BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of:	DOCKETS 12-R3D2-0492 through 0497
HHS CONSTRUCTION 2042 S. Grove Ave. Ontario, CA 91761 Employer	**DECISION**

Background and Jurisdictional Information

HHS Construction (Employer) is a construction contractor which installs fiber optic telephone cable. Beginning August 25, 2011, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Darcy Murphine conducted an accident inspection at a place of employment maintained by Employer at the 4200 block of Sorrento Valley Boulevard, San Diego, California (the site). On February 3, 2012, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations[1]:

Citation/ Item	Alleged Violation	Type	Penalty
1-1	2340.17(a) [unguarded live electrical wires]	General	$205
1-2	3203(a) [incomplete written Illness and Injury Prevention Plan]	General	$410
1-3	3395(f)(1) [incomplete heat illness training]	General	$410

[1] Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

1-4	3395(f)(3)	General	$205
	[incomplete written Heat Illness Prevention Plan]		
2	3203(a)(4)	Serious	$5,400
	[ineffective identification and evaluation of work place hazards]		
3	3203(a)(7)	Serious	$5,400
	[incomplete training on job hazards]		
4	3328(f)	Serious	$14,400
	[improper vehicle modifications]		
5	3380(f)(1)	Serious	$14,400
	[failure to select and provide personal protective equipment]		
6	8610(c)	Serious	$7,200
	[no roll-over protective structure]		

Employer filed timely appeals contesting the existence of the alleged violations for all violations. Employer contested the classification, abatement requirement, and the reasonableness of the proposed penalties for Citations 2 through 6. Employer also alleged 15 affirmative defenses for all violations.

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 May 10-11, 2013, July 30-31, 2013, and October 2, 2013. Ronald Medeiros, Esq. of the Robert D. Peterson Law Corporation represented Employer. Tuyet-Van Tran, Staff Counsel, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on October 2, 2013. The ALJ, on her own motion, extended the submission date to December 23, 2013.

Law and Motion

At the hearing, Employer stipulated that the heat illness standard, § 3395, applied to Employer; that the Division issued Form 1BY (Notice of Intent to Issue Serious Citation) timely to Employer for Citations 2 through 6; and that all penalties were calculated in accordance with the Divisions' Policies and Procedures Manual and applicable regulations. Employer stipulated that the penalty adjustment factors of 15% for good faith, 20% for size, and 10% for history were correct. (Exhibit 30)

At the hearing, Employer withdrew abatement as a ground for its appeal for all violations.

ALL DOCKETS

Summary of Evidence

The Division cited Employer for unguarded live electrical wires (Citation 1, Item 1), an incomplete written Illness and Injury Prevention Plan (IIPP) (Citation 1, Item 2), incomplete heat illness training (Citation 1, Item 3), an incomplete written Heat Illness Prevention Plan (HIPP) (Citation 1, Item 4), ineffective identification and evaluation of work place hazards (Citation 2), incomplete training on job hazards (Citation 3), improper vehicle modifications (Citation 4), failure to select and provide personal protective equipment (Citation 5), and lack of a roll-over protective structure (Citation 6).

Associate Safety Engineer Darcy Murphine (Murphine) began an inspection on August 25, 2011 concerning an off-road vehicle accident that occurred on August 9, 2011[2] to Employer's employee, Lineman Michael Cheney (Cheney).

Testimony of Jason Carmody

Background

The Division called Jason Carmody (Carmody) to testify. Carmody had worked for Employer for five years, first as a grounds man for about one year, then promoted to lineman, and then promoted again to foreman. He had been a foreman for about one year as of May 9, 2013. On the day of the accident, he was a lineman.

Employer takes down old telephone cable and installs new telephone cable at sites all over Southern California. On the day of the accident, Carmody was part of a crew whose assignment was to attach new fiber optic cable to existing telephone poles[3] that already had cable on them. The crew consisted of Carmody, Lineman Cheney, Lineman Justin Bradford (Bradford), and Foreman Joshua Nytes (Nytes).

The crew arrived at the site in the morning. Before any work began, all four of them met at the site to discuss the job. They met in a parking lot, at the base of the hill below pole #3, as seen in Exhibit 5. At that time, they determined how to pull the rope from pole #1 to pole #4. That morning, they hung cable on three poles.

Carmody marked poles #1, #2, and #3 and #4 on Exhibits 2, 3, 4, 5, 6 and 7. Pole #1 was on one side of an asphalt road (Lusk Boulevard.) The

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[2] Employer stipulated that the accident occurred on August 9, 2011.
[3] The poles were owned by San Diego Gas & Electric.

next pole, #4, was on the other side of Lusk Boulevard.[4]. Poles #1 and #4 were on top of steep hills covered with natural vegetation, mostly grass and shrubs. Exhibits 2, 3, 4, 5, 6, and 7 are photographs of the site. There is a dirt access road between poles #1 and #2[5]. The crew's procedure was to pull rope, using a cable car, from one pole to the next before attaching the new cable.

The Accident

When the accident occurred, Carmody was in the air in a cable car pulling rope from pole #4 across Lusk Boulevard to pole #1. The cable car is a seat with rollers that can travel between poles, hooked to the lines already attached to poles. When Carmody left pole #4, Cheney drove Employer's Polaris Ranger (Ranger) from pole #4 to meet Carmody at pole #1 so Carmody could throw him the rope. The Ranger, seen in Exhibits 12, 13, and 14, is a four-wheel open vehicle, similar to a small jeep. It is not a "street legal" vehicle; that is, it was not equipped properly to be driven on a public street.[6] Carmody saw Cheney driving the Polaris west on Lusk Boulevard.

When Carmody arrived at pole #1, Cheney was not there. Carmody, Bradford and Nytes all called for Cheney and searched for him. Eventually, Cheney answered Carmody's phone call and described his location. Carmody and Nytes found the Ranger's tire tracks leading up a steep hill toward pole #1 and veering off to the left. Following the tracks, they found tools strewed on the ground that were carried in the Ranger, and then they saw the Ranger at the bottom of the hill. Continuing to search, they found Cheney about half way down the hill.

The crew called 911. Cheney was helicoptered to one hospital (Exhibit 19) and later transferred to another.

Later, Carmody was present when the Polaris was pulled out of the ravine with a winch. A winch was necessary because the hill was so steep that it was not possible to drive a vehicle to where the Ranger had fallen. When Carmody found the tracks, he wondered why Cheney drove there. The tracks led up the steepest part of the hill to get to pole #1, and the vegetation was slippery. Carmody would not have driven the Ranger there.

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[4] On Exhibit 2, Carmody marked north, south, and west and drew a red arrow pointing to Lusk Boulevard. Exhibit 11 is a pole map that includes the poles in question.
[5] In Exhibits 2 and 3, there is a motor vehicle parked on the road between pole #1 and #2.
[6] Details about its shortcomings are set out below.

The Polaris Ranger

Exhibits 12 and 13 are accurate photographs of Employer's Ranger after the accident. Employer's Ranger had a few modifications. A U-shaped roller was placed on the top (marked in red on Exhibits 12 and 13.) A fire extinguisher holder was also added (marked in blue on Exhibits 12 and 13.)

Carmody testified that the Ranger was used rarely. It was brought on this job because the access roads were too narrow and steep for the crew's regular truck. All four crew members drove the Ranger at some time on the day of the accident. It was common to have different drivers for the Ranger.

Carmody testified that he was trained on how to operate the Ranger before he drove it. There was no training class, but his foreman sat next to him and explained how to operate the vehicle. It was like driving a small truck. They agreed to no horseplay. He knew how to start it, operate it, select the gears, use the brake, switch between 4-wheel drive and 2-wheel drive, and use the emergency brake. He was not given any instruction on how to drive over creek beds or uphill.

The Ranger's speedometer went up to 50 miles per hour, but Carmody did not think it could go that fast. When going over a creek bed, Carmody knew to drive slowly based on his own experience. Carmody could not remember if he had been instructed on how fast to drive uphill.

Referring to Exhibits 6 and 7, the area in which the crew was working on the day of the accident, Carmody testified that it was unusual terrain on which to drive the Ranger. There was no road. The ground was covered with bushes and grass. It was steep, slick, and was very unfamiliar terrain. Carmody has never driven the Ranger on similar terrain, and he would not have driven it where Cheney drove it.

Where the terrain was smooth, Carmody wore a seat belt while driving the Polaris. Where the terrain was bumpy, which might make the Polaris unstable, he would not wear a seat belt. Without a seat belt, he could jump out of the vehicle or stand up if it started to tip over. He has had the Polaris roll over on one occasion. He swerved to avoid hitting a deer, hit an embankment, and the Polaris rolled. His boss at the time (Gary Krosner) helped him right the Ranger and said to be more careful.

It was Carmody's decision not to wear a seat belt. There was no policy Employer had that Carmody knew for sure about wearing a seat belt. In the Employer Code of Vehicles, employees are instructed to wear seat belts at all times.

Carmody was aware that Employer put tires on the Ranger that were not the original size tires. He believed that the new tires changed the way the Ranger handled.

The Ranger had no windshield. When Carmody drove the Ranger, Employer did not supply a helmet, goggles, or eye protection. Employer's crew members typically wore their own personal sunglasses. Workers were required to wear safety glasses while on the job site, and Employer provided these. There was no rule about wearing safety glasses when driving the Ranger.

