

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

*In the Matter of the Appeal of:*

**SHUSTER'S LOGGING INC.**  
750 East Valley Street  
Willits, CA 95490

Employer

**DOCKETS 12-R1D5-2498**  
**through 2500**

**DECISION**

**Statement of the Case**

Shuster's Logging Inc. ("Employer") conducts logging operations in northern California. Beginning May 21, 2012, the Division of Occupational Safety and Health ("the Division") through Associate Safety Engineer Michael Harrington conducted an injury accident investigation at a wooded area near Navarro, California. On August 17, 2012, the Division cited Employer for three violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations<sup>1</sup>: (1) a violation of section 3203(a), for a failure to maintain inspection records; (2) a violation of section 6275(a), for a failure to locate tree fallers so as to avoid endangering others; and (3) a violation of section 6280(a), for an alleged failure of a tree faller to issue a warning cry and take notice that another worker was out of reach of the tree to be felled. Classifications 2 and 3 were classified as "serious" violations. The penalty proposed for Citation 2 was \$4,725. The penalty proposed for Citation 3 was \$10,800.

The Employer filed a timely appeal of each citation, contesting the violation's existence, the classification, and the appropriateness of the penalty and abatement requirements. In addition, Employer's appeal raised a series of affirmative defenses.

The matter was heard on July 9 and September 25, 2013 in Oakland, California before Martin Fassler, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board). Attorney Cynthia Perez represented the Division.

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<sup>1</sup> Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

Attorney Fred Walter of the firm Walter & Prince LLP represented Employer.

By agreement of the parties, the Division re-classified the violation alleged in citation 1 from “general” to “regulatory” and Employer then withdrew its appeal of the citation. The Division moved to amend the penalty proposed for Citation 3, from \$10,800 to \$14,400. The motion was granted, and Employer stipulated to the accuracy of the penalty calculations for Citation 3. In addition, Employer withdrew its appeal of the reasonableness of the abatement requirements for both citations, saying that Employer had completed abatements required.

Each party presented testimony and documentary evidence during the hearing, and presented oral argument at the close of the hearing on September 25, 2013.<sup>2</sup> The matter was submitted for decision on that date. The submission date was later extended to May 19, 2014, by order of the undersigned ALJ.

### **Issues Presented**

1. Did Employer act to assure that tree-fallers Salvador Yanez and Juan Bautista Lerma were so located that they would not endanger each other, as required by section 6275(a)? (Citation 2).
2. Did Employer establish that, with reasonable diligence, it could not have known of the hazardous condition of the location of the two tree fallers?
3. Did Employer’s tree faller Salvador Yanez give a timely audible warning to another Employer faller, Juan Bautista Lerma, and receive confirmation from Lerma that he had heard the warning, all as required by section 6280(a) before cutting a redwood tree which fell on Lerma? (Citation 3).

### **Findings of Fact**

1. Employer failed to take steps to assure that tree-fallers Salvador Yanez and Juan Bautista Lerma were so located that they would not endanger each other.

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<sup>2</sup> The witnesses and exhibits presented are identified in Appendix A, attached to this Decision.

2. There was a realistic possibility that if an injury were to result from Employer's failure to locate tree-fallers properly, it would be a serious injury or death.
3. Employer failed to act with reasonable diligence to prevent the two tree-fallers from working in improperly close locations and to inform itself of the locations of Salvador Yanez and Juan Bautista Lerma.
4. Employer failed to inform itself of the locations of Salvador Yanez and Bautista Lerma on the day of the accident.
5. The evidence supports the extent, good faith, size, and history ratings that the Division used in its calculations leading to the penalty of \$4,725 for Citation 2.
6. The initial exchange between Salvador Yanez and Juan Bautista Lerma, in which Lerma acknowledged that Yanez would be cutting a tree or trees that would fall in Lerma's direction, was an audible warning and response as required by section 6280(a).

#### Analysis

**Issue 1: Did Employer act to assure that tree-fallers Salvador Yanez and Juan Bautista Lerma were so located that they would not endanger each other (Citation 2).**

The citation alleged the following:

On May 21, 2012, an employee was killed when he was struck by a redwood tree (approximately 80 feet tall and 16 inches in diameter). The faller endangered an employee who was located about 65 feet from the base of the felled tree.

Section 6275(a) provides:

Falling trees. While falling, fallers shall be so located that they will not endanger other employees. In steep country, one set of fallers shall not work immediately up the slope from other fallers.

