

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

In the Matter of the Appeal of:

**HOT LINE CONSTRUCTION, INC.
9020 BRENTWOOD BLVD., STE. H
BRENTWOOD, CA 94513**

Employer

Inspection No.
1371328

DECISION

Statement of the Case

Hot Line Construction, Inc. (Hot Line or Employer), is an electrical contractor. On December 18, 2018, the Division of Occupational Safety and Health (the Division), through associate safety engineer Tomas Micheo (Micheo), commenced an accident investigation of a work site located at 12249 Lopez Canyon Road, in Sylmar, California (the job site).

On June 17, 2019, the Division cited Employer, alleging five violations of California Code of Regulations, title 8¹: three instances of failure to establish, implement, and maintain an Injury and Illness Prevention Program (IIPP); failure to provide an effective job briefing to employees; and failure to secure an unstable pole during pole removal operations.

Employer filed timely appeals of the citations. Employer appealed the existence of the alleged violations, the classifications of the citations, and the reasonableness of the penalties. Additionally, Employer asserted a series of affirmative defenses to each citation.²

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board. The hearing was conducted on May 4, 2021, March 9, 2022, November 1, 2022, January 12 and 13, 2023, and February 22 and 23, 2023, from West Covina, California, with the parties and witnesses appearing remotely via the Zoom video platform. Manuel Melgoza and Madeline Scates, attorneys with Donnell, Melgoza and Scates, LLP, represented Employer. Mark Licker, Staff Counsel, represented the Division. The matter was submitted on December 4, 2024.

¹ Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

² Except where discussed in this 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 establish, implement, and maintain an effective IIPP?
2. Did Employer provide required job briefings?
3. Did Employer perform pole removal operations of unstable poles that were not guyed, braced or otherwise securely supported?
4. Did the Division establish a rebuttable presumption of a Serious violation for Citation 2 or Citation 3?
5. Did Employer rebut the presumptions of Serious violations for Citation 2 and Citation 3?
6. Was the violation in Citation 3 a cause of a serious injury?
7. Are the proposed penalties calculated in accordance with the penalty-setting regulations?

Findings of Fact

1. On the morning of December 17, 2018, Foreman Adam Aguilera (Aguilera) inspected the pole location before attending a tailboard meeting at a helicopter landing zone (the Landing Zone) at the job site.
2. It is industry standard for a 45-foot utility pole to have a pole tag placed 10 feet from the bottom (butt) of the pole.
3. It is industry standard for a 45-foot pole to be set six feet deep in the ground.
4. It is industry standard for the pole tag on a 45-foot pole to be found on the pole approximately four feet above ground.
5. The pole at issue was unstable due to being a “corner pole” where conductor wires connected to it at angles and permanent guys anchored to the ground balanced the tension on the pole.
6. A pole tag was present on the pole before, during, and after the crew worked on removing the pole.

7. The pole tag was placed approximately 10 feet above the bottom (butt) of the pole.
8. The pole was set approximately 42 to 48 inches deep in the ground.
9. The pole tag was approximately 6 to 6.5 feet above ground.
10. The position of the pole tag did not result in Hot Line calling an all-stop, reassessing the hazards, or coming up with a plan to mitigate the hazards.
11. Hot Line did not hold an additional job briefing to discuss the pole tag, the shallowness of the pole, or the use of temporary guy wires.
12. The pole was unstable and fell once the second permanent guy wire was removed.
13. Chris Wimer (Wimer) and Abelardo Mendoza (Mendoza) were working atop the pole when it fell.
14. Wimer was hospitalized for three months while in a coma and underwent three brain surgeries.
15. Mendoza was hospitalized for three days and underwent surgery for a broken arm.
16. The failure to secure the pole was a cause of the injuries to Wimer and Mendoza.
17. The proposed penalty for Citation 2 did not include an abatement credit.

Analysis

1. Did Employer establish, implement, and maintain an effective IIPP?

Section 1509 requires employers engaged in construction work to comply with section 3203. In turn, section 3203, subdivision (a), provides:

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.

[. . .]

- (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
 - (A) When observed or discovered; and,
 - (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.
- (7) Provide training and instruction:
 - (A) When the program is first established; Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.
 - (B) To all new employees;
 - (C) To all employees given new job assignments for which training has not previously been received;
 - (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
 - (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
 - (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Citation 1 alleges:

Prior to and during the course of the investigation, including but not limited to, on December 17, 2018, the employer did not implement and maintain an effective Injury and Illness Prevention Program (IIPP).

Instance 1: Hazards associated with the removal of an unsecured wood utility pole on December 17, 2018 were not identified and evaluated. Ref. 3203(a)(4).

