

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

In the Matter of the Appeal
of:

DAVEY TREE SURGERY COMPANY

P.O. Box 5015
Livermore, CA 95402

Employer

DOCKET 13-R3D2-2996

DECISION

Introduction

Davey Tree Surgery Company (Employer) is a tree trimming contractor. Beginning June 11, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Louis Vicario conducted an accident inspection at a place of employment maintained by Employer at 1050 Rock Springs Road, Escondido, California (the site). On September 5, 2013, the Division cited Employer for failure to ensure that a tree was visually inspected by a qualified tree worker to determine a safe method of entry.

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, the time allowed to abate, the changes required to abate, and the reasonableness of the proposed penalty. Employer alleged several affirmative defenses.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at San Diego, California on February 19, 2014. Eric C. Bellafronto, Attorney, of Littler Mendelson, P.C., represented Employer. Joel Foss, Senior Safety Engineer, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on February 19, 2014.

Stipulations and Pre-Hearing Determinations

1. Employer's employee, Nicandro Campos (Campos), climbed a eucalyptus tree to trim it on May 17, 2013. It was located at 1050 Rock Springs Road, Escondido, California (the site). He completed trimming the tree, and began to descend the tree. When he was descending the tree, the tree trunk broke below him, causing Campos to fall and land on a concrete gutter.
2. As a result of the fall, Campos was seriously injured within the meaning of Labor Code § 6432(e).
3. Campos was performing his job duties at the time of the accident.
4. Eduardo Barojas (Barojas) was present at the time of the accident. He was Campos's crew leader. Barojas and Campos were the only Employer employees present at the site.
5. Eduardo Barojas and Nicandro Campos were both qualified tree workers.
6. General Foreman Jorge Orellana (Orellana) was Barojas' and Campos' supervisor. Orellana worked at Employer's office and was a management employee.
7. Associate Safety Engineer Louis Vicario (Vicario) began an inspection of the accident on June 11, 2013.
8. Employer does not admit that it has violated any safety order by performing abatement or by performing any of the activities described in Exhibit 13.

Issue

1. Was a tree visually inspected by a qualified tree worker who determined a safe method of entry into the tree?

Findings of Fact or Law

1. The Division did not meet its burden of proof to establish that either (1) a qualified tree worker did not visually inspect the tree in question, or (2) that a qualified tree worker did not determine a safe method of entry to the tree after visually inspecting the tree.

Reasons and Grounds for Decision¹

1. A violation of § 3427(a) was not established. The Division did not meet its burden of proof to establish that either (1) a qualified tree worker did not visually inspect the tree in question or (2) that a qualified tree worker did not determine a safe method of entry to the tree after visually inspecting the tree.

Section 3427(a) states:

Tree Work, Maintenance or Removal. Safe Work Procedures. Climbing and Access. Prior to climbing the tree, the employer shall ensure that the tree, including the root collar, is visually inspected by a qualified tree worker who shall determine and ensure a safe method of entry for the tree.

The safety order does not define the word “inspected.” However, the Appeals Board has interpreted “inspection,” which is the result when something is visually inspected, to mean a “careful and critical examination or scrutiny sufficient to determine compliance with regulations or detect susceptibility to hazards. This definition connotes that an expectation that an inspection will be done thoroughly and meaningfully.” (*Underground Construction Co., Inc.*, Cal/OSHA App. 98-4105, Decision After Reconsideration (Oct. 30, 2001), *affirmed in part regarding definition of inspection*, Judgment Granting Peremptory Writ of Mandamus, Sacramento County Superior Court, State of California, 01CS01671 (June 24, 2005), Amended Decision After Reconsideration (Feb. 22, 2006) vacating Decision After Reconsideration issued Oct. 30, 2001.) In that case, a competent person visually examined a trench and did a thumb test. Based on his examination, he erroneously determined that there was no evidence of a cave-in hazard. The Division alleged that the inspection was not an inspection within the meaning of the safety order because it was not effective. The Sacramento Superior Court (Court) disagreed, finding that his actions came within the Board’s definition of “inspection.” The Court held that inspections need not be 100% accurate, but only to be reasonably performed.

Employer provides tree trimming and maintenance service to commercial and residential property owners. Its employees, Campos and Barojas, were assigned to trim several eucalyptus trees at the site as a two-person crew. Campos and Barojas were experienced tree-trimmers, qualified

¹ Exhibits received and testifying witnesses are listed in Appendix A. Certification of the Record is signed by the ALJ.

to perform pre-climbing inspections. On May 17, 2013, Campos and Barojas each separately climbed and trimmed different eucalyptus trees. After Campos finished trimming the tree he climbed, the trunk broke during his descent, causing Campos to fall and sustain serious injuries.