Heat Illness Prevention Plan

Carmody testified that he had received training on heat illness prevention before the accident. Employees receive training when they are hired and when summer starts. The training was about 10 minutes. The topics included heat stroke, cramping, water, and over exertion in the heat. There was no training about making sure shade was provided. He has not received any training on high heat procedures. He did not recall any training about procedures triggered when the temperature rises above a certain point.

Illness and Injury Prevention Program (IIPP)

Carmody recently took a course on CPR certification, and they talked about Employer's IIPP. He sat in on training regarding confined space and other subjects that he does not remember, but was not trained on Employer's IIPP that time.

Testimony of Darcy Murphine

Education, Training, and Experience

Associate Safety Engineer – Compliance[7] Darcy Murphine (Murphine) has been employed by the Division for 24 years. Her duties include investigating accidents, identifying safety and health hazards, and issuing citations for California Code of Regulations Title 8 safety and health order violations. The hazards include any hazard to which an employee may be exposed, including hazards from heat, noise, chemicals, tools, equipment, physical conditions, and falls. During her employment with Cal/OSHA, she has conducted approximately 300 accident investigations.

Initially, the Division hired her as an Assistant Industrial Hygienist. Six months later, she was promoted to Associate Industrial Hygienist. In about 2001, the Industrial Hygienist job classification was merged with the Safety Engineer job classification, and she became an Associate Safety Engineer.

[7] Also called a Compliance Safety and Health Officer (CSHO).

Immediately prior to working for the Division, she was a Compliance Safety and Health Officer for federal OSHA for two years. Her duties were essentially the same as they are for Cal/OSHA.

Murphine earned a Bachelor of Science from the University of California at Davis in 1982. Her training included trigonometry, calculus, and a year of physics. Her study of physics included gravity, centers of gravity, and stability. Murphine explained the stability index and the things that affect it. In addition, she has taken advanced motorcycle safety courses. These courses explained the center of gravity, stability, and how loads affect stability.

Murphine has received extensive training from the Division. She has received all the Division mandated training plus approximately 150 individual training courses. She has received training in accident investigations, interviewing techniques, and legal aspects of enforcing safety orders. In addition, she has received training in construction, excavation, materials handling, and heat illness. She has attended at least three training sessions on heat illness. She has received training on Injury and Illness Prevention Programs (IIPP). The training was included as part of the initial compliance course, which was about a week.

She also received training from federal OSHA. She received the initial compliance course, and then courses on inspection techniques, legal aspects, accident investigations, and safety for industrial hygienists. These courses were all two to three weeks long.

The Inspection

Murphine began her inspection on August 25, 2011 at the general location of the accident. She took photographs which included poles #1, #2, and #3 (Exhibits 2, 3, 5), but she could not locate the exact site of the accident.

On August 25, 2011, Murphine met Employer's Director of Safety David Curry (Curry) at Employer's yard in El Cajon, and gave him a document request with a return date of August 30. (Exhibit 15) She received all requested documents except for the safety instructions and equipment manual for the Ranger. The documents she received included Employer's accident report (Exhibit 17), IIPP (Exhibit 19), Heat Illness Prevention Plan (HIPP) (Exhibit 20), registration information on the Ranger (Exhibit 25), and an invoice for purchase of four tires for the Ranger (Exhibit 26).

On August 30, 2011, Murphine met with Curry at Employer's yard in El Cajon. Murphine held an opening conference, saw the Ranger, took photographs, and arranged to interview witnesses.

The Polaris Ranger

Curry told Murphine that Employer uses the Ranger primarily for hauling materials. At the time of the accident, Cheney was taking some clip rollers to Carmody, who was traveling on the pole line. Curry said that Employer did not really do any training on the Ranger; they just operated it like one of the other truck vehicles that they operate on public streets. Employer has pick-up trucks and a boom truck that has a boom used to lift employees up to the telephone lines. Curry told Murphine that there were no inspections specific to the Ranger. Curry did job site inspections and job site audits. He viewed the activities and took photos, but there were no inspection records specifically for the Ranger or for any activities for which employees used the Ranger.

Curry told Murphine that the safety instructions and owner's manual were inside the Ranger when it crashed, were lost in the brush and never retrieved. Murphine located a manual for the model Ranger in question from the Polaris web site. (Exhibit 21)

The manufacture's plate on the Ranger stated that it was a 2007 4x4 700 cc efi model. Exhibits 12 and 13 are photographs she took of Employer's Ranger on August 30, 2011. Exhibit 14 is a photo of the same model from Google images.

Heat Illness Prevention Plan

Murphine spoke briefly to Supervisor Gary Krosner (Krosner)[8]. She, Krosner and Curry jointly spoke about heat issues and water for employees at the job site. They provided Murphine with Employer's written HIPP. (Exhibit 20) The crew foreman has the option of purchasing ice on the road and getting reimbursed. They use the truck for shade. The trucks have air conditioning.

The Accident

On August 30, 2013, Curry gave Murphine an accident report (Exhibit 17), photos, Employer's First Report of Injury or Illness (Form 5020), and contact information for the crew. From information Employer gave her, and Google maps (Exhibits 8, 9, 10), Murphine learned that the accident occurred on a brush-covered hillside north of Lusk Boulevard, south of Sorrento Valley

[8] Krosner showed Murphine the clip rollers.

Boulevard, and east of Vista Sorrento Parkway and east of poles #1, #2, and #3. (Exhibit 8, red X)

After interviewing Curry on August 30, 2011, Murphine went to the site, found the access road to pole #1, (Exhibit 4) and found the Ranger's vehicle tracks[9], (Exhibits 4, 6, 7). The tracks started at a parking lot at the base of the hill below pole #3.[10] The tracks made a crooked line up the hill, then went left. (Exhibit 6)

Using Exhibit 8, Murphine testified that there was only one route Cheney could have taken to get from pole #4 to the parking lot where the Ranger tracks started. He had to drive from pole #4 to Wateridge, turn left, make another left on Lusk Boulevard, drive down Lusk Boulevard, make a right on Vista Sorrento Parkway, drive down Vista Sorrento Parkway, make a right on Sorrento Valley Boulevard, and then take another right to enter the parking lot where the Ranger tracks start.

Murphine testified that to get to the access road to pole #1 from pole #4, it was necessary to drive down to Lusk Boulevard, then drive across Lusk Boulevard into a driveway, then turn left onto the dirt access road. The access road was not visible from Lusk Boulevard. The access road is visible in Exhibit 8, a Google satellite map. The access road had a long, shallow slope uphill. The slope with the Ranger's tracks was much steeper than the slope of the access road. Murphine measured the hillside with the Ranger tracks on it to be between 30 and 15 degrees.

Cheney's medical records (Exhibit 29) show that he was admitted to the hospital from August 9, 2011 to August 19, 2011, and that he received medical treatment. He had a closed head injury and a broken clavicle. He also suffered from short term memory loss after the accident.

Jason Nytes Interview

Murphine interviewed Nytes in person at the San Diego Cal/OSHA office on September 2, 2011. Nytes said he had been a foreman for two years before

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[9] Curry told Murphine that the crew offloaded the Ranger near a picnic table. Murphine remembered seeing the picnic table on August 25. She circled the picnic table on Exhibit 9. She went back to that spot and saw the Ranger's tracks. She believed that they were the Ranger's tracks based on the size of the tracks, the width, spacing, and location. The tracks were too close together to be the tracks of a truck. They were near the telephone poles, heading up the hill towards telephone pole #1. When she spoke with the witnesses, they identified seeing the same tracks on the day of the accident. Carmody told Murphine that the tracks were the first thing he found when he was looking for Cheney, so he followed the tracks.

[10] The parking lot was for a building on Sorrento Valley Boulevard.

the accident. Nytes told Murphine that the crew was pulling line from the top of the hill on the south side of Lusk Boulevard north across Lusk Boulevard.

Nytes asked Cheney to take a picture of Carmody as he was on the cable crossing Lusk Boulevard, and then to meet him at pole #1 on the other side of Lusk Boulevard. Cheney took off in the Ranger to take the photo and meet Carmody at pole #1. Nytes told Cheney that there was an access road, but he did not know how to get to it. Nytes assumed that Cheney would use his smart phone to pull up Google maps to find how to get to the access road because that typically was what they would do. That was the last time Nytes saw Cheney before the accident.

Nytes was aware of Employer's IIPP and the Code of Safe Practices. Employer had safety orientation training and tool box meetings every Monday.

Murphine asked Nytes very specific detailed questions about heat illness. Nytes was not very familiar with heat illness or Employer's HIPP. He did not really understand the heat illness prevention requirements, such as how to monitor the weather or procedures for high heat. He had a basic understanding of some heat illness symptoms and the requirement to provide water and keep hydrated. He could identify heat cramps and heat stroke.

Murphine asked Nytes what he would do if someone went down with heat illness symptoms in a remote area where there was no cell phone reception. Nytes responded that they would call 911. He would sit them down, and get them to drink water. He did not know the requirements for shade or cooling for treating someone with heat illness. She asked him what Employer's crew did for shade. Nytes said that they did not have shade.

Nytes said that the Ranger was used primarily to get to remote locations and that he was the one who usually used it. He used it frequently, up to four times a month. Everyone on the crew drove the Ranger except for Bradford.