Instance 2: Hazards associated with the removal of an unsecured wood utility pole on December 17, 2018 were not corrected. Ref. 3203(a)(6).

Instance 3: Employees engaged in the removal of a wood utility pole on December 17, 2018 had not been effectively trained in safe removal procedures. Ref. 3203(a)(7).

The Division bears the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) “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. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

The Appeals Board has established that employers must actually implement their written IIPP procedures. (*Papich Construction Company Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021) (hereafter *Papich*).)

Background

Southern California Edison (Edison) hired Hot Line to remove a 45-foot utility pole and replace it with a new utility pole. The pole held conductor lines (i.e., power lines) and communications lines.

The pole stood near the top of a hillside. It was a difficult location to access and required the assistance of a helicopter to bring the replacement pole and carry away the old pole. A helicopter landing zone near the bottom of the hillside was established as a staging area.

The pole was a “corner pole,” meaning that the conductor lines it supported formed an angle at the pole. Edison gave Hot Line a work order containing schematics and photographs of the pole and its conductor lines. (Ex. 2, pp. 1, 11.) The angle of the conductor lines created an unbalanced strain on the pole. To balance the pole, two permanent guy wires running from the pole to the ground were installed previously. (Ex. 2, pp. 1, 11, 12.)

Hot Line assigned a crew to the task which included Aguilera, Aaron Rodgers (Rodgers), Mendoza, and Wimer. Wimer and Mendoza climbed the utility pole to perform the required tasks of lowering the conductor and communications lines so that the top of the pole could be cut off to make way for the arrival of the new pole. Aguilera and Rodgers performed tasks on the ground. Crew members estimated that Wimer and Mendoza worked atop the pole for approximately 60 to 90 minutes. Rodgers released the first guy wire and the pole did not fall. Upon releasing the second guy wire, the pole fell a few moments later.

Aguilera and Rodgers called for emergency help. Wimer and Mendoza were transported away by helicopter. Both were hospitalized.

In addition to the Division’s investigation, both Hot Line and the California Public Utilities Commission (CPUC) investigated the accident. Hot Line investigated the accident and submitted a written report to Edison. (Ex. 22, pp. 4-13.) CPUC investigated the accident pursuant to its jurisdiction over Edison.

Instance 1

Instance 1 alleges a violation of section 3203, subdivision (a)(4). This subdivision requires employers to establish, implement, and maintain procedures for identifying and evaluating workplace hazards.

The Division does not contend that Hot Line's written IIPP procedures are deficient. Rather, the Division contends that there was a "failure of implementation."

Although it contends there was a failure of implementation, the Division does not identify which IIPP procedures were not implemented. Instead, the Division specifies a hazard at the job site that Hot Line did not observe or evaluate. Notably, the cited safety order does not state that an employer must observe and evaluate every hazard. Thus, the Division's argument regarding a hazard that was not observed and evaluated does not establish that Hot Line failed to implement its IIPP procedures.

The record establishes that Hot Line has written procedures regarding identification of workplace hazards. (Ex. A, pp. 5-6.) With respect to implementation, Aguilera testified that, upon arriving at the job site, he proceeded to the pole location while the rest of the crew went to the Landing Zone. (Hearing Transcript (hereafter "Tr."), at 119:24-121:25 (Feb. 23, 2023).) Aguilera testified that he inspected the pole location. (*Ibid.*) He then proceeded to the Landing Zone to participate in a briefing with the helicopter crew and two other Hot Line crews performing removals of other poles at the job site. The Division did not contradict Aguilera's testimony regarding his inspection. Micheo testified that he did not know if Aguilera performed an inspection and that he did not ask if Aguilera performed an inspection. (Tr., at 84:16-85:9 (Jan. 13, 2023).) Finally, although it is found below that Hot Line either did not inspect the pole tag or ignored the fact that the pole tag was at the wrong height (see Issue No. 5 *infra*), this does not establish that Hot Line failed to implement its IIPP procedures because the evidence does not establish that its procedures require inspection of the pole tag.

In sum, Hot Line established procedures regarding identification of workplace hazards. The evidence does not show that Hot Line failed to implement any of its established procedures. Therefore, the Division did not meet its burden to prove Instance 1.

Instance 2

Instance 2 alleges a violation of section 3203, subdivision (a)(6), which requires methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard.

The Division does not contend that Hot Line's written IIPP procedures are deficient. Rather, the Division contends that there was a "failure of implementation."

Implementation of an IIPP is a question of fact. (*Papich, supra*, Cal/OSHA App. 1236440.) Proof of implementation requires evidence of actual responses to known or reported hazards. (*Ibid.*)

Although it contends there was a failure of implementation, the Division does not identify which IIPP procedures were not implemented. Instead, the Division specifies a hazard at the job site that Hot Line did not correct. Notably, the cited safety order does not state that an employer must correct every hazard. Thus, the Division's argument regarding a hazard that was not corrected does not establish that Hot Line failed to implement its IIPP procedures.

