew members would be present for the investigation the day after the fatal accident, Wendland was not able to interview the crew members at the work site. Employer instructed them that they could leave town September 27, 2012, the day of the accident. On Dec. 4, 2012, Wendland conducted phone interviews with Maldonado, Sanchez and Gonzalez, who were working in a remote location, and were arranged by Employer's attorney. (Wendland) (Exhibit A)

- a. The ideal escape route is 45 degrees from the edge of the notch and opposite the felling direction.
- b. The escape route shall be cleared of obstacles and hazards to a minimum of 10 feet from the base of the tree.

No evidence, such as photographs, testimony from the percipient witnesses, or accident investigation reports were presented to establish that Employer complied with its policy by clearing an escape route before beginning the work. Division established a violation of section 3427, subdivision (c)(1).

**G. Did Division correctly classify Citation 4, Item 1 as serious?**

As stated above, the Division must establish a rebuttable presumption that a “serious violation” exists by showing a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. (Section 6432, subdivision (a).)

Here, it is undisputed that Curiel was killed when he was struck by a 92 foot pine tree, which broke off and fell in his direction, when it was scraped by the tree he was felling.

During Wendland’s telephone interview with Maldonado, he said “I saw Rene cutting the tree. Carlos (Sanchez) was working wedges. Rene (Curiel) made back cut. Carlos ran to the right, Rene walked to the back.” (Exhibit D.) The path was blocked. Wendland testified that because there was no clear escape path, when the tree started to fall in Curiel’s direction, he was struck by the tree because he had nowhere to go. But for the violation of the safety order, Curiel would have had an escape route.

Division established a realistic possibility that death or serious harm could result and the citation was properly classified as “serious”. (Labor Code section 6432.)

**H. Did employer establish that it did not know and could not with the exercise of reasonable diligence have known about the hazard of failing to clear the work area, so as to rebut the presumption that the violation properly classified as serious?**

As stated above, the burden of proof shifts to the employer to rebut the presumption, once the Division establishes a presumption of a serious violation. (*International Paper Co.*, Cal/OSHA App. 14-1189, Decision After Reconsideration (June, 2015).) (Labor Code section 6432, subdivision (c).)

Employer presented evidence from one witness, Finocchio. He testified that he went to the site of the accident with the supervisor, Bob Stansbury on the day before the accident. Finocchio stated that the access to the site was “good” and one needed a four wheel drive vehicle to get to the site. However, he did not testify that an escape route had been cleared, or specify who cleared it. The other crew

members did not testify. The employer failed to present evidence of what steps employer took to clear the work area prior to the accident.

Employer argues that the 1-B-Y notice of the intent to issue a serious violation (Exhibit 1) and notice of accident-related violation (Exhibit F) failed to provide Employer with adequate information regarding the alleged violation. The 1-B-Y and notice of accident-related violation however were provided to the Employer before the citations were issued and do describe the basis for the allegations. The basis for citing the Employer for a serious violation was described in the 1-B-Y notice as "On 9/27/12, at Clear Creek Rd, PG&E Tower 3-69, an employee while felling a burnt tree, was struck, and was not in his escape route which cause[d] a fatality. Exhibit F, the notice of accident-related violation, states: "Escape route for employee when felling a tree" and cited section 3427, subsection (c)(1). Thus, Employer was provided with notice of the serious violation and accident related characterization and given an opportunity to present evidence before the citation was issued.

Employer argues that the Division ignored the fact that Sanchez told Wendland that during the job briefing "they talked about escape routes". (Exhibit D, page 7.) Wendland recorded this statement in his notes of the December telephonic interview. This triple hearsay statement was made two months after the fatality, through an interpreter. No details were provided regarding what was said about escape routes, who said what, or what Sanchez or anyone else on the crew did with respect to creating escape routes around the trees in question. Sanchez was not subpoenaed and did not testify at the hearing.

Evidence Code § 412 provides, "If weaker and less satisfactory evidence is offered when it was within the power of a party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Employer did not provide any evidence to contradict the Division's assertions, and so the Division's statements made under penalty of perjury are credited as true. (See *Alika Ikaika Enterprises Inc. dba Attention to Details*, Cal/OSHA App. 10-1191, Decision After Reconsideration (May 11, 2012), citing *Club Fresh, LLC.*, Cal/OSHA App. 06-9242, Decision After Reconsideration (Sep. 14, 2007).)