The Ranger was used on graded roads and bushwhacking where there was no road at all. Nytes said he did not receive any training or instructions on use of Ranger. He did not instruct his crew on use of the Ranger. There was no policy on where the Ranger could be used. The Ranger was driven on public roads for short distances. However, the Ranger was not licensed for operation on public roads. It specifically so states on the Ranger and it does not have a license plate. It does not have mirrors, a windshield or other equipment required for operating on a public road.

Nytes told Murphine that he and the crew used the seat belt when they drove it on a public road, but when they were off road, they did not wear the

seat belts. They were concerned that the Ranger would tip over and they would have to jump free. He had flipped it over himself.

Nytes told Murphine that Employer added bars to the Ranger about 2008. It was for setting poles and hauling poles. Nytes said that the Ranger was breaking from horseplay. Employees were playing with it. For example, they would "jump" the Ranger.

Justin Bradford Interview

Murphine interviewed Bradford on September 2, 2011. He did not provide any additional information on how the accident occurred.

Murphine questioned Bradford about IIPP and heat illness issues. Regarding heat illness, Bradford told Murphine that he was trained to stay hydrated. Bradford did not know how to recognize symptoms of heat illness or what to do if someone had a heat illness. He thought the person should get into the truck and turn on the air conditioning. He did not know about monitoring the weather or provisions for shade.

Regarding Employers' IIPP, Bradford was aware of its existence. They had safety meetings every week. They went over the job every morning. He had attended the OSHA 10 hour course as well.

Michael Cheney Interview

Murphine interviewed Cheney on September 14, 2011 at a long term health facility. Cheney had no recollection of what happened on the day of the accident. As a result of the accident, he suffered a concussion and a broken clavicle. He was hospitalized as a result of his injuries, but he did not remember how long he was in the hospital. As of the day of the interview, he continued to have short-term memory issues. He was transferred to the long term health facility after he was released from the hospital. He did not know how long he had been there or how long he would be there.

Cheney recalled that he received training from Employer which included a CPR class and a pole climbing class. He had also taken the 10 hour OSHA course and forklift training. He said he had not had any training on heat.

Cheney told Murphine that he operated the Ranger about twice per month, using it to carry people and materials at remote job sites. He drove it in rough country where there were no roads or graded and dirt roads. Sometimes they drove it on public streets for short distances. Cheney had worked for Employer for six years, but he had never seen the owner's manual.

Cheney told Murphine that he wore the Ranger's seat belt when he drove on the street, but not when he drove off road so he could jump out if the Ranger tipped over. Cheney was aware that the Ranger had tipped over when Nytes was driving. Cheney described handling of the Ranger as "tippy." Employer changed the tires, and it affected the handling.

Training Documents

Murphine testified that she received documents from Employer that indicated that employees were trained on multiple topics on the same day. The documents were dated June, 2008. There were no training records for Cheney for 2009 or 2010. Cheney attended CPR and Code of Safe Practices training in 2011.

Docket 12-R3D2-0492

Citation 1, Item 1, General, § 2340.17(a)

Unguarded Live Electrical Wires

Summary of Evidence

The Summary of Evidence above is incorporated by reference.

Murphine testified that on August 30, 2011 when Murphine was at Employer's El Cajon yard and garage, she saw an electrical junction box[11] on the wall behind the Ranger. (Exhibit 12[12]) The box was less than seven feet off the ground level. Only one screw held the cover plate in place, but the cover plate was designed to be held in place by four screws. The cover did not fully cover the opening, and she could see the wires beneath the cover.

She tested the wires with a voltage meter light pen, and it indicated that the wires were energized at over 50 volts (Exhibit 18). Nothing cordoned off the junction box. Supervisor Krosner had an office next to the box. Access to the area where the box was located was unlimited. Curry told Murphine that at the yard near the office, employees meet to pick up their tools and equipment before going to a job.

Based on the above, Murphine issued Citation 1, Item 1 for a general violation of § 2340.17(a).

Employer did not present any evidence on this issue.

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[11] An electrical junction box is a place where electrical wires make a connection.
[12] Exhibit 12 depicts the wall behind the Ranger where the junction box was located.

Findings and Reasons for Decision

The Employer's employees were exposed to the hazard of unguarded live electrical wires.

The Division established a violation of § 2340.17(a).

Employer did not appeal the classification of general. It is established by law.

The proposed penalty of $205 is appropriate.

The Division cited Employer for a violation of § 2340.17(a), which reads as follows:

> Except as elsewhere required or permitted by these orders, energized parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures or by any of the following means:
> (1) By location in a room, vault, or similar enclosure that is accessible only to qualified persons.
> (2) By suitable permanent, substantial partitions or screens so arranged that only qualified persons will have access to the space within reach of the energized parts. Any openings in such partitions or screens shall be so sized and located that persons are not likely to come into accidental contact with the energized parts or to bring conducting objects into contact with them.
> (3) By location on a suitable balcony, gallery, or platform so elevated and arranged as to exclude unqualified persons.

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

Murphine credibly testified that she saw an electrical junction box only partially covered, and that the wires tested live and energized at over 50 volts.

Employer argued that the Division did not prove employee exposure. The standard for finding employee exposure is found in *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003). The Appeals Board adopted the Federal Occupational Safety and Health Review Commission interpretation of the "exposure" requirement. It held that the Division may establish employee exposure to a violative

condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger. The "zone of danger" is "that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Id.*)

The junction box was located in Employer's yard where employees meet before going out on jobs. It was near the supervisor's office. Murphine credibly testified that the box was less than seven feet off the ground.

Where the Division presents evidence, which, if believed, would support a finding if unchallenged, the burden of producing evidence shifts to the employer to present convincing evidence to avoid and adverse finding. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004).) Here, Employer did not offer any evidence to show that there was no employee exposure although it had the motive and opportunity to do so. This raises the inference that the evidence, if produced, would be adverse. (*Shehtanian v. Kenny* (1958) 156 Cal.App.2d 576,; *Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (June 21, 1982).) An admission may be inferred in circumstances where a party is silent where the party could explain or deny evidence against him. (See Evidence Code § 413[13]) Under Evidence Code § 1220[14], silence may be considered a tacit admission. (See *In re Neilson's Estate* (1962), 57 Cal.2d 733, 746) Therefore, an admission by Employer is inferred that there was employee exposure.

Under these circumstances, the Division proved employee exposure by a preponderance of the evidence. The Division established a violation of § 2340.17(a).

The Division classified the violation as general. Employer did not contest the violation's classification. An issue not properly raised on appeal is deemed waived. (See § 361.3 ["Issues on Appeal"]; *Bourgeois, Inc.,* Cal/OSHA App. 99-1705, Denial of Petition for Reconsideration (Apr. 26, 2000); *Western Paper Box Co.,* Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

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[13] Evidence Code § 413 provides, "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

[14] Evidence Code § 1220 provides, "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

Employer stipulated that the penalty was calculated in accordance with the Division's policies and procedures. Therefore, a penalty of $205 is found appropriate and is assessed.

Citation 1, Item 2, General, § 3203(a)

Incomplete IIPP

Summary of Evidence

Both Summaries of Evidence above are incorporated by reference.

Murphine testified that she reviewed Employer's written IIPP. She reviewed Exhibit 19 and all other documents Employer provided. Employer's safety program did not include all of the required elements. It did not include three elements: 1. A system of communication with employees, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. (§ 3203(a)(3)) 2. Procedures for identifying and evaluating work place hazards for new hazards and procedures. (§ 3203(a)(4)B,C) 3. Procedures to correct hazards when an imminent hazard exists. (§ 3203(a)(6)B)

Based on the above, Murphine issued Citation 1, Item 2 for a general violation of § 3203(a).

Employer did not offer any evidence on this issue.

Findings and Reasons for Decision

Employer's Illness and Injury Prevention Program did not contain all the required elements. The Division established a violation of § 3203(a).

The proposed classification of general was not appealed and is therefore established by operation of law.

The proposed penalty of $410 is affirmed.

The Division cited Employer for a violation of § 3203(a). Section 3203(a) requires every employer to establish, implement, and maintain an effective Injury and Illness Prevention Program (IIPP). The IIPP must be in writing and contain seven required elements. The Division alleged that Employer's IIPP did not contain the elements required by subsections (a)(3), (a)(4)(B), (a)(4)(C), and (a)(6)(B), which read as follows:

(a) 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:

(1) …

(2) …

(3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about the hazards, labor/management safety and health committees, or any other means that ensures communication with employees. [Exception omitted]

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.

(A) …

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

(5) …

(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) …

(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) ….

A review of Employer's IIPP (Exhibit 19) reveals that it does not contain provisions for a system communication with employees, procedures for identifying and evaluating work place hazards for new hazards and

procedures, or provisions to correct hazards when an imminent hazard exists. Murphine credibly testified that the other documents she examined did not contain the missing provisions. There is no reason to doubt her testimony, and it is credited.

Employer argued that Exhibit 19 did not contain its entire IIPP, and, therefore, the Division did not prove that the cited provisions were missing from Employer's IIPP. Where the Division presents evidence, which, if believed, would support a finding if unchallenged, the burden of producing evidence shifts to the employer to present convincing evidence to avoid and adverse finding. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004).)