Associate Safety Engineer Vicario spoke to both Campos and Barojas by telephone in separate interviews approximately a month after the accident. Campos stated that prior to starting the job on the day of the accident, they inspected the area where they were working to assess any hazards as well as to be aware of any property that could be damaged. (Exhibit 9) Campos could not think of anything that could have been done to prevent the accident. (Exhibit 9) Vicario did not ask if Campos inspected the tree or if he determined a safe means of entry.

Barojas told Vicario during a telephonic interview on June 25, 2013 that he was up in a eucalyptus tree when he saw that Campos was going to climb the tree that eventually broke. From the tree he was trimming, Barojas called down to Campos telling him not to climb the tree. Barojas directed him to trim the tree from the ground. Barojas saw Campos climb the tree and then, upon him descending, saw the trunk lean over and snap with Campos on it. (Exhibit 9) Vicario did not ask if Barojas inspected the tree or determined a safe method of entry.

In a follow-up telephone interview on August 8, 2013, Campos denied that Barojas ever told him not to climb the tree. (Exhibit 9)

General Foreman Orellana investigated the accident but he did not conclude that a failure to inspect either occurred, or led to the accident. Employer's injury investigation report, prepared by Manager Brian Friedrich, (Exhibit 10) listed accident precursors as the diameter of the tree, climber's body weight, and the weak structure of the trunk. The report stated that the hazards associated with the incident were identified and planned for during the job briefing. The report did not state that a precursor was failure to visually inspect the tree.

It is not reasonable to believe that Campos did not inspect the tree before he climbed it and that he did not make a determination that it was safe to climb. Campos was trained² and had seven years of experience tree trimming. (Exhibit 9) Campos safely entered the tree. The trunk did not break until Campos started descending, or exiting, the tree. The record is

² Exhibit A lists training he received. Employer's safety manual describes planning a tree climb. (Exhibit 11, p. 119). It directs employees to inspect the job before starting and to note the general condition of the tree.

void of evidence regarding the reason the tree trunk broke. It is unknown if a visual inspection would have detected the reason that the tree broke. Dispositive facts not in evidence cannot be assumed. (*Barbagelata Farms*, Cal/OSHA App. 09-2083, Denial of Petition for Reconsideration (Sep. 23, 2010) citing *California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009).)

The fact that the tree broke does not establish that Campos did not perform a visual inspection and determine a safe method of entry. (*Underground Construction Co., Inc.*, Cal/OSHA App. 98-4105, Decision After Reconsideration (Oct. 30, 2001), *affirmed in part regarding definition of inspection*, Judgment Granting Peremptory Writ of Mandamus, Sacramento County Superior Court, State of California, 01CS01671 (June 24, 2005), Amended Decision After Reconsideration (Feb. 22, 2006) vacating Decision After Reconsideration issued Oct. 30, 2001.)

It was the Division's burden of proof to show that no visual inspection was made, or if one was made, that there was no determination of a method of safe entry. For the above reasons, the Division did not meet its burden of proof.

Conclusion

Therefore, Employer's appeal is granted. Citation 1, Item 1, is vacated, and the penalty is set aside.

Dated: March 10, 2014

DALE A. RAYMOND
Administrative Law Judge

DAR:ml

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
Davey Tree Surgery Company
Docket 13-R3D2-2996**

Date of Hearing: February 19, 2014

Division Exhibits – Admitted

Exhibit Number	Exhibit Description
1	Jurisdictional Documents
2	Form C-10
3	Photograph – concrete culvert
4	Photograph – cut trunk
5	Photograph – measurement of cut trunk
6	Photograph – demonstration of position of injured after he fell
7	Photograph – pieces of broken trunk
8	SDG&E Tree Work Order Form
9	Field Documentation Worksheet – Vicario’s summary of interviews of Barojas and Campos
10	Employee Injury Investigation Report
11	Safety and Operating Manual – Tree Climbing
12	Safety Meeting Reports – 4/19/2013 and 1/7/12
13	Safety Meeting Reports – 5/20/13

Employer Exhibits – Admitted

**Exhibit
Letter**

Exhibit Description

- A Field Documentation Worksheet – Summary of Campos’s Training
- B Narrative Summary—Form Cal/OSHA 170A

Witnesses Testifying at Hearing

- 1. Louis Vicario

CERTIFICATION OF RECORDING

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

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

DAVEY TREE SURGERY COMPANY
Docket 13-R3D2-2996

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

IMIS No. 315348912

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R3D2-2996	1	1	3427(a)	S	ALJ vacated violation		X	\$18,000	\$18,000	\$0
Sub-Total								\$18,000	\$18,000	\$ 0

Total Amount Due* **\$ 0**
 (INCLUDES APPEALED CITATIONS ONLY)

NOTE:
 Please do not send payments to the Appeals Board.
All penalty payments must be made to:
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

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

ALJ: DR/ml
 POS: 03/10/14