The safety standard includes two distinct requirements, each about the location of tree fallers. The first sentence applies to fallers in any and all settings. The second applies to fallers in a particular kind of work setting - "in steep country." Since the Division did not allege a

“steep country” work setting, and the safety order addresses two alternate and independent circumstances, a violation will be shown if the fallers were located where they would endanger other employees, regardless of evidence of the setting being “steep country”. *Golden State Erectors*, Cal/OSHA App. 85-0026, DAR (Feb. 25, 1987).

Section 6275(a) requires each employer conducting logging operations to take appropriate steps to locate – that is, to place - its workers in such a way that their work, cutting down trees, does not endanger other workers.

There appear to be no Appeals Board decisions construing section 6275(a).

However, other safety orders require employers to assure employees are not located near equipment that presents a danger to employees. Among those decisions are *Kenai Drilling Limited*, Decision After Reconsideration, Cal/OSHA App. No. 00-2326 (Sep. 23, 2002); *HB Parkco*, Cal/OSHA App. 07-1731, DAR (Mar. 26, 2012) and *Bay Area Rapid Transit District* Cal/OSHA App. 09-1218 (Sep. 6, 2012). Consistent among these cases is the holding that an employer cannot leave it up to the employee to safeguard himself. Those decisions hold that regulations impose affirmative duties upon employers to eliminate hazards and to assure the existence of safe working conditions.

In those instances, the Board held that employers do not satisfy a safety standard by leaving it up to employees to so locate themselves to stay out of harm’s way. Rather, the burden is consistently placed on the employer to control the equipment, employees and activities in order to assure the safety of the employees.

In *HB Parkco Construction Inc.*, *supra*, the Board upheld a citation for an employer’s violation of section 1592(e), which requires an employer to control hauling or earth moving operations “in such a manner that equipment or vehicle operators know of the presence” of workers on foot in the area of operations. In upholding the citation, the Board held:

[S]imply informing the operator that workers will be in the area and to look out for them, does not ensure that operators obtain knowledge of the workers’ locations sufficient to satisfy the requirements of the safety order. . . .

[T]he method selected by Employer to control earthmoving operations did not ensure the operators were aware of on foot worker in their immediate vicinity.

*H. B. Parkco, id*, at pp.4-5.

In *Kenai Drilling Limited, supra*, the Board upheld a citation for violation of section 6580(c) (defective fall protection equipment) in a case in which a lanyard used on an oil derrick platform had a “sticky” latch on its end hook and would not close properly. The Board held that statutory and regulatory provisions “clearly manifest an intent that the employer is affirmatively responsible for safety devices used by an employee . . . .” Section 6580(c) requires that defective pieces of equipment must be removed from service. The employer contended that its employees had been trained to remove defective lanyards from service, that the employer had taken some steps to replace the defective lanyard, and those steps should be enough to satisfy its obligation under the regulation.<sup>3</sup> The Appeals Board, however, held that:

[L]ack of effort by employer to *effectively* remove the defective lanyard from service created both time and opportunity for a worker in the derrick to use a defective lanyard in violation of section 6580(c). . . . Simply delegating the removal to a rank and file worker without subsequent oversight to ensure prompt removal of the defective lanyard does not constitute an employer’s discharge of its obligation under section 6580(c).

In *Bay Area Rapid Transit District, supra*, the Board cited both *Kenai Drilling Limited* and *HB Parkco Construction* and upheld a citation against the transit district which had implemented a “safety system” for trackside workers, working during hours while trains were running, which simply required track-side workers to stay alert for oncoming trains, but included no other safety precautions to be taken by the employer in the potentially hazardous situation. The Board applied the rule established in those two cases that an “Employer cannot leave it up to the employee to safeguard himself,” and found BART’s inadequate rule to be in violation of section 3332(b) which states: “Controls to safeguard personnel during railcar movement shall be instituted.”

Employer here likewise allowed lax procedures in the workplace that left it up to the employees to maintain safe locations as required by the safety order. Since this type of behavior on the part of an employer has consistently been held to be a failure to comply with the safety order holding employers responsible for the safe location of employees, the

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<sup>3</sup> The employer in that case had sent a properly functioning lanyard to the derrick, but the defective lanyard remained on the derrick platform for two shifts, available for use by workers. A worker used a defective lanyard, it failed, and he fell 55 feet.

same result is appropriate here. Employer declined to take affirmative steps to locate its employees in a manner that protected their safety, and in doing so violated the regulation.