Employer did not offer any evidence to show that there were other portions of its IIPP that were not presented at hearing that contained the elements in question, although Employer had the motive and opportunity to do so. It is not reasonable to believe that Employer would withhold relevant portions of its IIPP. As discussed above, this raises the inference that the evidence, if produced, would be adverse to employer. As discussed, an admission may be inferred where a party is silent in situations where the party could explain or deny evidence against him. (*In re Neilson's Estate* (1962), 57 Cal.2d 733, 746); Evidence Code § 413, § 1220) Therefore, an admission by Employer is inferred that the IIPP sections in question did not exist.

To establish that an omission amounts to a failure to establish an IIPP, the Division must show the probable consequences of an accident caused by the omission in the IIPP in relation to a specific hazard. (See *W.F. Scott & Co., Inc.* Cal/OSHA App. 95-2623, Decision After Reconsideration (Oct. 29, 1999); *Tenneco West, Inc.*, Cal/OSHA App. 79-535, Decision After Reconsideration (Jan. 24, 1985).) Here, the failure to have provisions to identify and evaluate work place hazards connected with driving the Ranger on hilly and rough terrain resulted in the accident in question[15], which, in turn, caused a serious injury.

Accordingly, it is found that the omissions in Employer's IIPP are significant enough that they amount to a failure to establish an effective IIPP.

Therefore, the Division established a violation of § 3203(a) by a preponderance of the evidence.

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[15] Employer did not evaluate and identify the hazards associated with driving the Ranger off road on hilly, rough terrain. Consequently, employees were not trained on the relevant hazards and were not issued appropriate personal protective equipment. Causation is more fully discussed below in connection with Citations 2, 3, and 5.

Employer did not appeal the classification. As discussed, it is therefore established by law.

Employer stipulated that the proposed penalty was calculated in accordance with the Division's policies and procedures. Hence, a penalty of $410 is found appropriate.

Possible reduction of this penalty for multiple violations concerning one hazard is discussed below in connection with Citation 3.

Citation 1, Item 3, General, § 3395(f)(1)

Incomplete Heat Illness Training

Citation 1, Item 4, General, § 3395(f)(3)

Incomplete Heat Illness Prevention Plan (HIPP)

Summary of Evidence

All Summaries of Evidence above are incorporated by reference.

Murphine testified that she received Employer's HIPP in response to her document request. (Exhibit 20) Employer's employees worked outdoors, so they were required to be trained on all topics relating to heat illness including risk factors, procedures for compliance, drinking water, acclimatization, types of heat illness, reporting symptoms, procedures to respond to heat illness, procedures to contact emergency medical services, and procedures to ensure clear and precise directions can and will be provided to emergency personnel.

Murphine testified that Employer did not have any record of training on the heat illness standard and when Murphine interviewed the employees, they had only a partial understanding of heat illness and how to treat it. Accordingly, Murphine issued Citation 1, Item 3 for a general violation of § 3395(f)(1).

Murphine testified that she examined all of Employer's documents relating to heat illness. (Exhibits 19, 20) She determined that Employer's HIPP was deficient because it did not have provisions for high heat procedures. Exhibit 20 was also missing provisions regarding shade, acclimatization, and heat illness emergency procedures. For example, if an employee working in a remote location called 911, there were no provisions for how an employee would describe the location of an injured employee. He might be in a place without roads or a street address. Employer did not have in its plan provisions for shade for workers. A truck is suitable for shade only if the air conditioner is running. Otherwise, the inside of the truck might

be hotter than the outside. For that reason, she testified, an employer may not rely on the availability of a truck or trucks to provide shade. Accordingly, Murphine issued Citation 1, Item 4, for a general violation of § 3395(f)(3).

Employer did not offer any evidence on these issues.

Findings and Reasons for Decision

Employer did not provide its employees with required training relating to heat illness and Employer's Heat Illness Injury and Prevention Plan (HIPP). The Division established a violation of § 3395(f)(1).

Employer's Heat Illness and Injury Prevention Plan did not contain all the required elements. The Division established a violation of § 3395(f)(3).

Employer did not contest the violations' classifications. They are established as general by law.

The proposed penalties of $410 for Citation 1, Item 3 and $205 for Citation 1, Item 4 are affirmed.

The Division cited Employer for violations of § 3395(f)(1) and § 3395(f)(3), which read as follows:

> **§3395 (f)(1) Heat Illness Prevention; Training. Employee Training.** Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness:
>
> (A) The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment.
> (B) The employer's procedures for complying with the requirements of this standard.
> (C) The importance of frequent consumption of small quantities of water, up to 4 cups per hour, when the work environment is hot and employees are likely to be sweating more than usual in the performance of their duties.
> (D) The importance of acclimatization.

(E) The different types of heat illness and the common signs and symptoms of heat illness.
(F) The importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves, or in co-workers.
(G) The employer's procedures for responding to symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.
(H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.
(I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

§ 3395(f)(3) Heat Illness Prevention; Training. The employer's procedures for complying with each requirement of this standard required by subsections (f)(1)(B), (G), (H) and (I) shall be in writing and shall be made available to employees and to representatives of the Division upon request.

Employers in the construction industry[16] must comply with the high-heat procedures, § 3395(e). (§ 3395(a)(2)(B)) Section 3395(e) provides as follows:

(e) **High-heat procedures.** The employer shall implement high-heat procedures when the temperature equals or exceeds 95 degrees Fahrenheit. These procedures shall include the following to the extent practicable:
(1) Ensuring that effective communication by voice, observation, or electronic means is maintained so that employees at the work site can contact a supervisor when necessary. An electronic device, such as a cell phone or text messaging device, may be used for this purposed only if reception in the area is reliable.
(2) Observing employees for alertness and signs or symptoms of heat illness.

[16] Employer did not dispute that its employees worked in the construction industry or that they worked in an outdoor place of employment. Section 3395 applies to all outdoor places of employment. § 3395(a)(1)

(3) Reminding employees throughout the work shift to drink plenty of water.
(4) Close supervision of a new employee by a supervisor or designee for the first 14 days of the employee's employment by the employer, unless the employee indicates at the time of hire that he or she has been doing similar outdoor work or at least 10 of the past 30 days for 4 or more hours per day.

A review of Employer's HIPP (Exhibits 19 and 20) shows that Employer had provisions on page 105 that complied with subsections (f)(1)(A) on personal risk factors, (f)(1)(C) on drinking water, (f)(1)(E) on types, signs and symptoms of heat illness, (f)(1)(G) on procedures for responding to heat illness, and (f)(1)(H) on procedures for contacting emergency personnel.

There were no written procedures that complied with (f)(1)(B)—procedures for complying with the standard—which includes the procedures for water (§ 3395(c)), shade (§ 3395(d)), and high heat (§ 3395(e)). Employer's HIPP did not have any provisions on acclimatization [(f)(1)(D)], immediately reporting signs of heat illness [(f)(1)(F)], transporting employees to a point where they could the reached by medical personnel [(f)(1)(H)], or giving clear and precise directions to the work site to emergency responders and designation of a person to be available [(f)(1)(I)].

Employer did not present any evidence that its employees had been trained on its HIPP [(f)(1))B)], acclimatization [(f)(1)(D)], immediately reporting signs of heat illness [(f)(1)(F)], transporting employees to a point where they could the reached by medical personnel [(f)(1)(H)], giving clear and precise directions to the work site to emergency responders and designation of a person to be available [(f)(1)(I)], shade or high heat. There were no written records.

When Murphine questioned Employer's employees, they responded with vague knowledge about heat illness. Curry and Carmody said that they used the truck for shade. Murphine credibly testified that the inside of a truck may be hotter than outside a truck. Cheney told Murphine that he had not had any training on heat. Bradford and Nytes had had some training on heat illness.

Carmody credibly testified that he received heat illness training from Employer when he was hired and at the start of summer. Carmody listed the topics covered in the training. Neither Nytes, nor Carmody nor Bradford said that they had been trained on any of the topics missing from Employer's HIPP—acclimatization [(f)(1)(D)], immediately reporting signs of heat illness [(f)(1)(F)], transporting employees to a point where they could the reached by medical personnel [(f)(1)(H)], giving clear and precise directions to the work

site to emergency responders and designation of a person to be available [(f)(1)(I)], or shade and high heat.

Employer did not present any evidence that its HIPP contained all the required elements or that its employees had been trained on all the required topics, although it had the motive and opportunity. As previously discussed, Employer's silence is a tacit admission that the written provisions do not exist and no training was given on the topics.

Consequently, it must be found that although Employer has conducted heat illness training and has a written HIPP, both are incomplete. The Division has therefore established violations of §§ 3395(f)(1) and 3395(f)(3).

Employer did not appeal the classification of the violations. Therefore, both are established by law as general.

The Appeals Board has long held that an employer may be cited, and the existence of numerous violations concerning the same hazard may be established, but only one penalty may generally be assessed against an employer for multiple violations concerning one hazard. (*Pace Arrow, Inc.,* Cal/OSHA App. 78-1016, Decision After Reconsideration (Nov. 19, 1984).)

Here, the Division cited Employer for two violations related to heat illness. The Appeals Board has repeatedly refused to eliminate civil penalties where the hazards involved different pieces of equipment in different locations, even where the generic hazard was the same. (*Ontario Residential Manor,* Cal/OSHA App. 96-1260, Decision After Reconsideration (June 30, 2000).) Citations are not duplicative unless they can be abated by one act. (*Color Specialists, Inc.,* Cal/OSHA App. 95-3883, Decision After Reconsideration (June 30, 2000).)