Based on the preponderance of the evidence, it is found that the employer failed to take all of 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.

**I. Did the Division establish that the failure to plan an escape route before any cutting is started was the cause of the accident?**

To establish the characterization of the violation as accident-related, the Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002) citing *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).) The Division establishes that a violation is accident-related by showing that the

violation more likely than not was the cause of the injury. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).)

Wendland testified, based on his interviews with the employees who were on the crew (Maldonado, Sanchez and Gonzalez) and his examination of the accident site (Exhibits 4 through 9, 12 through 16, and 19), that there was no escape route planned, as required. The trees were 80 to 100 feet tall. The photos of the site taken by Wendland show that the trees on the ground were too large to climb over. Wendland inspected the forest around the accident site and there was no evidence of cutting trees to create an escape route. Employer's foreman, Robert Stansbury was present during the investigation but did not testify at the hearing and did not present any photos showing an escape route. Based on Wendland's credible testimony and the photographs documenting the site of the accident, it is found that Curiel had no way to get out from the path of the tree which fell on him.

Employer argued in its closing brief that this was a "freak accident"; the tree being felled did not cause the injury, because a totally different tree flew back into the work area. Curiel would not have been struck by any of the trees, had Employer cleared the work area to permit safe working conditions before any cutting was started. Being hit by a tree which falls on another tree is the type of accident which can be anticipated and which could have been avoided, if the area had been cleared to provide an exit route.

The accident-related characterization is sustained.

**J. Were the proposed penalties for Citation 1, Item 1, Citation 2, Item 1 and Citation 4, Item 1, reasonable?**

Employer appealed the reasonableness of the penalties for Citation 1, Item 1, Citation 2, Item 1 and Citation 4, Item 1. Labor Code section 6319, subdivision (c), sets forth the factors which the Director of the Department of Industrial Relations must include when promulgating penalty regulations: size of the employer, good faith, gravity of the violation, and history of any previous violations. (§§ 333-336.) Penalties proposed in accordance with the penalty setting regulations promulgated by the Director of the Department of Industrial Relations are presumptively reasonable and will not be reduced absent evidence that the proposed 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 (May 27, 2006).)

If the Division introduces the proposed penalty worksheet and testifies that the calculations were completed in accordance with the appropriate regulations and procedures, it has met its burden to show the penalties were calculated correctly, absent rebuttal by the Employer. (*M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014).) Where a serious violation causes a serious injury, the only downward penalty adjustment allowable is for

size. (Labor Code § 6319(d); §336(d)(7); *Dennis J. Amoroso Construction Co., Inc.*, Cal/OSHA App. 98-4256, Decision After Reconsideration (Dec. 20, 2001).)

Division introduced the Proposed Penalty Worksheet, and it was admitted as Exhibit 2. Wendland testified that he calculated the penalty in accordance with the Division's policies and procedures. Citation 1, Item 1 was classified as a general violation. He rated severity as low, based on the fact that the deficiencies in the IIPP would not likely cause an injury. Extent was rated as high because over 50 percent of employees were subject to the violation, namely, the failure of the IIPP to identify the workplace hazards in a burnt forest. Wendland evaluated the likelihood as medium, based on the likelihood that an injury would occur as a result of the failure of the IIPP to identify the workplace hazards in a burnt forest.<sup>21</sup> He applied penalty adjustment factors of 15% for good faith, 0% for size, and 10% for good history.<sup>22</sup> The adjusted penalty of \$1,250 was reduced 25% to \$938 and that was reduced 50% by application of the abatement credit, resulting in a proposed penalty of \$465.<sup>23</sup> Division introduced the proposed penalty worksheet; Wendland testified that he made the calculations in accordance with the Director's manual and applied the appropriate regulations and procedures. Employer did not offer rebuttal evidence. Therefore, the Division met its burden to show that the penalty was calculated correctly. The proposed penalty of \$465 for Citation 1, Item 1 is reasonable and is assessed.

