BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
TSU/TREE SERVICE UNLIMITED, INC.	**1532781**
	DECISION
Employer	

Statement of the Case

TSU/Tree Service Unlimited, Inc. (Employer or TSU) operates a tree care service company. Beginning May 26, 2021, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Shannon Lichty, conducted an inspection of an accident that occurred at a job site located at 6680 Stewart Mine Road in Kelsey, California, in response to a report of injury.

On October 5, 2021, the Division issued one citation to Employer. The citation alleges that Employer failed to ensure an employee used a second point of attachment while operating a chain saw in a tree. Employer filed a timely appeal of the citation on the grounds that the safety order was not violated, the classification is incorrect, the abatement requirements are not reasonable, and the proposed penalty is not reasonable. Employer also asserted a series of affirmative defenses.[1]

While Employer initially contested the reasonableness of abatement, the parties confirmed that there are no outstanding abatement issues. As such, the issue of abatement is moot.

This matter was heard by Jennie Culjat, Administrative Law Judge for the California Occupational Safety and Health Appeals Board (Appeals Board), in Sacramento, California, on June 24 and 25, 2025, via the Zoom video platform. Krystal N. Weaver and P. Sean Kearney of Littler Mendelson, P.C., represented Employer. Jennifer Martin, Staff Counsel, represented the Division. The hearing was recorded by a certified court reporter provided by Employer. Based on the stipulation of the parties at the hearing, the court reporter's transcript is the official record of the hearing. The parties submitted closing briefs on October 10, 2025. The matter was submitted for decision on January 20, 2026.

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

Issues

1. Did Employer fail to ensure that an employee used a second point of attachment while operating a chain saw in a tree?

2. Did Employer establish that the Independent Employee Action Defense relieves it of liability?

Findings of Fact

1. Mitchell Dunn (Dunn) worked for Employer as a Tree Climber.

2. On April 29, 2021, Dunn and four other crew members were performing line clearance trimming at the job site.

3. Prior to starting work that day, David Wilson (Wilson), the crew's supervisor, walked the job site, gave the crew their assignments, and held a tailgate meeting.

4. On the second tree Dunn was to trim that day, while cutting away smaller branches with his chain saw, Dunn cut through his only point of attachment to the tree and fell approximately 20 feet to the ground below.

5. Dunn intended to climb to the top of the tree, tie in, and work his way down trimming the tree. However, because the smaller branches were making it difficult to throw his line up, Dunn intentionally decided to use his chain saw to cut the branches away without first attaching his second line.

6. Dunn had approximately five years of experience working as a tree climber and held a top climber position with TSU.

7. Employer had an Injury and Illness Prevention Program (IIPP) and a Safety Manual & Policy, which included the requirement to use two points of attachment while operating a chain saw in a tree.

8. Employer trained its employees on its IIPP and Safety Manual & Policy upon hire and yearly. In addition, Employer held safety trainings and daily tailgate meetings where various safety topics were reviewed, including the requirement to use two points of attachment while operating a chain saw in a tree.

9. Employer used a progressive discipline system for disciplining employees who violated Employer's safety rules.

Analysis

1. Did Employer fail to ensure that an employee used a second point of attachment while operating a chain saw in a tree?

The Division cited employer for a violation of California Code of Regulations, title 8, section 3425, subdivision (a)(10),[2] which provides the following:

> Tree workers shall use a second point of attachment such as a work-positioning lanyard or double-crotched rope when operating a chain saw in a tree, unless the employer demonstrates that a greater hazard is posed by using a second point of attachment while operating chain saws in that particular situation.

In Citation 1, the Division alleges:

> Prior to and during the course of the investigation, including, but not limited to, on 5/26/21, the employer failed to ensure a tree worker used a second point of attachment, such as a work positioning lanyard or double-crotched rope, while operating a chain saw in a tree. As a result on, or about, 4/29/21 an employee suffered a serious injury when he cut his flip line and fell to the ground below.