Completing the written HIPP would not cause employees to receive training. Conversely, giving employees complete training on heat illness topics would not create a complete HIPP. Thus, the citations are not duplicative and the penalties are therefore not duplicative.

Employer stipulated that the penalties were calculated in accordance with the Division's policies and procedures. Accordingly, the proposed penalties of $410 for Citation 1, Item 3 and $205 for Citation 1, Item 4 are found appropriate and are affirmed.

Dockets 12-R3D2-0493 and 0494

Citation 2, Serious, § 3203(a)(4)

Ineffective Evaluation and Identification of Work Place Hazards

Citation 3, Serious, § 3203(a)(7)

Incomplete Training on Work Place Hazards

Summary of Evidence

All Summaries of Evidence above are incorporated by reference.

Murphine obtained and reviewed the Owner's Manual for Maintenance and Safety (Manual) for the 2007 Ranger 4x4 700 EFI. (Exhibit 21) The manual identified many hazards, and explained the hazards and the procedures for safe operation and maintenance of the Ranger. Some of these procedures included use of appropriate personal protective equipment (PPE) such as eye protection (Manual, inside front cover, p. 10), prohibition of operating the vehicle on terrain exceeding 15 degrees (Manual, inside front cover, pp. 14, 44), prohibition of operating the vehicle on public roads or pavement (Manual, inside front cover, pp. 7, 10, 14), use of seat belts at all times (Manual, pp. 6, 10, 12, 33, 42), use of safety decals and warning labels (Manual, pp. 5, 6, 8), proper riding techniques (Manual, inside front cover, pages 7, 10), proper tire size (Manual, p. 11), vehicle modifications (Manual, pp. 12, 13), pre-ride inspections (Manual, pp. 10, 39) and proper cargo loads (Manual, pp. 50, 51). The cab frame was not designed or intended to provide roll-over protection. (Manual, p. 6)

The Manual stated that no person should operate the Polaris unless the driver had read the Manual, the safety decals, and had received proper instruction. (inside front cover, first unnumbered page, pages 5, 6, 8, 10, 15) Worn or illegible decals were to be replaced. (page 5). Murphine testified that nearly all of the safety decals in Employer's Ranger were missing or illegible when she inspected it. Two illegible decals were on the front dash (Exhibits 22 and 24) and a third unreadable decal was at the front of the cargo box (Exhibit 23).

According to the Manual, no person was to operate the vehicle on hills too steep for the driver's ability (page 11) due to the rollover risk. The Manual detailed the hazards associated with climbing a hill, which included stalling, rolling backwards, and overturning (pages 14, 44). The manual directed the driver to inspect a hill before driving up it (page 11) and stated that it should not be driven on a hill with a slope greater than 15% (page 44).

The Ranger was strictly an off-road vehicle, and it was licensed for off – road use only. (Exhibit 22). The Manual stated the danger of operating the vehicle on a paved surface was loss of control because the tires were designed

for off road use only. (pages 14, 15, 19) The manual explained the dangers of driving on rough terrain (page 10), slippery surfaces (pages 10, 43), on the sides of hills (pages 10, 45), over obstacles (pages 10, 47), and driving in reverse (pages 10, 48). Helmets were recommended when driving in an aggressive manner. (page 10)

The Manual stated that any modifications to the original equipment creates a substantial safety hazard and increases the risk of bodily injury. (page 13) It further stated that the addition of certain accessories may change the handling characteristics, and said to use only Polaris-approved accessories. (page 13)

Murphine noted that Employer added a U-shaped cradle, a rack and bracket (Exhibits 27 and 28) to the original Ranger cab cage which Employer made. The manufacturer did not recommend or approve these modifications.

The Manual stated that use of non-standard tires could adversely affect vehicle handling, which could result in vehicle damage. (page 91) The designated tire size for Employer's Ranger was 26 x 8-12 for the front tires and 26 x 11-12 for the rear tires. (page 109) The invoices for the Ranger's tires (Exhibit 26) showed that the Ranger's front tires were 26 x 9-12 and the rear tires were 26 x 12-12.

Murphine testified that she issued Citation 2 for a serious violation of § 3203(a)(4) because Employer did not do an initial evaluation of hazards when it purchased the Ranger or any inspection on the job site to evaluate and identify the hazards of using the Ranger on the job site. Both Curry and Nytes told Murphine that they did not do any inspections.

Driving the Ranger generally, and in this situation specifically, presented a number of hazards, many of which were identified in the Manual, as described above. For example, Employer did not evaluate whether Cheney had the requisite skills to drive up hills or on rough terrain. The Manual prohibited driving the Ranger on a hill steeper than 15 degrees, but the Ranger was driven up a hill steeper than that. Murphine measured the hillside with the Ranger tracks on it to be between 30 and 15 degrees. Employer did not identify and evaluate this hazard. The Ranger's tires were not the size recommended by the manufacturer. Employer did not identify and evaluate this hazard. The Manual prohibited driving on pavement or on public roads. Employer did not identify and evaluate this hazard. The Manual prohibited modifications. Employer added the U-shaped carrier on top, but did not identify and evaluate this hazard, as for example, whether the modification increased the tip- over hazard by raising the center of gravity. The Ranger had tipped over at least twice, once with Nytes driving and once with Carmody driving, but Employer did not evaluate the rollover hazard.

Murphine classified the violation as serious because there is a realistic possibility of serious injury or death in the event of an accident caused by failure to inspect, identify, and evaluate hazards. The Ranger's gross vehicle weight is 2,750 pounds. The hazard associated with the violation is a roll-over, loss of control, collision with another vehicle or an object, and ejection from the vehicle. The driver is likely to be thrown from the vehicle if not wearing a seat belt. There is no windshield or enclosure around the driver. The types of injuries to be expected are lacerations, head injuries, concussions, broken vertebrae, paralysis, other broken bones, amputations, crushing injuries and internal injuries (Manual, pp. 5, 108). Murphine testified that her opinion was based on her education, training and experience investigating about a dozen forklift accidents.

Murphine testified that she issued Citation 3 for a serious violation of § 3203(a)(7) because the employees were not trained on the specific job hazards associated with operation of the Ranger. Curry told her that he did not do any training on the Ranger and that it was like all the other vehicles. Carmody and Nytes told her they did not have training specific to the Ranger. As previously discussed, the Ranger had a number of significant hazards associated with it, some of which are not commonly encountered in truck driving.

Murphine classified the violation as serious for the same reasons that she classified Citation 2 as serious. The hazards[17] and potential injuries[18] associated with Citation 3 are the same as those associated with Citation 2.

Findings and Reasons for Decision

Employer did not implement its IIPP to effectively identify and evaluate work place hazards. Employer did not inspect and evaluate the Ranger to adequately identify the hazards to which its employees could be exposed when operating it. The Division established a violation of § 3203(a)(4).

Employer did not implement its IIPP to adequately and effectively train its employees on all the hazards and hazardous operations present in the work place. Employer did not provide its employees with training and instruction on hazards associated with operating the Ranger.

[17] Roll over, loss of control, collision, being thrown from the vehicle.
[18] Lacerations, head injuries, concussions, broken vertebrae, paralysis, other broken bones, amputations, crushing injuries and internal injuries.

The Division established a violation of § 3203(a)(7).

Both violations were properly classified as serious.

The proposed penalties of $5,400 for Citation 2 and $7,200 are affirmed.

The Division cited Employer for ineffectively implementing § 3203(a)(4) and (a)(7), which provide as follows:

(a) 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:
(1) …
(2) …
(3) …
(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
(A) When the program is first established; [exception omitted]
(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
(C) Whenever the employer is made aware of a new or previously unrecognized hazard.
(5) …
(6) …
(7) Provide training and instruction:
(A) When the program is first established; [exception omitted]
(B) To all new employees;
(C) To all employees given new job assignments for which training has not been previously 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.

Employer had an IIPP in place on the date of the accident. (Exhibit 19) The Division has alleged that the cited provisions of the IIPP are ineffective.

To establish an IIPP violation, the Division must prove that flaws in a program amount to a failure to establish, implement or maintain an effective program. A single, isolated failure to implement a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (See *GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, dba Fisher Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).) On the other hand, the Board has held that an IIPP can be proved not effectively maintained on the ground of one deficiency, if that deficiency is shown to be essential to the overall program. (*Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).)

Murphine credibly testified regarding a myriad of potential hazards associated with driving the Ranger, such as driving the Ranger on a public road or asphalt. Murphine testified to her extensive education, experience and training in the health and safety fields. She is current in her training. (See Labor Code § 6432(g)) Opinions that are sufficiently supported by education, training, or experience are sufficient to support a finding. (See *Home Depot USA, Inc. # 6617*, *Home Depot,* Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec, 24, 2012); *Davis Brothers Framing Inc.*, Cal/OSHA App. 05-634, Decision After Reconsideration (Apr. 8, 2010).) Murphine had courses in college that included physics, centers of gravity, and stability. She has had training regarding job hazards, accidents, and experience from investigations of accidents, including forklift accidents.

Therefore, Murphine is found competent to render an opinion regarding hazards associated with the Ranger. Significantly, as previously discussed, Employer did not offer any evidence on this issue although it had the motive and opportunity to do so. Under the circumstances of this case, Employer's silence is a tacit admission. Therefore, Murphine's opinions are credited.