The activities of the workers on the day of the fatal accident demonstrate Employer assigned to the employees themselves the task of safely locating themselves.

On May 21, 2012, Employer assigned a crew of six workers to cut second growth redwood trees in a forested area near Navarro, California. The six workers were organized into pairs. Salvador Yanez and Juan Bautista Lerma (Lerma) were partners on the day of the accident.

It was generally the responsibility of Raul Yanez, Employer's "woods boss" or foreman, to assign cutters or fallers to the area in which each was to work.<sup>4</sup> Raul Yanez testified that as part of his responsibility to assign workers day-to-day, on the day of the accident he assigned an excavator operator to work in a particular location not far from where Salvador Yanez and Lerma were cutting. However, he was not asked by either party about his instructions to Salvador Yanez and Lerma about their work location on the day of the accident.

Raul Yanez testified that he did not see either Salvador Yanez or Lerma on the day of the accident, until after the accident occurred.<sup>5</sup>

Salvador Yanez and Lerma drove to work together, arriving at their work area around 6:00 a.m. The two men were assigned to fell trees in adjacent "strips" of a wooded area. Yanez testified that at the beginning of the day, "I walked to my strip and he walked to his." No witness testified as to how either of the men knew the proper location of either of the strips. The strips, Yanez testified, were 600 to 700 feet wide. There is no evidence that there were physical markings of any kind - e.g. rope or tape - designating a "line" dividing the two adjacent strips.

Salvador Yanez was the only witness questioned during the hearing by either party about how the locations of individual cutters generally are decided, when two tree cutters are assigned to work in adjacent areas. He testified that tree fallers decide where to position themselves by looking out for safety: they need to be close enough to each other to be able to hear each other call for help, but far enough

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<sup>4</sup> Raul Yanez is Salvador Yanez's nephew.

<sup>5</sup> Raul Yanez testified that when he was informed of the accident, by a call to his radio, he was driving to the area where Salvador Yanez and Lerma were cutting, and he was 900 feet away from them.

apart to avoid being hit by a tree cut by the other. The distance needed to avoid being hit by a tree is determined by the height of the trees to be cut. If trees in an area are about 100 feet high, Yanez testified, cutters should be 200 feet apart. Yanez was asked how two cutters would make their decision and communicate it to each other. He answered, "We see the situation, and you move far enough apart." He testified that cutters make an estimate of the proper distance: "We figure it out. At the beginning of the strip [one cutter would say], 'You go from there to there.'"

Employer presented no evidence as to any actions that either Raul Yanez or any other manager took to designate the areas in which Salvador Yanez and Lerma were to work on the day of the injury, or what steps the two men were instructed to take to prevent one cutter's actions from causing injury to the other.

On the day of the accident, and prior to its occurrence, Yanez first cut several trees within the portion of his strip that was farthest away from Lerma's strip. After cutting those, he moved to an area close to the imaginary line dividing his strip from Lerma's. He chose a tree to cut, then walked downhill, to a point close to the location where he believed Lerma was. The vegetation in the area of the accident was "very dense."<sup>6</sup>

When Yanez heard Lerma stop his chain saw, Yanez called out to Lerma, telling him that he was about to start cutting trees that would be falling in Lerma's direction. Lerma responded by saying that would be ok, because he, Lerma, had room to move farther away within his own strip. Yanez did not see Lerma during this exchange, because of the density of the vegetation.

Yanez then walked back uphill to the tree he had chosen to cut first. He made an undercut (which he completed in about 30 seconds), then he called out to Lerma, in Spanish, "Here it comes." He heard no response, and went on to make the final cut on the tree, causing it to fall. Yanez estimated that two to three minutes passed between the time he had his exchange with Lerma (during which he heard Lerma respond) and the time that he resumed cutting the tree.

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<sup>6</sup> Harrington testified that the vegetation was very dense, His testimony is supported by photographs in evidence and by Salvador Yanez's testimony.