It is undisputed that Dunn failed to use a second point of attachment while operating a chain saw in a tree. On April 29, 2021, Employer had a crew of five employees, including Dunn, performing line clearance tree trimming at the job site. According to Employer's investigation report, on the day of the accident, Dunn was in a tree and used his chain saw to cut smaller branches out of his way without a second point of attachment to the tree. (Ex. J12.) While cutting the smaller branches, Dunn cut through his only point of attachment, his flip line, and fell approximately 20 feet to the ground below. (Ex. J12.)

As Dunn used only one point of attachment while operating a chain saw in a tree, the Division established a violation of section 3425, subdivision (a)(10).

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

2. Did Employer establish that the Independent Employee Action Defense relieves it of liability?

In order to prevail on the affirmative defense of Independent Employee Action (IEAD), an employer must establish each of the following elements:

> (1) The employee was experienced in the job being performed;
> (2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
> (3) The employer effectively enforces the safety program;
> (4) The employer has a policy of sanctions against employees who violate the safety program; and
> (5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

(*Synergy Tree Trimming, Inc.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017); *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

a. Was Dunn experienced in the job being performed?

This requirement is satisfied when an employer shows that the employee had sufficient experience performing the work that resulted in the alleged violation. (*West Coast Communication*, Cal/OSHA App. 05-2801, Decision After Reconsideration (Feb. 4, 2011).)

Employer offered Exhibit H to show that Dunn was an experienced tree climber. Exhibit H contains TSU's C4 Evaluation for Dunn. (Ex. H, p. 1 and 2.) Dale Van Bebber (Van Bebber), who was the owner and Chief Financial Officer of TSU during the relevant period, testified that C4 means Climber 4, which is a top climber position one step below foreman at TSU. Van Bebber explained that this C4 Evaluation form was used to evaluate an employee to ensure they were qualified for the C4 position, which includes using two points of attachment while operating a chainsaw. Van Bebber further explained that he understood from this form that Cary Crouss, TSU Lead Safety, evaluated Dunn for the C4 position. (Ex. H, p. 3 and 4.) Exhibit H also contains a training sign-in sheet reflecting that Dunn attended a new hire safety training course on various topics upon hiring. (Ex. H, p. 5.)

The Division objected to the documents in Exhibit H as hearsay and lacking foundation. California Evidence Code section 1200, subdivision (a), defines hearsay evidence as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." The Appeals Board's evidence rules, found in section

376.2, provide that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

Business records are not made inadmissible by the hearsay rule. (Evid. Code, §1271.) Van Bebber gave sufficient testimony to establish that each of the documents in Exhibit H, TSU's C4 Evaluation, Rescue Climber Evaluation, and the training sign-in sheet, were made in the regular course of business and at or near the time of the event. (Evid. Code, § 1271, subd. (a) and (b).) Furthermore, Van Bebber testified sufficiently as to the identity of the documents, their mode of preparation, and to establish that the source of the information and the preparation of the documents render the documents trustworthy. (Evid. Code, § 1271, subd. (c) and (d).) As the owner of TSU who was involved in the operation of the company with familiarity of these documents, Van Bebber was qualified to establish the foundation of these documents. As such, the documents in Exhibit H qualify as business records and may be relied on to support a finding of fact.

In addition, supporting these documents are interview statements made by Dunn during the Division's inspection. Shannon Lichty (Lichty), Associate Safety Engineer, interviewed Dunn on August 4, 2021, in the presence of his union business representative. Exhibit 23 is Lichty's audio recording of the interview. During Lichty's interview with Dunn, he informed her that he had been working for TSU for about six months. (Ex. 23 at 0:35-0:48.) Before becoming employed by TSU, Dunn worked as a tree climber doing line clearance for four to four and one-half years. (Ex. 23 at 0:50-1:05.) Dunn also informed Lichty during his interview that he attended a safety orientation training upon hire at TSU. (Ex. 23 at 1:07-1:16.)