Both Nytes and Carmody drove the Ranger when it tipped over while they were performing their job duties. This established, at a minimum, that a tip-over hazard existed.

Supervisor Curry told Murphine that Employer did not do any special training regarding the Ranger. Carmody testified that he received basic training on operation of the Ranger, but Carmody testified that there was no special training on how to drive it on hills or on how to prevent tip-overs. Carmody had not seen the Ranger's owner's manual. Nytes told her he had not received training on the Ranger.

The statements by Curry and Nytes are not hearsay because they are authorized admissions. Curry was Employer's Director of Safety. Nytes was the foreman. A statement by a foreman or supervisor is attributed to his or her employer, and if the statement is one against the interests of the employee, it falls within the authorized admission exception to the hearsay rule. (*Devon Construction Inc.*, Cal/OSHA App. 09-3398, Denial of Petition for Reconsideration (Feb 16, 2012) citing Evidence Code § 1222; *Bill Nelson General Engineering Construction, Inc.* Cal/OSHA App. 09-3769, Denial of Petition for Reconsideration (Oct. 7, 2011).) Evidence Code § 1222 provides that evidence offered against a party is not made inadmissible by the hearsay rule if the statement was made by a person authorized by the party to make statements concerning the subject matter of the statement.

Employer did not do an inspection or evaluation of the driving hazard on the day of the accident before Cheney drove the Ranger from pole #4 towards pole #1. There was no evidence that Employer ever did an inspection to identify the hazards associated with driving the Ranger that were different from the hazards of vehicles legal to drive on public streets. The employees were not briefed on the hazards of driving off road. Apparently, Curry assumed that the employees were experienced and did not need instruction. This is not a defense to a § 3203(a)(4) or § 3203(a)(7) violation. (See *Hill Crane Service*, Cal/OSHA App. 12-2475, Denial of Petition for Reconsideration (Dec. 23, 2013).)

Therefore, the Division established violations of §§ 3203(a)(4) and 3203(a)(7).

Classification and Penalty

The Division classified both violations as serious.

In this case, the hazard associated with both violations is a collision or roll-over from a loss of control of the Ranger due to lack of inspection and identification of the hazard (Citation 2) or lack of training to avoid the hazards (Citation 3). The current legal standard in use for violations that occur on or after January 1, 2011, is expressed in Labor Code section 6432, subdivision (a) which states:

> 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** [emphasis added] that death or serious physical harm could result from the actual hazard created by the violation.

The legal standard "realistic possibility" is not defined in the safety orders. When words are not defined in safety orders, the common and ordinary meaning of words is used. (*D. Robert Schwartz dba Alameda Metal Recycling and Alameda Street Metals*, Cal/OSHA App. 96-3553, Decision After Reconsideration (March 15, 2001), citing *Kenneth L. Poole, Inc.*, Cal/OSHA Decision After Reconsideration (April 18, 1991).)

The Appeals Board utilized a "realistic possibility" standard in *Oliver Wire & Planting Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980) when analyzing whether an employer must ensure workers possibly exposed to the danger of splashing caustic chemicals were required to wear eye protection. The Appeals Board determined that it is unnecessary for DOSH to "present actual proof of hazardous splashing if a realistic possibility of splashing exists." They explained, "[C]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation) of the existence of unsafe working conditions if such a prediction is clearly within the bounds of human reason, not pure speculation." This definition was again utilized in *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001).

The courts presume that the Legislature is aware of existing and related laws when enacting a statute and intended to maintain a consistent body of rules. (*Stone Street Capital, LLC v. California State Lottery Com'n* (2008) 165 Cal. App. 4th 109, 118). Presumably, the Legislature was aware of the Appeals Board's interpretation of "realistic possibility," and by adopting that language, approved the Board's definition. (See *Moore v. California State Board of Accountancy* (1992) 2 Cal. 4th 999, 1017, 9 Cal. Rptr. 2d 358, 831 P. 2d 798.)

Furthermore, when analyzing the legislative history of the revised Labor Code section 6432, subdivision (a), there is little question that a lower standard of proof was intended when switching from "substantial probability" to "realistic possibility." Addressing criticism of the pre-amended Labor Code section 6432, subdivision (a), and the difficulty in proving a serious violation, the Assembly Committee on Labor and Employment stated:

> Critics also point to other interpretations of the current Appeals Board that make it exceedingly difficult to prove 'serious violation' cases. For example, the Appeals Board has also applied a strict interpretation of the requirements that there be a 'substantial probability' that serious physical harm occur – at least a 50 percent chance. In fact, in a recent article the Chief of DOSH characterized this interpretation by stating, "that is impractical, unrealistic and calculated to make it almost impossible for us to meet our burden." (Assem. Com. On Labor Standards, on Assem.

Bill No. 2774 as amended April 14, 2010, May 5, 2010 date of hearing, (reg. sess. 2009-2010).)

Thus, the Legislature clearly intended a lesser, easier to prove, standard when implementing "realistic possibility" over the previous legal requirement of "substantial probability." An expression of the Legislature concerning its later understanding of the effect of prior legislation must be given consideration, unless there are more contemporaneous expressions by the Legislature indicating otherwise. (See *Luis Alejo et al v. Tom Torlakson, as Superintendent of Public Instruction, Etc. et al*, 212 Cal. App. 4th 768, 151 Cal. Rptr. 3d 420.)

Clearly, the likelihood of serious injuries from a collision or tip-over meets the lesser "realistic possibility" test. The fact that a serious injury occurred here establishes that a serious injury is not speculative. (*Oliver Wire & Planting Co., Inc. supra.*) Therefore, the violation was properly classified as serious.

Employer stipulated that the penalties were calculated in accordance with the Division's policies and procedures. Accordingly, penalties of $5,400 for Citation 2 and $7,200 for Citation 3 are found appropriate.

Citation 1, Item 2, Citation 2 and Citation 3 are all citations relating to Employer's IIPP. As discussed above, the Division may issue multiple citations for a single hazard, but only one penalty may be assessed. As discussed, citations are not duplicative unless they can be abated by one act. (*Color Specialists, Inc.,* Cal/OSHA App. 95-3883, Decision After Reconsideration (June 30, 2000).) The Appeals Board has repeatedly refused to eliminate civil penalties where the hazards involved different pieces of equipment in different locations, even where the generic hazard was the same. (*Ontario Residential Manor,* Cal/OSHA App. 96-1260, Decision After Reconsideration (June 30, 2000).)

Here, the hazards relate to the same piece of equipment, the Ranger. However, abatement of one hazard will not abate the other hazards. If Employer does inspections and identifies the hazards associated with driving the Ranger, taking those steps does not necessarily include the provision of training and instruction to the employees. Conversely, if Employer instructs the employees on the possible hazards associated with driving the Ranger, this action does not act as an inspection of any one particular job site to identify the potential hazards present. Therefore, the citations cannot be abated by one act. The penalties are not duplicative, and both will be assessed.

Docket 12-R3D2-0495

Citation 4, Serious, § 3328(f)

Improper Vehicle Modifications

Summary of Evidence

All Summaries of Evidence above are incorporated by reference.

Murphine testified that she issued Citation 4 for a serious violation of § 3328(f) because Employer made modifications to the Ranger that were not authorized by the manufacturer or in accordance with good engineering practice. The rack added weight in the front, which made the vehicle more likely to tip over in front. The U-shaped carrier added weight at the top, which raised the center of gravity and decreased the Ranger's stability. In addition, Employer used tires other than the recommended tires, which adversely affects the Ranger's mobility and handling. The accessories and additions were not made by Polaris. Manual warned "Do not make any modifications to your RANGER." (Manual, p. 13). The Manual further stated that modifications, unless approved by Polaris, "create a substantial safety hazard and increase the risk of bodily injury." (Manual, p. 13) It added that "The addition of certain accessories, including (but not limited to) movers, blades, ***tires***, sprayers, or ***large racks***, may change the handling characteristics of the vehicle. Use only Polaris-approved accessories." (Manual, p. 13, emphasis added)

Murphine testified that Cheney told her that Employer obtained the Ranger in 2007 or 2008. Cheney believed that the Ranger was modified with the rollers on top for the purposed of hauling telephone poles to remote areas, but he had never done that.

Carmody testified that the rollers top of the Ranger were used during the fires in 2007 to help with the setting of poles. His understanding was that during the 2007 fires, there were a lot of poles that Employer's trucks could not get to. Someone would hand dig a hole, then a helicopter would lower a pole into the hole. There are "pikes," 12-foot poles with a spike, that men could manually use to straighten the pole. Someone manufactured the rollers so the Ranger could get under the pole and give it a push instead of men trying to push the pole.

Carmody testified that he had never used the Ranger to carry a pole. Carmody testified that the rollers were difficult. Attempts were made to carry things in the rollers, but most times, the attempts were unsuccessful. The attempts were unsuccessful because the Ranger did not have the maneuverability that it should.

Murphine classified the violation as accident-related serious because there is a realistic possibility of serious injury or death in the event of an accident caused by modifications to the Ranger that are not authorized by the manufacturer or in accordance with good engineering practice. The hazard associated with the violation is decreased stability, roll-over, loss of control, collision. Based on her investigation, Murphine determined that one of the causes of the accident was the modifications Employer made.

