

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

In the Matter of the Appeal of:

RONALD D. LITTLE dba AAA TREE SERVICE
7535 Levagin Court
Sacramento, CA 95842

Employer

Docket. 11-R2D1-1499

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Ronald D. Little doing business as (dba) AAA Tree Service (Employer).

JURISDICTION

Commencing on February 1, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On March 27, 2011, the Division issued a citation to Employer alleging a “serious” violation of occupational safety and health standards codified in California Code of Regulations, Title 8, section 3427(a)(5).¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed evidentiary hearing.

On December 20, 2012, the ALJ issued a Decision (Decision) which sustained the alleged violation and imposed a civil penalty.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

ISSUE

Does the evidence in the record support the Decision's holding that a violation of section 3427(a)(5) had occurred?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer's petition maintains, in essence, that the evidence does not justify the findings of fact.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Order was based on substantial evidence in the record as a whole and appropriate under the circumstances.

Employer is a tree service company. One of Employer's employees was seriously injured in a fall from a tree in which he working without being tied in. After conducting an investigation of the accident, the Division cited Employer for allegedly violating section 3427(a)(5). That section is part of Group 3, Article 12 of California's workplace safety standards (or "safety orders") pertaining to tree work, maintenance and removal. The initial section, § 3420, states, "(a) Scope. This standard applies to work performed and equipment used in tree maintenance and removal."

Employer's first argument is that the safety order alleged in the citation to have been violated does not exist. This is incorrect.² Section 3427(a)(5) is codified in the California Code of Regulations, Title 8, and provides:

§ 3427. Safe Work Practices

- (a) Climbing and Access [¶]
- (5) Employees shall remain tied in until the work is completed and they have returned to the ground, unless it is necessary to recrotch.

Employer correctly advances the proposition that the Division must prove each element of a violation by a preponderance of the evidence. (*Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011) citing *Cambro Manufacturing Co.*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986), *et al.*)³ The elements of the safety order are that (1) employees (2) working in trees are to be (3) tied in (4) until work is completed and they have returned to the ground. The exception regarding recrotching was not shown to apply.

It was not disputed that the injured worker was Employer's employee and that he was working in a tree, thus satisfying the first two elements. The employee admitted he was not tied in, and even if that statement were not to be accepted into evidence, that he fell while working in the tree shows he was not tied in at the time. Thus, element 3 is shown. Finally, there was no dispute and ample evidence that the injured worker was working in the tree when he fell. Therefore, the violation was established.

Employer next argues that the evidence does not show that the injured worker was a supervisor or foreman, and therefore his statement about not being tied in could not be admissible as an admission by Employer.

We disagree. There is substantial evidence in the record to support the ALJ's finding that the injured worker was a supervisor or foreman, including statements made by Employer in his communications with the Division prior to the hearing. Statements by supervisors and foremen are admissions of their employers and admissible as evidence in civil proceedings. (*Duininck Bros., Inc.*, Cal/OSHA App. 06-2870, Decision After Reconsideration (Apr. 13, 2012).) And, even if the statement were not admissible hearsay, it could be used to corroborate other evidence in the record, such as the fall from the tree itself.

² Unlike Employer's counsel, we had no difficulty locating section 3427(a)(5). (See Barclay's California Code of Regulations, Title 8, p. 598.) Counsel's efforts may have been frustrated by the several subdivisions within the section.

³ Employer cites federal OSHA authority for this rule. We are not bound by that authority in this context. (See *United Air Lines, Inc. v. Occupational Safety and Health Appeals Bd.* (1982) 32 Cal.3d 762.)

(Board Regulation section 376.2 [hearsay may be used to supplement or explain other evidence].)

Finally, because the injured worker was found to be a supervisor, Employer's "independent employee action defense" or IEAD was properly rejected. The IEAD is an affirmative defense which requires the asserting Employer to prove by a preponderance of the evidence all five of its elements. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) If, however, the employee causing the violation is a supervisor or foreman, the defense is not available to the cited employer. (*Sign Designs, Inc.*, Cal/OSHA App. 08-4686, Denial of Petition for Reconsideration (Feb. 23, 2012).) The rationale for making the defense inapplicable in such circumstances is that supervisors are the employer's representative at the worksite and the employer is responsible for the supervisor's actions. (*Id.*) It has also been said that when a supervisor causes the violation, the third element of the defense is not satisfied, and it therefore fails. (*Davey Tree Surgery Company v. Occupational Safety and Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1242-1243.)⁴

DECISION

For the reasons stated above, the petition for reconsideration is denied.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

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⁴ The third element of the IEAD is "employer effectively enforces the safety program." (*Davey Tree, supra.*)