Although the recorded interview of Dunn was the Division's exhibit, it was Employer who moved the exhibit into evidence. The Division objected to the statements Dunn made during the interview as hearsay. However, while Dunn's interview statements are hearsay, they can be relied on to supplement and explain other evidence. (§ 376.2.) Van Bebber's testimony and the documents in Exhibit H, supplemented by Dunn's interview statements, establish that Dunn was an experienced tree climber. It is noted that, despite its objections to evidence, the Division did not assert in its post-hearing brief that Employer failed to meet this element.

Based on the foregoing, Employer established the first element of IEAD.

b. Did Employer have a well-devised safety program?

The second element of the IEAD requires the employer to have a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments. (*Mercury Service, Inc*., *supra,* Cal/OSHA App. 77-1133.) "'This element should be analyzed by taking a realistic view of the written program and policies, as well as the actual

practices at the workplace. [Citation.]'" (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020), quoting *FedEx Freight Inc.*, Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018).)

Employer produced a copy of its IIPP. (Ex. C.) Lichty testified that TSU's IIPP contained all the required elements and she did not cite TSU for any IIPP violations. In addition to its IIPP, Employer had a detailed 82-page Safety Manual & Policy that covers various safety topics. (Ex. D.) This manual contains a section entitled Climbing Safety, which outlines the requirement of using two points of attachment while operating a chain saw in a tree. (Ex. D, p. 43.) Van Bebber testified that TSU's safety programs were reviewed when an employee was first placed in a position and reviewed with employees on a yearly basis.

Van Bebber testified that Employer conducts regular safety meetings and daily tailgate meetings where numerous safety topics are reviewed with employees. Van Bebber further testified that he himself participated in and often spoke at the tailgate meetings. Eric Jackson (Jackson), who was working as a groundsman on the crew with Dunn on the day of the accident, testified that Employer conducted, and employees attended, daily tailgate meetings. Employer submitted several forms documenting TSU's tailgate meetings from early 2021. (Ex. K, L, M, N and O.) Exhibit K is a TSU Report of Morning Safety Tailgate for January 20, 2021, reflecting that the requirement of using two points of attachment was reviewed and Dunn was in attendance.

The Division objected to Employer's records of its tailgate meetings as either hearsay or lacking foundation. Van Bebber gave sufficient testimony to establish that all these documents fall under the business record exception to hearsay. (Evid. Code § 1271.) In addition, these documents supplement and explain Van Bebber's and Jackson's testimony that employer conducted tailgate meetings and may be considered for that purpose. (§ 376.2.)

Employer also had placards outlining the essential controls for tree work. (Ex. P.) One of the many essential controls listed on the placards is the requirement to use two points of attachment while using a chain saw in a tree. (Ex. P.) Van Bebber and Jackson similarly testified that the essential controls placards were present on all TSU's trucks and essential controls were discussed daily at the tailgate meetings.

Van Bebber's and Jackson's testimony and Employer's records of tailgate meetings are sufficient to demonstrate that Employer had a well-devised safety program and trained employees on that program.

In its post-hearing brief, the Division asserts that Employer did not have a well-devised safety program because it did not implement its safety requirement of two points of attachment while operating a chain saw in a tree on the day of the accident despite having three foremen on

the jobsite. However, as discussed in detail below, Dunn's violation of the safety order was isolated and momentary. Considering Employer's otherwise robust safety program, Dunn's violation alone does not render Employer's safety program ineffective.

Based on the foregoing, Employer has met the second element of IEAD.

c. Did Employer effectively enforce its safety program?

The Appeals Board has held that "'[a]n essential ingredient of effective enforcement is provision of that level of supervision reasonably necessary to detect and correct hazardous conditions and practices.'" (*FedEx Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016), quoting *City of Los Angeles Water and Power*, Cal/OSHA App. 86-349, Decision After Reconsideration (Apr. 4, 1988).) "[W]here an employee violates a safety rule in plain view of management, it cannot assert the independent employee action defense." (*Kingston Constructors, Inc.* (*Kingston*), Cal/OSHA App. 95-1098, Decision After Reconsideration (Sep. 15, 1999).)