Citation 2, Item 1 was classified as a serious violation. (Exhibit 2) Wendland calculated the proposed penalty by beginning with a base of \$18,000, for high severity.<sup>24</sup> Extent was rated high, because more than 50 percent of employees were subject to the violation of failure to train the employees; thus resulting in an increase of 25 percent or an additional \$4,500.<sup>25</sup> Likelihood was rated as moderate,<sup>26</sup> which did not affect the penalty. The gravity-based penalty was \$22,500. Penalty adjustment factors of fifteen percent were given for "good faith" and ten percent for "history",<sup>27</sup> reducing the penalty by \$5,625 to \$16,875. A fifty percent abatement credit was given, resulting in a proposed penalty of \$8,435.<sup>28</sup> No evidence was presented that the calculation of the penalty was incorrect or that the ratings were inappropriate. The proposed penalty of \$8,435 for Citation 2, Item 1 is found reasonable and is affirmed.<sup>29</sup>

Citation 4, Item 1 was classified as an accident-related serious violation. (Exhibit 2) Since a serious violation caused a serious injury, the only downward

---

<sup>21</sup> Section 335, subdivision (b).

<sup>22</sup> Section 335, subdivisions (d)(1),(2) and (3).

<sup>23</sup>  $1,000 + 250 = 1,250$ ;  $1,250 - 312 = 938$ ;  $938 \div 2 = 465$ . Amounts are rounded downward to the next lower five dollar value, pursuant to Section 335, subdivision (j).

<sup>24</sup> Section 335, subdivision (c)(1).

<sup>25</sup> Section 335, subdivision (c)(1).

<sup>26</sup> Section 335, subdivision (c)(1).

<sup>27</sup> Section 335, subdivisions (c) and (d).

<sup>28</sup> Section 335, subdivision (e).

<sup>29</sup>  $18,000 + 4,500 = 22,500$ ;  $22,500 - 5,625 = 16,875$ ;  $16,875 \div 2 = 8,435$ .

adjustment possible is for size.<sup>30</sup> Employer has over 100 employees; no adjustment for size is allowable.<sup>31</sup> The ratings for extent and likelihood may not be given a lower rating than medium. Wendland rated “extent” high, based on the degree to which a safety order was violated, in this case, there was no way out of the forest for the decedent because the escape route was not cleared. “Likelihood” was rated as moderate, given the number of employees exposed to the hazard created by the violation and the extent to which the violation in the past resulted in injury to employees. There is no abatement credit given for accident-related serious violations. The Division established that the calculation of the penalty was correct and the ratings were appropriate. The proposed penalty of \$22,500 for Citation 4, Item 1 is found reasonable and is affirmed.<sup>32</sup>

### **Conclusion**

Employer failed to implement the IIPP by failing to inspect the workplace to identify and evaluate hazards involved in a burned forest area.

The evidence supports a finding that Employer violated section 3421, subdivision (c), by failing to ensure employees were trained and instructed in the hazards involving job assignments, including falling burnt trees and failing to document the training.

The evidence was insufficient to show that Employer was responsible for cutting the eleven inch wide tree.

The evidence supports a finding that Employer violated section 3427, subdivision (c)(1), by failing to insure employees worked in a work area that had been cleared to permit safe working conditions and an escape route which is planned before any cutting is started.

### **Order**

The appeal of Citation 3, Item 1 is granted, and the penalty is vacated.

Citation 1, Item 1, is affirmed and a \$465 penalty is assessed. Citation 2, Item 1, is affirmed and an \$8,435 penalty is assessed. Citation 4, Item 1, is affirmed and a \$22,500 penalty is assessed.

Dated: December 30 , 2015

---

**MARY DRYOVAGE**  
**Administrative Law Judge**

---

<sup>30</sup> Section 335, subdivision (d)(7).

<sup>31</sup> Section 335, subdivision (d)(1).

<sup>32</sup>  $18,000 + 4,500 = 22,500$ ;  $22,500 - 0 = 22,500$ .

## APPENDIX A

### SUMMARY OF EVIDENTIARY RECORD DAVEY TREE SURGERY Docket 13-R2D3-1018 THROUGH 1021

Dates of Hearing: March 19 and 20, 2015

#### Division's Exhibits

<b>Exhibit Number</b>	<b>Exhibit Description</b>	<b>Admitted</b>
1	Jurisdictional Documents	Yes
2	Proposed Penalty Worksheet	Yes
3	Document Request, Sept. 28, 2012, email from Wendland, Oct. 24, 2012 and Dec. 4, 2012, email from Bellafronto, Jan. 14, 2013 (6 pages)	Yes
4	Photo – Accident scene in Burned Forest	Yes
5	Photo – Accident scene in Burned Forest, close up view	Yes
6	Photo – Accident scene with tree that struck deceased	Yes
7	Photo – Tree with white mark	Yes
8	Photo – Accident scene with trees on ground	Yes
9	Photo – Accident scene – end of tree stump	Yes
10	Photo – measurement of tree trunk - 11 inches with straight cut	Yes
11	Photo – measurement of tree – 11 feet	Yes
12	Photo – Accident scene with two people in yellow vests	Yes
13	Photo – measurement of distance between leaner and tree fallen by Curiel	Yes
14	Photo – Accident scene – bark of tree scrapped	Yes
15	Photo – top of tree that broke off when hit by tree	Yes
16	Photo – tree that hit Curiel	Yes