Murphine further testified that the types of injuries to be expected are lacerations, head injuries, concussions, broken vertebrae, paralysis, other broken bones, amputations, crushing injuries and internal injuries. Her opinion is based on her education, training and experience investigating about a dozen forklift accidents.

Employer did not offer any evidence on this issue.

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Findings and Reasons for Decision

Employer's employees were exposed to the hazard of operation of a vehicle with modifications that were not authorized by the manufacturer or in accordance with good engineering practice. The Division established a violation of § 3328(f).

The violation was properly classified as serious accident-related.

The proposed penalty of $14,400 is affirmed.

The Division cited Employer for a violation of § 3328(f). The relevant sections read as follows:

3328. Machinery and Equipment.

(a) Machinery and equipment shall be of adequate design and shall not be used or operated under conditions of speeds, stresses, or loads which endanger employees.

(f) Any modifications shall be in accordance with (a), and with good engineering practice.

The factual allegations of Citation 4 included the following:

The Polaris Ranger XP had been modified with the addition of welded brackets holding stabilizer bars to the existing Cab

> Frame, modifying the cab frame to add carrying capacity for telephone poles to the top of the Ranger. The modifications were made without addressing how the additional weight would affect the center of gravity of the vehicle, or how the welds would affect the structural integrity of the existing cab frame. The modifications were also contrary to the manufacturer's written instructions . . . . The added stabilizer/loading bars were not part of the original equipment manufacturer parts or accessories.

The parties agreed that Employer made modifications to the Ranger. The circumstantial evidence that Cheney operated the Ranger under conditions which caused it to roll over is convincing. Circumstantial evidence may be as persuasive and convincing as direct evidence and may properly be found to outweigh conflicting direct evidence. (*R & L Brosamer, Inc.*, Cal/OSHA App., Decision After Reconsideration (Oct. 5, 2011), citing *ARB, Inc.*, Cal/OSHA App. 93-2084, Decision After Reconsideration (Dec. 22, 1997).) The crooked tracks from the parking lot up the hill towards pole #1 (Exhibit 6), the beaten down grass (Exhibit 6), the location on the hillside where Carmody found tools that had been in the Ranger, Cheney's location on the hillside, and the Ranger's resting place at the bottom of the ravine (Exhibit 16) are all persuasive circumstantial evidence that Cheney operated the Ranger under speeds and stresses that caused a roll over, and thereby endangered the employee driving the vehicle.

Rollovers endanger the operator. Carmody testified, and Nytes told Murphine, that the Ranger operators did not wear seat belts when going over rough terrain. Cheney and the other drivers did not wear a seat belt because they wanted to be able to jump out in case the Ranger started to tip over. There was nothing to keep Cheney from being thrown from the Ranger. There was no evidence that the Ranger's seat belt malfunctioned. Carmody testified that he had not driven on that type of terrain and that he would not have driven up the hill in question because the terrain was too rough. This testimony corroborates the circumstantial evidence that Cheney operated the vehicle under conditions that endangered him.

In addition, Employer put tires on the Ranger that were not recommended by the manufacturer. (Exhibit 26, Manual p. 109[19]) The Manual's prohibition on using tires other than the recommended tires (Manual, pp. 13, 109) and Carmody's testimony that the new tires changed the handling of the Ranger is further evidence that the modifications to the Ranger were not in accordance with good engineering practice.

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[19] The Manual directs sizes 26 x 8-12 in front and 26 x 11-12 in the rear. Employer installed 26 x 9-12 in the front and 26 x 11-12 in the rear.

As previously discussed, an inspector's opinions that are sufficiently supported by education, training, or experience support a finding. (See *Home Depot USA, Inc. # 6617*, *Home Depot,* Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec, 24, 2012); *Davis Brothers Framing Inc.*, Cal/OSHA App. 05-634, Decision After Reconsideration (Apr. 8, 2010).) Murphine had courses in college that included physics, centers of gravity, and stability. She had training regarding accidents, and experience from investigations of accidents, including forklift accidents. It is found that her opinion had a sufficient foundation and was not speculation. Therefore, her opinion that the rack and carrier were not in accordance with good engineering practice and decreased the Ranger's stability is credible and is credited.

Employer argued that the safety order does not require the modifications to be authorized by the manufacturer, and the Division did not present evidence that the modifications were not in accordance with good engineering practice.

As discussed, when the Division presents sufficient evidence to sustain a violation, the burden shifts to Employer. Employer's failure to produce any evidence on the issue raises the inference that the evidence, if produced, would be adverse, and Employer's silence operates as a tacit admission.

Accordingly, it is found that the Division established a violation of § 3328(f) by a preponderance of the evidence.

Classification and Penalty

The Division classified the violation as serious. The standard for finding a serious violation was discussed above. Murphine credibly testified that a serious injury, as happened here, was a realistic possibility in the event of an accident caused by the violation. As Murphine is current in her training, she is deemed competent to render an opinion of whether a violation is serious. (Labor Code § 6432(g)). Thus, her opinion is credited.

The Division also classified the violation as accident-related. The Appeals Board has held that to establish the characterization of the violation as accident-related, the Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury. (*Pierce Enterprises,* Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002) citing *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).) To find that a violation is accident-related, the violation does not have to be the only cause of the accident, but only a contributing cause, as long as a causal nexus exists between the violation and the serious injury. (*Id.*) As discussed, Murphine's opinion that the modifications to the Ranger decreased the Ranger's stability, increased the

risk of loss of control, and thereby contributed to the roll-over was credited. Therefore, the violation is found to be accident-related.

Employer stipulated that the penalty was calculated in accordance with the Division's policies and procedures. Therefore, the proposed penalty of $14,400 is affirmed.

Docket 12-R3D2-0496

Citation 5, Serious, § 3380(f)(1)

Failure to Select and Provide Personal Protective Equipment

Summary of Evidence

All Summaries of Evidence above are incorporated by reference.

Murphine testified that employees drove the Ranger off road in rough terrain which subjected them to flying debris and possible tip overs. The Ranger had tipped over when both Nytes and Carmody drove it. Even if the driver wore seat belts, the driver was not enclosed and could contact the ground in a roll-over. Helmets were needed to protect against head injuries if the driver was thrown from the vehicle, as happened here, or contacted the ground in a roll-over. Murphine believed that Cheney owned a construction industry conventional hard hat; however, hard hats are inadequate. Hard hats are designed to protect someone's head from falling objects only. Murphine did not have any evidence that Cheney was wearing his hard hat when the accident happened.

The Ranger did not have a windshield. Employees wore sunglasses, but sunglasses are not goggles. Sunglasses do not protect eyes against dirt, brush, or other flying objects. A full-face helmet, like a motorcycle helmet, would provide adequate eye protection.

Murphine testified that she issued Citation 5 for a serious violation of § 3380(f)(1) because Employer did not select or provide employees with appropriate personal protective equipment, such as a helmet or goggles.

The most likely injury as the result of an accident caused by the violation is a head or eye injury. Head injuries cause swelling on the brain and concussions, if not death. With head injuries, hospitalization for over 24 hours for more than observation is a realistic possibility, as happened here. Therefore, she classified the violation as serious.

Cheney's medical records (Exhibit 29) show that he sustained a head injury. Since he most likely would not have sustained a head injury had he

been wearing an appropriate helmet[20], Murphine determined that the violation was accident-related.

Employer did not offer any evidence on this issue.

Findings and Reasons for Decision

Employer's employees were exposed to the hazard of operation of a vehicle without the use of personal protective equipment provided by Employer. The Division established a violation of § 3380(f)(1).

The violation was properly classified as serious and is accident-related.

The proposed penalty of $14,400 is not appropriate.

The Division cited Employer for a violation of § 3380(f)(1), which provides as follows:

> **Personal Protective Devices. Hazard assessment and equipment selection.** The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:
>
> (A) Select, and have each affected employee use, the types of PPE that will protect the affected employee form the hazards identified in the hazard assessment;
>
> (B) Communicate selection decisions to each affected employee.
>
> (C) Select PPE that properly fits each affected employee.

The relevant factual allegations of Citation 5 are the following:

> A[n] … employee operating . . . the Ranger . . . in a remote, ungraded hillside and canyon . . . suffered serious injury to the head when the vehicle slipped and rolled approximately halfway down the hillside. The vehicle rolled into a deep canyon, and the employee was thrown or jumped off . . . The employee was not using head protection at the time of the accident.

[20] For example, a DOT-approved motorcycle helmet or off-road helmet.

> The employer had not assessed the workplace to determine if hazards are present, to select and provide appropriate PPE for the hazards, and to communicate the selections to employees.
> Employees did not use and were not provided appropriate PPE such as DOT approved off-road helmets for use when operating the utility vehicle off-road, in aggressive riding conditions, in rough terrain, and on hillsides with a greater than 15% grade.

It was not disputed that Employer did not provide any personal protective equipment to its employees, except for possibly a standard construction industry hard hat. It was previously found in connection with Citation 2, that above, Employer did not inspect and evaluate the Ranger and the terrain over which it was being driven to determine the hazards that were present.