The record establishes that Hot Line has written procedures regarding correction of hazards. (Ex. A, p. 6.) With respect to implementation of procedures to correct hazards, an employer must be aware of a hazard before it can implement its procedures to correct the hazard. The Division acknowledges this element. It argues in its closing brief that correcting the hazard "would require first observing that [the pole to be replaced was set too shallow] and then [taking steps to adequately guy, brace, or otherwise securely support it before loosening the permanent guy wires.]" The Division then argues that Hot Line was not aware of the hazard: "This failure to observe the hazard resulted in [Aguilera's] failure to evaluate it, a violation of 3203(a)(4). And his failure to evaluate it resulted in the failure to correct it by adding support to the corner pole before removing the permanent guy wires, a violation of 3203(a)(6)." Finally, although it is found below that Hot Line either did not inspect the pole tag or ignored the fact that the pole tag was at the wrong height (see Issue No. 5 *infra*), this does not indicate that Hot Line failed to implement its correction procedures because it is consistent with Hot Line being unaware of the hazard.

In sum, Hot Line established procedures regarding correction of hazards. The evidence does not show that Hot Line failed to implement its procedures for correction of hazards because it does not show that Hot Line was aware of a hazard. Therefore, the Division did not meet its burden to prove Instance 2.

Instance 3

Instance 3 alleges a violation of section 3203, subdivision (a)(7), which requires that employers provide training and instruction at specified times.

The Appeals Board has found that the purpose of section 3203, subdivision (a)(7), "is to provide employees with the knowledge and ability to recognize, understand and avoid the

hazards they may be exposed to by a new work assignment through ‘training and instruction.’” (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

The Division contends that Hot Line failed to establish necessary procedures for an effective IIPP. In particular, the Division asserts that an effective IIPP for electrical linemen must include: (i) training on how to evaluate the need for temporary guy wires when removing a pole, and (ii) training on how to install temporary guy wires when removing a pole. Although it asserts that an effective IIPP for electrical linemen must include training regarding temporary guy wires, the Division does not cite authority or testimony to show that such procedures must be included.

Hot Line’s IIPP contains written procedures for training and instruction. (Ex. A, pp. 6-7.) With respect to implementation, the evidence indicates that Hot Line provided training and the crew understands the hazards involved. Aguilera testified that Hot Line has weekly safety trainings and annual refresher courses. (Tr., at 52:20-53:18 (Feb. 23, 2023).) Hot Line submitted training documents for the crew. (Exs. Y, AO.)

In sum, Hot Line established procedures regarding training and instruction. The testimony and cited authorities do not support the assertion that an effective IIPP for electrical linemen must include training regarding temporary guy wires. Therefore, the Division did not meet its burden to prove Instance 3.

Accordingly, Citation 1 is vacated because the evidence does not establish its alleged violation instances.

2. Did Employer provide required job briefings?

Section 2940, subdivision (g), provides requirements for job briefings. It addresses the number of job briefings and the topics to be covered:

(1) Before each job.

(A)

(B) The employer shall ensure that the employee in charge conducts a job briefing that meets (g)(2) Subjects to be covered, (g)(3) Number of briefings, (g)(4) Extent of the briefing, of this section with the employees involved before they start each job.

(2) Subjects to be covered. The briefing shall cover at least the following subjects: hazards associated with the job, work procedures involved, special precautions, energy-source controls, and personal protective equipment requirements.

(3) Number of briefings.

(A) If the work or operations to be performed during the work day or shift are repetitive and similar, at least one job briefing shall be conducted before the start of the first job of each day or shift.

(B) Additional job briefings shall be held if significant changes, which might affect the safety of the employees, occur during the course of the work.

(4) Extent of briefing.

(A) A brief discussion is satisfactory if the work involved is routine and if the employees, by virtue of training and experience, can reasonably be expected to recognize and avoid the hazards involved in the job.

(B) A more extensive discussion shall be conducted:

1. If the work is complicated or particularly hazardous, or
2. If the employee cannot be expected to recognize and avoid the hazards involved in the job.

NOTE to subsection (g)(4): The briefing must address all the subjects listed in subsection (g)(2) of this section.

Citation 2 alleges: “Prior to and during the course of the investigation, including but not limited to, on December 17, 2018, the person in charge of pole removal operations did not conduct effective job briefings with all the employees involved prior to the start of work.”

The Division contends that Hot Line should have held an additional job briefing upon reaching the pole location and seeing that the pole tag was higher than it should have been, which indicated that the pole was set shallow.