The Division argues that Employer failed to enforce its safety program because Dunn used a chain saw in a tree without a second point of attachment in plain view of management. As the Division asserts that there were three foremen on site, Wilson, Samantha McClung (McClung), and Jackson, it should first be discussed whether all three of these individuals were supervisors whose knowledge and actions may be imputed to Employer.

"The Appeals Board has long held that a supervisor means someone who has the authority or responsibility for the safety of other employees." (*Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932.) "[A] title alone is not sufficient to determine if an employee has sufficient authority at a work site to impute his knowledge of safety violations to Employer." (*City of Sacramento, Dept. of Public Works*, Cal/OSHA App. 93-1947, Decision After Reconsideration (Feb. 5, 1998).)

On the day of the accident, Jackson held the title of foreman. Jackson testified that, at the time of the accident, his job title of foreman was only "on paper," and he was not yet working in that capacity. Jackson explained that TSU was not awarded the contract for the job for which he was to be made foreman, and TSU did not put him in the actual role of foreman until two or three months after Dunn's accident. Jackson further testified that, on the day of the accident, he was working as a groundsman, hauling brush or cutting logs with a chain saw. Other than having the title of foreman, there is no evidence that Jackson was responsible for the safety of other employees on the day of the accident or at any time prior to the accident. As such, the preponderance of the evidence is that Jackson was not a supervisor.

As to McClung, according to Employer's accident investigation report, her job title was Brush Crew Foreman. (Ex. J12.) However, other than to assert that she was a foreman, the Division presented no other evidence to establish that McClung was responsible for the safety of other employees on the day of the accident. Accordingly, it cannot be found that McClung was a supervisor.

There was no dispute that Wilson was a supervisor. Van Bebber testified that Wilson was the foreman of Dunn and the other crew members and was responsible for their safety. Wilson was present at the job site on the day of the accident. Jackson testified that Wilson was aloft trimming a tree about 20 feet away from Dunn at the time of the accident. Jackson further testified that Dunn and Wilson were looking out for one another as they worked. During his interview, Dunn similarly informed Lichty that Wilson was working in the tree next to him about 10 feet away. (Ex. 23 at 5:04-5:26, 10:22-10:30.)

The Division relies on *Kingston, supra*, Cal/OSHA App. 95-1098, to show that Dunn's violation happened in plain view of Wilson. In *Kingston*, an employee was working in an elevated aerial device without a safety belt and lanyard in violation of a safety order. The Division's compliance officer observed the violation from a public street and issued a citation to the employer. (*Id*.) In finding that employer did not meet the third element of IEAD, the Appeals Board explained:

> The evidence is unchallenged that Employer's foreman was at the site at the time of the inspection. Although the foreman was across the street approximately 100 feet away and may not have been able to see the employee in the bucket from his exact location, he was charged with ensuring compliance with the safety orders at the work site. Had the foreman taken steps to ensure the employee had attached the safety belt and lanyard to the bucket of the aerial device before it was elevated, the violation would not have occurred.

In *Kingston,* while the Appeals Board acknowledged that the supervisor may not have been able to see the violation from his location, the Appeals Board found it persuasive that the supervisor nonetheless could have prevented the violation. Here, the facts are distinguishable because the record supports a finding that Wilson took steps to ensure that Dunn complied with the requirement of using two points of attachment while operating a chain saw in a tree prior to the violation.

Jackson testified that, on the morning of the accident, the crew arrived, they did their tailgate meeting, they walked the property, and Wilson assigned the climbers to the trees they were to trim. Jackson further testified that at every single tailgate meeting essential controls were reviewed. Essential controls include the requirement to use two points of attachment while

operating a chain saw in a tree. In Dunn's interview, he similarly informed Lichty that, on the day of the accident, there was a briefing before beginning work, and Wilson gave crew members their assignments and reviewed hazards. (Ex. 23 at 4:27-4:46.) Dunn also told Lichty that he checks his equipment every day and the foreman ensure that this is done. (Ex. 23 at 14:15-14:38.) Furthermore, Dunn informed Lichty that his accident occurred on the second tree he was to trim that day. (Ex. 23 at 6:04-6:10.) When Lichty asked Dunn if he had done "that" on the first tree he trimmed that day, which appears to refer to using only one point of attachment while operating a chain saw, Dunn replied "no." (Ex. 23 at 12:40-13:27.)