Since the instant accident involved a roll-over, and both Nytes and Carmody had rolled the Ranger over before, it must be found that driving the Ranger subjected the driver to the hazard of a roll over, and that the hazard of a head injury is not speculative. (See *Ford Motor Company*, Cal/OSHA App. 76-706, Decision After Reconsideration (July 20, 1979)). The Ranger did not have a windshield and the operator was not enclosed inside a cab. Murphine's testimony that the driver was exposed to the hazard of objects flying into his eyes and the hazard of hitting his head if thrown from the Ranger or if the Ranger rolled over is credited, based upon her education, training, and experience. The possibility of exposure is sufficient to establish a violation. (See Zapata *Constructors, Inc.*, Cal/OSHA App. 79-1531, Decision After Reconsideration (July 30, 1984)) Her opinion that a hard hat is inadequate for the hazard is also credited. (See *Douglas Oil Company of California*, Cal/OSHA App. 77-931, Decision After Reconsideration (Feb. 24, 1982).)

Employer argued that no DOT approved helmet or equivalent was needed when the Ranger was driven as intended. Employer alleged the affirmative defense that it was not foreseeable that Cheney would treat the Ranger as a toy and drive it off-road up a steep hill when there was an access road (*Newberry v. Occupational Safety and Health Appeals Board* (1981) 123 Cal.App.3d 641 (DCA3)), and there was therefore no need to provide helmets or goggles.

Employer's argument does not have merit. First, Employer did not perform the required assessment on site to determine if hazards were present. Second, the circumstantial evidence tends to show that Cheney was performing his job duties in a serious manner, not playing. To reach pole #1 from pole #4, Cheney had to drive down to Lusk Boulevard. To get to the access road, he needed to drive straight across Lusk Boulevard onto a

driveway, and then turn left onto the access road. This route was not visible from Lusk Boulevard. The tracks from the parking lot are headed directly towards pole #1 (Exhibit 6). Because the poles were located off road, the employees were not instructed not to drive it where there was no road. The foreman was aware that the access road was not visible from pole #4, but pole #1 was visible from the parking lot, and he did not know if Cheney knew where the access road was. Thus, it is foreseeable that the Ranger might be driven off road over rough terrain towards pole #1.

Accordingly, the Division established a violation of § 3380(f)(1).

The Division classified the violation as accident-related serious. The standard was discussed above. The existence of a serious head injury in this case (Exhibit 29) establishes that a serious injury is a realistic possibility, and not speculative, in the event of an accident caused by Employer's failure to provide head protection. The violation was properly classified as serious.

As discussed, to be accident-related there must be a relationship between the violation and the serious injury. (Section 336(c)(7)) While it is not disputed that Cheney suffered a head injury, it is not clear that a DOT-approved helmet would have prevented a serious head injury. There was no testimony from a medical doctor, accident reconstruction specialist, or other expert. Therefore, the evidence is insufficient to find that the violation is accident-related.

Employer stipulated that the Division applied the appropriate factors consistently with the regulations. Applying the adjustments[21] to the base penalty of $18,000 for a serious violation results in a penalty of $4,950. This amount is found appropriate and is assessed.

Docket 12-R3D2-0497

Citation 6, Serious, § 8610(c)

No Roll Over Protective Structure (ROPS)

Summary of Evidence

All Summaries of Evidence above are incorporated by reference.

Murphine testified that she issued Citation 6 for a serious violation of § 8610(c) because the Ranger did not have a roll-over protective structure. Murphine classified the Ranger as a haulage vehicle or industrial tractor

[21] The factors are medium extent, medium likelihood, 15% good faith, 20% size, 10% history, and the 50% abatement credit. See Exhibit 30.

within the meaning of § 8610(c). It has a brake horse power of over 20. Brake horsepower is the available horsepower when a vehicle is stopped. Murphine testified that she learned from the manufacturer that the brake horsepower was 40. (See Exhibit 21) The vehicle was a rubber tire vehicle. The vehicle was being used to haul materials to install telecommunication lines, so Murphine believed that it met the definition.

The hazard associated with the violation is that the vehicle or the cab would fall on the driver and crush or hit him. The most likely injuries, Murphine testified, are multiple fractures, spinal fractures, paralysis, head injuries, and death. In the event of an accident caused by the violation, a serious injury is a realistic possibility. Therefore, Murphine classified the violation as serious.

Employer did not offer any evidence on this issue.

Findings and Reasons for Decision

Employer's employees were exposed to the hazard of operation of a vehicle that did not have a roll-over protective structure (ROPS). The Division established a violation of § 3810(c).

The violation was properly classified as serious.

The proposed penalty of $7,200 is affirmed.

The Division cited Employer for a violation of § 8610(c), which reads as follows:

> All rubber-tired, self-propelled scrapers, rubber-tired front-end loaders, rubber-tired dozers, agricultural and industrial tractors, crawler tractors, crawler-type loaders, and motor graders, with or without attachments, that are used in telecommunications work shall have roll-over protective structures, when required, in accordance with Article 25 of the General Industry Safety Orders or Section 1596 of the Construction Safety Orders as applicable.

The relevant factual allegations of Citation 6 are:

> On August 9, 2011, a telecommunications employee operating the Polaris Ranger ... utility vehicle . . . in a remote, ungraded hillside and canyon . . . suffered serious injury to the head when the vehicle slipped and rolled approximately halfway down the hillside. . . . The Polaris Ranger XP did not have a roll-over protective structure as required by section 1596(a)(1) for haulage

> vehicles. The cab frame, part of the original equipment manufacturer [sic], did not meet the requirements of ROPS and was specifically identified by the manufacturer as "This cab frame is not designed or intended to provide roll-over protection."

There was no dispute that the Ranger was used in telecommunications work and that it was rubber-tired. The Ranger was used in construction, thus making § 1596 applicable[22]. Employer argued that the Ranger was not the type of vehicle required to have a ROPS.

The Division argued that the Ranger was an industrial tractor. "Industrial Tractor" is defined in § 3649 as "A wheel or track-type vehicle of more than 20 engine horsepower used in operations such as landscaping, construction services, loading, digging, grounds keeping, and highway maintenance." Since the Ranger has a brake horsepower[23] of 40, the engine horsepower is at least 40. As previously discussed, Employer's failure to offer contradictory evidence on this point is a tacit admission that Murphine's statement of horsepower is correct. Therefore, it is found that the Ranger is an industrial tractor within the meaning of § 8610(c).

Employer argued that the original cab cage on the Ranger was a ROPS. The Manual stated that the cab cage was not designed or intended to provide roll-over protection, (Manual, p. 6). The original cab cage was severely bent in the accident (Exhibits 12, 24), which indicates the strength was not sufficient to support the Ranger's weight. Section 1596(c) provides that "ROPS shall provide operator protection against the hazard of falling objects." The Ranger did not have any protection for the operator against falling objects. Thus, it cannot be found that the Ranger had a ROPS complying with § 1596.

Therefore, the Division established a violation of § 8610(c) by a preponderance of the evidence.

The Division classified the violation as serious. The standard for finding a serious violation was set forth above. Murphine credibly testified that the hazard addressed by the violation is injury from the vehicle falling on and crushing the driver, and that serious injury is a realistic possibility. As

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[22] The Division argued that the Ranger was a haulage vehicle and was required by § 1596(a) to have a ROPS. Section 1504 defines "haulage vehicle" as a self-propelled vehicle including its trailer, used to transport materials on construction projects. The term 'haulage vehicle' includes trucks, truck and trailer combinations, and all other similar equipment used for haulage." By this definition, the Ranger was a haulage vehicle because it was used to transport the rollers and other equipment. However, § 8610(c) does not apply to haulage vehicles.

[23] "Brake horsepower" is defined as "the power of an engine or other motor as calculated from the force exerted on a friction brake or absorption dynamometer applied to the flywheel or shaft." Webster's Third New International Dictionary Unabridged (1986) p. 267.

discussed, Murphine has a sufficient foundation for her opinion. Accordingly, the violation was properly classified serious.

The Division stipulated that the penalty was calculated in accordance with the Division's policies and procedures. Thus, the proposed penalty of $7,200 is found appropriate and is affirmed.

Decision

It is hereby ordered that the citations are established, modified, or withdrawn as indicated above and as set forth in the attached Summary Table.

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

Dated: January 13, 2014

DALE A. RAYMOND
Administrative Law Judge

DAR:ml

SUMMARY TABLE
DECISION

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

In the Matter of the Appeal of:

HHS CONSTRUCTION
Dockets 12-R3D2-0492/0497

IMIS No. 315341818

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	**FINAL PENALTY ASSESSED BY BOARD**
12-R3D2-0492	1	1	2340.17(a)	G	ALJ affirmed violation	X		$205	$205	**$205**
		2	3203(a)	G	ALJ affirmed violation	X		410	410	**410**
		3	3395(f)(1)	G	ALJ affirmed violation	X		410	410	**410**
		4	3395(f)(3)	G	ALJ affirmed violation	X		205	205	**205**
12-R3D2-0493	2		3203(a)(4)	S	ALJ affirmed violation	X		5,400	5,400	**5,400**
12-R3D2-0494	3		3203(a)(7)	S	ALJ affirmed violation	X		7,200	7,200	**7,200**
12-R3D2-0495	4		3328(f)	S	ALJ affirmed violation	X		14,400	14,400	**14,400**
12-R3D2-0496	5		3380(f)(1)	S	ALJ reduced penalty	X		14,400	14,400	**4,950**
12-R3D2-0497	6		8610(c)	S	ALJ affirmed violation	X		7,200	7,200	**7,200**
					Sub-Total			$49,830	$49,830	**$40,380**

Total Amount Due* **$40,380**
(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should 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: 01/13/14