Hot Line acknowledges, in hindsight, that the pole was shallow and that temporary guy wires should have been used. (Tr. at 24:10-12; 24:22-25:4 (Nov. 1, 2022).) However, Hot Line contends that it satisfied section 2940 because it held multiple job briefings on the morning of the accident. Hot Line argues that it was not required to hold a further job briefing because it did not know that the pole was shallow because the pole tag was missing, or alternatively, because pole tags are not necessarily determinative of a pole’s depth.

Background

A pole tag is an industry custom used to indicate how deep a utility pole is set in the ground. A pole tag (also known as a pole brand, medallion, or “belly button”) is placed at a standard distance from the bottom (butt) of a pole. The depth of a pole is determined using two elements: (1) the standard distance from the bottom (butt) of the pole to a pole tag, and (2) then measuring the distance from the pole tag to the ground. For instance, if a crew measures a pole tag to be four feet above ground, and if the standard distance between a pole tag and the bottom

(butt) of a pole is 10 feet, then the crew subtracts four feet from 10 feet to conclude that the pole is six feet deep in the ground. For a different example, if a crew measures a pole tag to be two feet above ground, and if the standard distance between a pole tag and the bottom (butt) of a pole is 10 feet, then the crew subtracts two feet from 10 feet to conclude that the pole is eight feet deep in the ground.

Whether the pole tag was missing

On the morning of the accident, Aguilera's crew had been working for 30 consecutive days at a different site due to a firestorm. The crew left the site where they had been working, went to Hot Line's yard to pick up tools and equipment, and then proceeded to the job site.³ Rodgers and Aguilera testified that they looked for a pole tag, but did not see one. (Tr. at 196:19-197:14 (Feb. 22, 2023); Tr. at 80:22-81:2 (Feb. 23, 2023).) Hot Line Senior Vice President Jerad Simmons (Simmons) testified that he did not remember seeing a pole tag on the pole when he examined it after the accident. (Tr. at 190:6-24 (Feb. 23, 2023).) Based on this evidence, Hot Line argues that the pole tag was missing, and therefore, Hot Line did not know the pole was set shallow.

Photographs before and after the accident show a pole tag on the pole. The work order that Hot Line received from Edison contains pictures showing a pole tag on the pole. (Ex. 2, p. 8.) The pictures also show a yellow tag "R2" and a metallic strip with the pole number "2068014E." (Ex. 2, p. 8.) Investigation pictures taken after the accident show a pole tag on the pole. (Exs. 34, 40.) The investigation pictures also show a yellow tag "R2" and a metallic strip with the pole number. (Exs. 34, 40.) There is no evidence that anyone removed the pole tag, yellow tag, and metallic strip before the accident and then replaced them after the accident.

Despite testifying that he did not see a pole tag on the pole, Rodgers acknowledged that he was later told that there had been a pole tag on the pole:

- Q. Did anyone at Hot Line ever tell you that in fact there was a brand on this pole?
- A. Later they did say there was a brand on the pole.
- Q. Who told you that?
- A. When I had the meeting with the union representative, Hot Line's guys, and myself, and I believe the union guy showed me a picture of a brand on the pole.

³ Additionally, Aguilera's crew had been to the job site earlier in the year to perform the pole replacement. However, the crew was not able to perform the work because a different crew had failed to dig a new hole in which the replacement pole would be placed.

(Tr. at 38:17-25 (Feb. 23, 2023).) There is no evidence that Hot Line disputed this claim that a pole tag was on the pole.

CPUC Utilities Engineer Monica Robledo (Robledo) arrived at the pole location after the accident. Robledo testified that she observed the pole tag on the pole and measured the depth of the hole where the pole had been. Robledo testified that the pole had been four feet deep in the ground. (Tr. at 36:14-25 (Feb. 22, 2023).) Robledo further testified that during the CPUC investigation, none of the parties claimed that the pole tag had been missing. (Tr. at 143:4-163:19 (Feb. 22, 2023).)

Hot Line performed its own investigation after the accident. (Ex. 22, pp. 4-13). Hot Line identified six contributing factors to the accident, including: “the crew failed to discover that the pole was set short/shallow, based off the height of the pole tag.” Additionally, the investigation report does not state that the pole tag was missing. The investigation concluded that “the crew perceived a need to hurry when they were informed that the contract helicopter had been booked for another job and had to leave at 11:30.” (Ex. 22, pp. 4-13.)