While the Division objected to Dunn's interview statements as hearsay, the statements are here again being used to supplement and explain other admissible evidence, Jackson's testimony, and therefore, can be considered for that purpose. (§ 376.2.) Accordingly, based on Jackson's testimony and Dunn's interview statements, the preponderance of the evidence is that Employer took steps to ensure Dunn used two points of attachment while operating a chain saw in a tree prior to starting work that day.

As to whether Dunn's violation nonetheless occurred in plain view of Wilson, the Appeals Board has held that it is unreasonable to expect a supervisor to observe all actions of an employee at all times. (*Synergy Tree Trimming, Inc.* (*Synergy*), *supra,* Cal/OSHA App. 317253953.) In *Synergy*, a tree climber's climbing rope was tied to a part of a tree above where he cut the tree with a chain saw resulting in him falling 30 feet to the ground. (*Id*.) While a supervisor was present at the time of the violation, the Appeals Board noted that the tree climber's "actions of throwing the rope and making the cut occurred quickly, and that even the most diligent supervisor cannot watch his or her employees at every minute of the workday." (*Id*.) The Appeals Board also found persuasive that the tree climber's "act was not demonstrated to be an ongoing safety rule violation" and "was an unusual and unintended mistake, and one that may have occurred too quickly for [the supervisor] to intervene in." (*Id*.)

Dunn's actions leading up to and during the violation are largely undisputed. According to the Division's investigation summary, just before the violation, Dunn was "climbing [a] tree for line clearance." (Ex. 3.) The Division's investigation summary further provides that when the violation occurred, Dunn was "about 30 feet up tree decided to cut some limbs to allow himself to go higher. Had is zip line around tree but did not do a secondary line as he cut branches cut through zip line and fell to the ground below."[3] (Ex. 3.) Employer's accident investigation report similarly provides that Dunn "was about 20' in blue oak getting in position to trim the tree to be worked. He was cutting smaller limbs out of his way and cut his flip line without having a second tie-in which caused him to fall to the ground." (Ex. J12.)

[3] Spelling and grammatical errors are as they appear in the quoted material.

In the Division's recorded interview of Dunn, Dunn gave the following account of his actions surrounding the violation:

> I was planning on going up to top and tie in, and, like, work my way down, but there was a bunch of sucker growth all in my way, so I got lazy and was, like, being stupid, and besides, like, throwing my climb line above me, I just had my flip and was going to clear a little bit of suckers and I gaffed out and hit my rope. That is when I went backward…. It was, like, hard to, like, throw my line up because it, like, kept hitting all the branches and stuff.

(Ex. 23 at 7:13-7:51.) In response to Lichty's question if this was his first attempt to trim the sucker growth, Dunn responded in the affirmative. (Ex. 23 at 8:24-8:36.)

Here, like the violation in *Synergy*, Dunn operating his chain saw in a tree without a second point of attachment happened quickly. The fact that Dunn was making his way up the tree and planned to work his way down, tends to show that Dunn momentarily operated his chain saw to cut the sucker branches out of his way to make his way up the tree. Even though Wilson was working in the tree next to Dunn, due to the brevity of the violation, any failure by Wilson to observe or intervene in that moment does not establish that Employer failed to provide adequate supervision. Furthermore, because Dunn and Wilson were working in trees, it is not apparent that Dunn's violation was in plain view as the trees' branches and foliage would have obstructed the line of sight at times.