17	Photo – Accident scene with dust and debris near trees on ground and burnt tree	Yes
18	Photo – charred wood and green wedges on ground near accident	Yes
19	Photo – tree stump with parts of green wedges	Yes
20	Sheriff's & Coroner's Report, June 20, 2013	Yes
21	Davey Safety & Training Tailgate No. G-217 (1 page)	Yes

**Employer's Exhibits**

<b>Exhibit Letter</b>	<b>Exhibit Description</b>	<b>Admitted</b>
A	Wendland's handwritten notes, Dec. 4, 2012 (3 pages)	Yes
B	Cal OSHA Form 1-A (2 pages)	Yes
C	Davey Safety & Training Tailgate No. G-266 (Feb. 25, 2012) in English and Spanish (2 pages)	Yes
D	Hand written notes of employee interviews (8 pages)	Yes
E	Davey Safety & Operations Manual (141 pages) and attached IIPP with forms (24 pages)	Yes
F	Notice of Accident-Related Violation (1 page)	Yes
G	Documentation of Maldonado Line Clearance Tree Trimmer Training beginning Oct. 2, 2005 (2 pages)	Yes
H	Documentation of Curiel Line Clearance Tree Trimmer Training beginning August 30, 2009 (2 pages)	Yes
I-1	Davey Safety Meeting Report Sept. 11, 2012	Yes
I-2	Davey Safety Meeting Report Sept. 11, 2012	Yes

**Witnesses Testifying at Hearing**

1. John Wendland, DOSH Associate Safety Engineer
2. Alan Finocchio, Davey Tree Regional Vice President, Northern California

**CERTIFICATION OF RECORDING**

*I, Mary Dryovage, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.*

\_\_\_\_\_  
**MARY DRYOVAGE**  
Signature

12/30/15  
Date

# SUMMARY TABLE DECISION

*In the Matter of the Appeal of:*  
**DAVEY TREE SURGERY CO.**  
**DOCKETS 13-R2D3-1018 - 1021**

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

Site: Clear Creek Rd, PG&E tower 3-69, Chester, CA 96020

IMIS No. 119920106
--------------------

Date of Inspection: 09/27/12 – 02/25/13

Date of Citation: 03/06/13

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R2D3-1018	1	1	3203(a)(4)	G	[Failure to evaluate work place hazards.] ALJ affirmed violation.	X		\$465	\$465	<b>\$465</b>
13-R2D3-1019	2	1	3421(c)	S	[Failure to ensure employees were trained and instructed in the hazards involving job assignments, including falling burnt trees.] ALJ affirmed violation.	X		\$8,435	\$8,435	<b>\$8,435</b>
13-R2D3-1020	3	1	3427(c)(3)	S	[Failure to use a notch and backcut in felling a tree over 10 inches in diameter.] ALJ vacated violation.		X	\$8,435	\$8,435	<b>\$0</b>
13-R2D3-1021	4	1	3427(c)(1)	S	[Failure to insure employees worked in a work area that had been cleared to permit safe working conditions and an escape route which is planned before any cutting is started.] ALJ affirmed violation.	X		\$22,500	\$22,500	<b>\$22,500</b>
<b>Sub-Total</b>								\$39,835	\$39,835	<b>\$31,400</b>
<b>Total Amount Due*</b>										<b>\$31,400</b>

(INCLUDES APPEALED CITATIONS ONLY)

<p>NOTE: <i>Please do not send payments to the Appeals Board.</i>  <b>ALL penalty payments must be made to:</b>            Accounting Office (OSH)            Department of Industrial Relations            PO Box 420603            San Francisco, CA 94142            (415) 703-4291, (415) 703-4308 (payment plans)</p>
--

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

**ALJ:MD**  
**POS: 12/\_\_\_/15**