Edison Project General Supervisor Rick Karran (Karran) testified that he went to the pole location after the accident. Karran’s recollection of the accident was that the pole had been set 3.5 feet deep in the ground. (Tr. at 82:22-83:5 (Nov. 1, 2022).) Karran further testified that a 45-foot pole should be buried six feet deep and that a pole tag should be 10 feet from the bottom of the pole. (Tr. at 73:5-17, 76:17-19 (Nov. 1, 2022).) Simmons’ testimony closely matched Karran’s testimony on the depth of the pole. Simmons testified that the pole had been approximately 42 inches deep in the ground. (Tr. at 197:6-10 (Feb. 23, 2023).)

In weighing the evidence, the photographs receive great weight because they are objective evidence. Hot Line’s investigation report receives substantial weight because Hot Line had no incentive to state that the crew was rushed and “failed” to locate the pole tag unless Hot Line believed those statements to be true. Hot Line’s conclusion that the crew “failed” is a direct and unequivocal characterization. In addition to being rushed, the crew was likely tired from working 30 straight days and long hours. Moreover, Robledo’s testimony that, during the CPUC investigation, the parties had not asserted that the pole tag was missing is consistent with Hot Line’s investigation report. The testimony of Aguilera and Rodgers receive less weight because their testimony on this point directly concerns their own job performance. Thus, it is found that the pole tag was on the pole during the work being performed.

It is further found that the pole had been 3.5 to four feet deep in the ground and that it was supposed to be six feet deep. It is further found that the pole tag was supposed to be, and was in fact, 10 feet above the bottom (butt) of the pole.

These findings lead to the conclusion that the pole tag would have appeared on the pole at a height of six to 6.5 feet above ground. This is two to 2.5 feet higher than where it would be expected to appear based on the industry standard.

Significant change

Hot Line contends that it was not aware of a significant change with respect to the pole depth because the pole tag was missing, and even if it had not been missing, pole tags are not reliable indicators of pole depth.

Aguilera, Rodgers, and Simmons testified that pole tags are sometimes missing and Hot Line does not have a policy to stop a removal operation simply because a pole tag is missing.

Documents before and after the accident indicate the role of pole tags. Hot Line's accident investigation identifies a cause of the accident as the crew's failure to discover that "the pole was set short/shallow, based off the height of the pole tag." Additionally, both Edison and the labor union emphasize the need to locate the pole tag. (Ex. 28, p. 4; Ex. 29, p. 3.) The California Safety Manual Code of Safe Work Practices Accident Prevention Rules (the "Red Book") states: "Employees shall observe the pole brand to assist in evaluating that the pole is set to proper depth." (Ex. 29, p. 3.) Both Rodgers and Aguilera testified that union members are obligated to follow the Red Book. (Tr. at 17:12-18:1, 143:13-22 (Feb. 23, 2023).) Simmons testified that Hot Line is obligated to follow the Red Book. (Tr. at 195:9-15 (Feb. 23, 2023).)

In weighing the evidence, Hot Line's accident investigation receives great weight because Hot Line had no incentive to reference the pole tag and the crew's failure unless Hot Line believed the pole tag was significant. Both the Edison documents and the labor union documents receive substantial weight because they existed before the accident, and they are binding on Hot Line and union members. Based on this evidence, it is found that a pole tag is a significant industry custom relating to a pole's depth. A pole's depth, in turn, is significant to employee safety. The issue is not whether a pole tag is always correct. Safety instruments, devices, valves, gauges, etc., can be incorrect on occasion. This does not mean that such instruments and devices are not significant and that employees can ignore them.

With respect to the contention that the pole tag had been missing, even the absence of the pole tag would constitute a significant change. Hot Line should have expected a pole tag because the work order provided by Edison showed a pole tag on the pole. Therefore, a missing pole tag would give rise to questions whether the crew was at the correct pole and if so, whether the pole conditions had changed.

Additional job briefing

At the pole location, the height of the pole tag indicated that the pole was shallow. The pole tag and the shallow depth of the pole were significant changes. They affected the safety of employees because the depth of the pole affects the stability of the pole. Thus, the pole tag and the shallowness of the pole were significant changes that affected the safety of employees. As such, they necessitated an additional job briefing under section 2940, subdivision (g)(3)(B), to discuss the subjects required by subdivision (g)(2). Hot Line did not hold such a job briefing.

Accordingly, Hot Line violated section 2940, subdivision (g).

3. Did Employer perform pole removal operations of unstable poles that were not guyed, braced or otherwise securely supported?

Section 2940.8, subdivision (f), provides requirements related to unstable poles:

Damaged or unstable poles, or sections of poles shall be guyed, braced or otherwise securely supported during pole removal operations.

Citation 3 alleges:

Prior to and during the course of the investigation, two employees were working aloft on a wood utility pole during removal operations. The guy wires for the wood pole were cut and the pole was not stable, braced, or secured. As a result, on December 17, 2018, the wood utility pole with the two employees fell causing the employees to sustain serious injuries.