Moreover, Dunn's failure to use two points of attachment while operating a chain saw was isolated. While Lichty testified that Jackson informed her during his interview that he had observed Dunn failing to use two points of attachment at times prior to the accident, Jackson testified that he never said such a thing during the interview. Jackson's testimony is corroborated by Dunn's interview statements to Lichty. Dunn informed Lichty that he had, on a few occasions, in the past, failed to use two points of attachment while operating a chain saw in a tree, but these failures occurred prior to his time working for TSU and the accident was the first time he committed this violation at TSU. (Ex. 23 at 9:15-10:05.) As such, Jackson could not have previously seen Dunn fail to use two points of attachment while operating a chain saw prior to the accident because he had not done so at TSU. Furthermore, as this was the first time Dunn committed this violation at TSU, it was certainly an isolated violation.

Again, the Division objected to Dunn's interview statements in the audio recording as hearsay. However, Dunn's interview statements may be considered to supplement and explain Jackson's testimony, the Division's investigation summary in Exhibit 3, and Employer's accident investigation report in Joint Exhibit 12. (§ 376.2.) To the extent that the descriptions of Dunn's actions contained in Exhibit 3 and Joint Exhibit 12 are themselves based on hearsay as to the

circumstances surrounding the violation, the Division offered these exhibits against Employer to establish the violation. Employer did not raise any objections to either exhibit. Accordingly, these unobjected-to exhibits can be relied upon to support a finding of fact and hearsay evidence may be used to explain and supplement these exhibits. (§ 376.2.) Furthermore, as Employer's accident investigation report was offered against Employer, it is an adoptive admission as to the circumstances of the violation. (Evid. Code, § 1220.) As to the Division's investigation summary, Lichty explained that this document was created based on information that she gathered during her inspection and she issued the citation, in part, based on the witness statements. As such, it is appropriate to consider Dunn's recorded interview statements under section 376.2 to understand the full picture of Dunn's actions during the violation.

Based on the foregoing, the preponderance of the evidence is that any failure by Employer to observe or intervene in Dunn's brief and isolated safety violation does not rise to the level of inadequate supervision and a failure to enforce its safety program. Employer presented sufficient evidence to establish that it effectively enforces its safety program, and therefore, Employer has met the third element of IEAD.

d. Did Employer have a policy of sanctions against employees who violate the safety program?

"Element four requires a demonstration that the employer has a policy of sanctions which it enforces against employees who violate the safety program." (*Synergy Tree Trimming, Inc.*, *supra*, Cal/OSHA App. 317253953.)

Employer's Safety Manual & Policy contains its disciplinary policy regarding employee safety violations. (Ex. D.) The manual provides that not following TSU's safety policies is considered a safety violation. (Ex. D, p. 68.) The manual outlines TSU's progressive discipline process to correct safety violations. (Ex. D, p. 68.) The progressive discipline consists of verbal counseling, a written warning, a one-day suspension, and ends with termination of employment. (Ex. D, p. 68.) Each step of the process is documented. (Ex. D, p. 68.) Depending on the severity of the safety violation, Employer may move directly to termination of employment. (Ex. D, p. 68.)

"Employers may show compliance with this element through producing records of disciplinary actions related to safety." (*Synergy Tree Trimming, Inc.*, *supra*, Cal/OSHA App. 317253953.) Employer submitted four examples of Employee Warning Notices issued to employees in 2020 and 2021 for various safety violations. (Ex. R.) Van Bebber testified that he reviewed employee warnings before they were issued to ensure the warning accurately reflects what transpired. Additionally, Jackson testified that TSU disciplines employees for safety violations and that he has received a written warning from TSU for his own safety violation.

The Division objected to the Employer's records of discipline as hearsay and lacking foundation. However, there is sufficient evidence from Van Bebber that these documents are business records. (Evid. Code, § 1271.) In addition, the records of discipline supplement Jackson's testimony and Employer's written disciplinary policy contained in Exhibit D. Notably, despite the hearsay objection, the Division did not argue or present evidence to counter Employer's position that it had a policy of sanctions against employees who violated its safety program.