Here, there is no dispute that the crew was engaged in pole removal operations. Although the pole was stable with the permanent guy wires in place, the operation called for removing the permanent guy wires. After removal of the permanent guy wires, the pole became unstable. The unstable pole was not guyed, braced, or otherwise securely supported.

Accordingly, Hot Line violated section 2940.8, subdivision (f).

4. Did the Division establish a rebuttable presumption of a Serious violation for Citation 2 or Citation 3?

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

There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

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

“Serious physical harm” was defined as any injury or illness occurring in the place of employment that results in:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code § 6432, subd. (e).)

A. Citation 2

The violation in Citation 2 is the failure to have an additional job briefing as a result of the pole tag indicating that the pole was approximately two feet shallow in the ground. The actual hazard created by the violation was exposing employees to a fall hazard because they were not aware of the hazardous condition and because appropriate safeguards were not put in place.

There was a realistic possibility that death or serious physical harm could result from the hazard. Simmons’ testimony highlights the severity of the hazard because he testified that a shallow pole merits “an all-stop” and “a reassessment of the job, the hazards, and come up with a plan to mitigate those hazards.” (Tr. at 205:25-206:10 (Feb. 23, 2023).)

In fact, serious physical harm resulted here. The crew did not discuss the hazards and come up with a plan to mitigate the hazards. As a result, the pole fell and both Wimer and Mendoza were hospitalized. (Ex. 22, p. 7.) Wimer was in a coma for three months and

underwent three brain surgeries. (Tr. at 9:2-11 (Jan. 13, 2023).) Mendoza was hospitalized for three days and underwent surgery for a broken arm.

Accordingly, the Division established a rebuttable presumption that Citation 2 is a Serious violation.

B. Citation 3

The violation in Citation 3 is that Hot Line failed to guy, brace, or otherwise securely support an unstable pole during pole removal operations. The actual hazard created by the violation was exposing employees to a fall hazard. There was a realistic possibility that death or serious physical harm could result from the hazard. In fact, the utility pole fell, resulting in the hospitalizations of Mendoza and Wimer. (Ex. 22, p. 7.)

Accordingly, the Division established a rebuttable presumption that Citation 3 is a Serious violation.

5. Did Employer rebut the presumptions of Serious violations for Citation 2 and Citation 3?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a Serious violation exists 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.” In order to satisfactorily rebut the presumption, the employer must demonstrate both:

- (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) [; and]
- (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (i) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (ii) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (iii) Supervision of employees exposed or

potentially exposed to the hazard; and (iv) Procedures for communicating to employees about the employer's health and safety rules and programs.

An employer bears the burden of proof for its affirmative defenses. (*Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (Jun. 21, 1982).) The knowledge of its foreman is attributable to the employer. (*Dick Miller, Inc.*, Cal/OSHA App. 13-0578, Denial of Petition for Reconsideration (Mar. 5, 2014).)

A. Citation 2

The violation in Citation 2 is the failure to have an additional job briefing as a result of the pole tag indicating that the pole was approximately two feet shallow in the ground. The actual hazard created by the violation was exposing employees to a fall hazard because they were not aware of the hazardous condition and appropriate safeguards were not put in place.

Severity of the harm

An employee was assigned to climb to the top of the 45-foot pole and remain atop the pole for a substantial duration of time. The pole had equipment (electrical and communications) attached, which presented additional hazards in the event of the pole falling. By not having a job briefing to address the shallowness of the pole, the employees remained exposed to the full extent of these hazards. Indeed, Simmons' testimony highlights the severity of potential harm because he testified that a shallow pole merits "an all-stop" and "a reassessment of the job, the hazards, and come up with a plan to mitigate those hazards." (Tr. at 205:25-206:10 (Feb. 23, 2023).) Thus, it is found that severe harm could be expected to occur in connection with the work activity during which the violation occurred. Moreover, in the present case, the severe harms could be expected to affect more than one employee because two employees were assigned to climb the pole.

Likelihood of the harm

Simmons testified that a shallow pole merits "an all-stop" and "a reassessment of the job, the hazards, and come up with a plan to mitigate those hazards." (Tr. at 205:25-206:10 (Feb. 23, 2023).) This testimony indicates that Simmons believes harm resulting from a shallow pole is a realistic likelihood that requires immediate action. Additionally, it is clear that the stability of the pole was a concern previously because two guy wires had been installed for support. Thus, it is found that there was a substantial likelihood of harm in connection with the work activity during which the violation occurred. Moreover, the likelihood of harm was increased because, even if one employee escaped harm, there was a second employee on the pole who could suffer harm.

Reasonable steps to anticipate and prevent the violation

In light of the severity and the likelihood of harm here, an employer should be expected to take immediate action to anticipate and prevent the violation. Simmons' testimony supports this conclusion because he testified that there should be "an all-stop" and "a reassessment of the job, the hazards, and come up with a plan to mitigate those hazards." (Tr. at 205:25-206:10 (Feb. 23, 2023).) Notably, the actions identified by Simmons are tantamount to an additional job briefing under section 2940, subdivision (g)(3)(B), to discuss the subjects required by subdivision (g)(2).

Hot Line's actions

Rodgers and Aguilera testified that they looked for a pole tag, but did not see one. (Tr. at 196:19-197:14 (Feb. 22, 2023); Tr. at 80:22-81:2 (Feb. 23, 2023).) Rodgers and Aguilera also testified that they performed a hammer test on the pole. (Tr. at 195:25-196:6 (Feb. 22, 2023); Tr. at 79:9-20 (Feb. 23, 2023).)

Here, it is found that the pole tag was on the pole (see Issue No. 2 *supra*). The testimony of Rodgers and Aguilera that they looked for a pole tag and did not find one is not credited. Either they did not look for the pole tag or they disregarded the pole tag when they found it. Neither of these actions is reasonable or responsible. Consequently, there was not an all-stop to reassess the job and the hazards, or to come up with a plan to mitigate the severe and likely hazards. With respect to the hammer test performed by Rodgers, that test addressed the hazard of a rotten pole, not the hazard of a pole tipping over due to shallow depth indicated by the pole tag. (Tr. at 195:25-196:18 (Feb. 22, 2023).)

Aguilera was the foreman. He knew or should have known of the pole tag location and been on notice of the shallowness of the pole. His knowledge and actions are attributable to Hot Line. (*Dick Miller, Inc., supra*, Cal/OSHA App. 13-0578.) Therefore, Hot Line did not take all the steps a reasonable and responsible employer in like circumstances should be expected to take to anticipate and prevent the violation.

Accordingly, Citation 2 is properly classified as a Serious violation.

B. Citation 3

With respect to Citation 3, the violation is the failure to secure an unstable pole during pole removal operations. The actual hazards created by the violation were exposing two employees to fall hazards and exposing four employees to crushing hazards from the falling pole and equipment.

Severity of the harm

An employee was assigned to climb to the top of the 45-foot pole and remain atop the pole for a substantial duration of time. The pole had equipment (electrical and communications) attached, which presented additional hazards in the event of the pole falling. Simmons' testimony highlights the severity of potential harm because he testified that a shallow pole merits "an all-stop" and "a reassessment of the job, the hazards, and come up with a plan to mitigate those hazards." (Tr. at 205:25-206:10 (Feb. 23, 2023).) Thus, severe harm could be expected to occur in connection with the work activity during which the violation occurred. Moreover, the severe harms could be expected to affect more than one employee because two employees were assigned to climb the pole.

Likelihood of the harm

Simmons testified that a shallow pole merits "an all-stop" and "a reassessment of the job, the hazards, and come up with a plan to mitigate those hazards." (Tr. at 205:25-206:10 (Feb. 23, 2023).) This testimony indicates that Simmons believes harm resulting from a shallow pole is a realistic likelihood that requires immediate action. Additionally, it is clear that the stability of the pole was a concern previously because two guy wires had been installed for support. Thus, it is found that there was a substantial likelihood of harm in connection with the work activity during which the violation occurred. Moreover, the likelihood of harm was increased because even if one employee escaped harm, there was a second employee on the pole who could suffer harm.

Reasonable steps to anticipate and prevent the violation

In light of the severity and the likelihood of harm here, an employer should be expected to take immediate action to anticipate and prevent the violation. Simmons' testimony supports this conclusion because he testified that there should be "an all-stop" and "a reassessment of the job, the hazards, and come up with a plan to mitigate those hazards." (Tr. at 205:25-206:10 (Feb. 23, 2023).) Moreover, Karran, Micheo, and Simmons testified that temporary guy wires could have been used to stabilize the pole. (Tr. at 167:16-168:12 (Nov. 1, 2022); Tr. at 42:15-43:9 (Jan. 13, 2023); Tr. at 196:12-18 (Feb. 23, 2023).)

Hot Line's actions

Rodgers and Aguilera testified that they looked for a pole tag, but did not see one. (Tr. at 196:19-197:14 (Feb. 22, 2023); Tr. at 80:22-81:2 (Feb. 23, 2023).) Rodgers and Aguilera also testified that they performed a hammer test on the pole. (Tr. at 195:25-196:6 (Feb. 22, 2023); Tr. at 79:9-20 (Feb. 23, 2023).) Aguilera further testified that, while Rodgers released the permanent

guy wires, he monitored their tension and watched whether the pole moved in the dirt. (Tr. at 98:3-20, 99:2-19 (Feb. 23, 2023).)