In addition, Employer disciplined Dunn for his failure to use two points of attachment while operating a chain saw in a tree on the date of the accident. On September 27, 2021, TSU issued a final warning to Dunn. (Ex. Q.) According to this warning, TSU demoted Dunn for his violation of the safety rule. While the accident occurred on April 29, 2021, and Dunn was not disciplined until September 2021, the delay in issuing the discipline was to allow Dunn time to recover from his injuries. Van Bebber testified that Employer typically does not discipline an injured employee until they recover and return to work.

Employer's progressive discipline process, records of disciplinary actions, and the testimony of Van Bebber and Jackson establishes that TSU has a policy of sanctions that it enforces against employees who violate its safety rules. Accordingly, the fourth element of IEAD is established.

e. Did Dunn commit a safety infraction which he knew was contra to Employer's safety requirements?

"The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements." (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953.) Inadvertence or error in judgment is insufficient to establish a knowing violation of an employer's safety program. (*Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).) "Whether an action was inadvertent or constituted a conscious disregard of a safety rule is a question that must be examined in each case, in light of all facts and circumstances." (*Synergy Tree Trimming, Inc., supra,* Cal/OSHA App. 317253953.)

Dunn stated in his interview with Lichty that he "got lazy and was being stupid" and in addition that "I just, like, made a mistake you know," about his failure to use two points of attachment while using his chain saw to clear sucker branches in the tree. (Ex. 23 at 7:13-7:34; 12:55-13:01.) Employer relies on Dunn's statements that he was "lazy" and "stupid" to show that Dunn knowingly committed a violation of a safety rule. The Division asserts that these statements by Dunn are ambiguous hearsay that is not sufficient to establish that Dunn knowingly committed a safety violation.

Dunn's statements that he was lazy, stupid, or made a mistake may be ambiguous conclusions. However, during his recorded interview, Dunn also gave statements simply describing his actions during the violation. As established above, Dunn's recorded interview statements about his actions leading up to and during the violation can be used to supplement Employer's accident investigation report (Ex. J12) and the Division's investigation summary (Ex. 3), both of which contain their own descriptions of Dunn's actions. On Dunn's way up the second tree where he was going to work his way down, he decided to clear some sucker branches out of his way with his chain saw but did not attach his second line. (Ex. 3, J12, and 23 at 7:13-7:51.) Based on this sequence of events, it can be reasonably inferred that Dunn knew he should use two points of attachment while operating a chain saw, but he elected to bypass this requirement because he intended to quickly remove some sucker branches on his way up the tree to start his work.

While Dunn cutting his only point of attachment was accidental, it is the action of failing to use the second point of attachment that is under consideration. There is nothing in Dunn's recorded interview to indicate that Dunn was confused as to whether he had attached his second line or that he made an error in the placement of his second line. Rather, Dunn intentionally decided not to use his second point of attachment in order to quickly cut away the sucker branches. Accordingly, the preponderance of the evidence is that Dunn knowingly violated Employer's safety rule, and Employer has established the fifth element of IEAD.

As set forth above, Employer has successfully satisfied all five elements of IEAD. Accordingly, Employer's appeal of Citation 1 is granted.

Conclusions

The evidence supports a finding that Employer violated section 3425, subdivision (a)(10), because Dunn failed to use two points of attachment while operating a chain saw in a tree. However, Employer established all five elements of the independent employee action defense and, therefore, it is not liable for the violation.

Order

It is hereby ordered that Citation 1 and the associated penalty are dismissed as set forth in the attached Summary Table.

/s/ Jennie Culjat
_____
Jennie Culjat
Administrative Law Judge

Dated: 02/19/2026

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.**

If no petition is filed, the penalty amount set forth in the Summary Table is due and payable 30 days after the Order or Decision is issued. If the Appeals Board approved a payment plan, all payments are due in accordance with the dates indicated in the Summary Table. If a Petition for Reconsideration is filed, no payment should be made until the final outcome of the appeal.