Here, it is found that the pole tag was on the pole (see Issue No. 2 *supra*). The testimony of Rodgers and Aguilera that they looked for a pole tag and did not find one is not credited. Either they did not look for the pole tag or they disregarded the pole tag when they found it. Neither of these actions is reasonable or responsible. Consequently, there was not an all-stop to reassess the job and the hazards, or to come up with a plan to mitigate the severe and likely hazards. With respect to the hammer test performed by Rodgers, that test addressed the hazard of a rotten pole, not the hazard of a pole tipping over due to shallow depth. (Tr. at 195:25-196:18 (Feb. 22, 2023).) With respect to watching the dirt and checking the tension on the guy wires while they were being released, these actions were not sufficient given that the pole tag indicated the pole was shallow, especially when temporary guy wires could have been used.

Aguilera was the foreman. He knew or should have known of the pole tag location and been on notice of the shallowness of the pole. His knowledge and actions are attributable to Hot Line. (*Dick Miller, Inc., supra*, Cal/OSHA App. 13-0578.) Therefore, Hot Line did not take all the steps a reasonable and responsible employer in like circumstances should be expected to take to anticipate and prevent the violation.

Accordingly, Citation 3 is properly classified as a Serious violation.

6. Was the violation in Citation 3 a cause of a serious injury?

The Division characterized Citation 3 as Accident-Related. A violation is Accident-Related if an employee suffers death or a “serious injury” and a causal nexus exists between the violation and the death or serious injury. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018); see § 336, subds. (c)(2), (d)(7).)

A. Serious injury

At the time of the injuries, a “serious injury” was defined as any injury or illness occurring in a place of employment that results in:

- (1) inpatient hospitalization for a period in excess of 24 hours for other than medical observation;
- (2) the loss of any member of the body; or
- (3) any serious degree of permanent disfigurement.

(§ 330, subd. (h)).⁴

Here, both Wimer and Mendoza were hospitalized. (Ex. 22, p. 7.) Wimer was in a coma for three months and underwent three brain surgeries. Mendoza was hospitalized for three days and underwent surgery for a broken arm. Thus, the injury to Wimer and the injury to Mendoza each independently meets the serious injury element.

B. Causal nexus

The Division must make a showing that the violation more likely than not was a cause of the injury. The Division need not show that the violation was the only cause of the injury. (*United Parcel Service, supra*, Cal/OSHA App. 1158285.)

Here, the violation is the failure to secure an unstable pole during pole removal operations. Securing the pole would have prevented it from falling over while Wimer and Mendoza were on it. Thus, the Division established a causal nexus between the violation and the injuries to Wimer and Mendoza.

In sum, the evidence establishes the Accident-Related characterization of Citation 3.

7. Are the proposed penalties calculated in accordance with the penalty-setting regulations?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc., supra*, Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The Division submitted its Proposed Penalty Worksheet showing the penalty calculations. (Ex. 25.) Micheo testified to the calculation of the penalties. Micheo could not recall if Hot Line had abated Citation 2 by the abatement date. The Division acknowledges that the penalty for Citation 2 should be reduced by 50 percent, to a penalty of \$11,250. Hot Line did not present evidence or argument that the penalties were improperly calculated.

Citation 3 is not eligible for an abatement reduction because it is Accident-Related. (§ 336, subds. (c)(2), (d)(7).)

⁴ Section 330, subdivision (h), was amended in 2020.

Accordingly, the proposed penalty for Citation 3 is found to be reasonable. The proposed penalty for Citation 2 is reduced to \$11,250.

Conclusions

The evidence does not support a finding that Employer violated section 1509 for failure to establish, implement, and maintain an IIPP.

The evidence supports a finding that Employer violated section 2940, subdivision (g), for failure to provide an effective job briefing to employees. The violation was properly classified as Serious. The proposed penalty is reduced to \$11,250.

The evidence supports a finding that Employer violated section 2940.8, subdivision (f), for failure to guy, brace, or otherwise secure damaged or unstable poles during pole removal operations. The violation was properly classified as Serious and properly characterized as Accident-Related. The proposed penalty is reasonable.

Order

It is hereby ordered that Citation 1, Item 1, is vacated.

It is hereby ordered that Citation 2, Item 1, is affirmed and a penalty of \$11,250 is sustained.

It is hereby ordered that Citation 3, Item 1, is affirmed and the penalty of \$25,000 is sustained.

It is further ordered that the penalties indicated above shall be assessed as set forth in the attached Summary Table.

Dated: 12/30/2024

/s/ Mario L. Grimm

Mario L. Grimm
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**