The tree that Yanez cut, about 80 feet long, fell in the expected direction, falling on the downward sloping area immediately below the stump. The tree hit Lerma and killed him.<sup>7</sup>

The evidence supports findings that Salvador Yanez and Lerma were given a general location in which to work, told to work on adjacent strips, were given responsibility for defining the boundaries of the strips, and were given the responsibility of assuring their own safety by choosing when and where on those strips to work. Employer asserted no further control over their work locations, at either the beginning of the day or during the next 90 minutes (ending with the accident). Employer had an opportunity to present evidence that it had taken appropriate steps to assure that the two cutters working on adjacent strips were properly located to avoid hazards. Employer presented no evidence about what steps it took to identify for the two workers the location of the two strips they were to work on, or to identify the dividing line between them, or about any precautions that Employer took to maintain a safe separation between them. The absence of such evidence further supports a finding that employer took no such steps (Evidence Code sections 412 and 413).

Under the precedents cited above, Employer's failure to provide direction or control over the locations of two workers, each instructed to cut down tall trees while the two were in proximity to each other, amounted to a violation of section 6275(a). Like the safety regulations at issue in *HB Parkco Construction* and in *Bay Area Rapid Transit District*, the safety standard here requires an employer to take steps to prevent the development of highly hazardous situations around workers – here, falling trees; in the other two cases, movement of large vehicles. Here, as was true in *HB Parkco, supra*, Employer did not take the affirmative steps that the safety standard required. Instead, the two employees, each in a hazardous situation because of the likelihood of falling large trees, were required to exercise their own judgment as to how to assure their own safety, with no participation or oversight by their immediate foreman or any other supervisor. This delegation of safety from employer to employees in a known hazardous situation, in violation of a safety standard that imposes on Employer an obligation to create a system that assures safety, was similar to the failures underlying the citations that were upheld in *HB Parkco* and in *Bay Area Rapid Transit District, supra*.

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<sup>7</sup>Employer stipulated during the hearing that the first sentence of the factual allegation of the citation was accurate: On May 21, 2012, an employee was killed when he was struck by a redwood tree approximately 80 feet tall and 16 inches in diameter.

**Issue 2: With reasonable diligence, could the Employer have known that two of its tree fallers were positioned so close together as to place each in danger from a falling tree?**

Labor Code section 6432(a) in effect in May 2012 (as amended in 2010) provided that “There shall be a rebuttable presumption that a ‘serious violation’ exists . . . if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.” So long as the likelihood of serious injury resulting from an accident occurring as a result of a violation is a “realistic possibility,” the serious classification is proper. “Realistic possibility” has been defined as “a prediction [that] is clearly within the bounds of human reason, not pure speculation” in *Janco Corporation*, Cal/OSHA app. 99-565, DAR (Sep. 27, 2001), citing *Oliver Wire & Planting Co. Inc.*, Cal/OSHA app. 77-693, DAR (Apr. 30, 1980).

The Board has repeatedly recognized that the occurrence of a serious injury in a given circumstance is evidence of the likelihood that a serious injury would occur as a result of a safety standard violation in that setting. *Massive Prints Inc.* Cal/OSHA App. 98-1789, DAR (Jul 27, 2001).<sup>8</sup> More recently, in *Bay Area Rapid Transit District*, Cal/OSHA App 09-R2D2-1218, DAR (Sep. 6, 2012), the Board held “evidence of the accident that actually happened can provide the evidence that violation, under the circumstances shown, would likely yield serious injury. The statute does not require, in addition to the circumstances of the actual fatality, statistical evidence of the results of similar incidences.”

Thus, the event of a death occurring when a violation of the safety order occurred demonstrates that a resulting serious physical harm or death was a “realistic possibility.”<sup>9</sup> Therefore, the evidence supports the “serious” classification.<sup>10</sup>

Labor Code section 6432(c) provides an affirmative defense to prevent a “serious” classification of a violation:

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<sup>8</sup> See also *Sierra Ready Mix*, Cal/OSHA App. 95-2453, DAR (Apr 12, 2000)

<sup>9</sup> In addition, Division witness Harrington testified that the tree’s weight was probably 2,500 to 2,600 pounds (with a possible variation of plus or minus 10 per cent of that total). If a tree of that size and weight were to fall on a person, the most likely result would be that person’s death, Harrington testified. Harrington’s testimony is credible, and employer offered no testimony to cast doubt on its accuracy.

<sup>10</sup> Harrington mailed the Division’s “1-B-Y” form to Employer, informing Employer of the Division’s intent to issue two classifications that would be classified as serious, approximately one month before issuing the citations, thereby satisfying the requirement of section 6432(b).

If the division establishes a presumption [that a serious classification is supported by the evidence] the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.

That statutory provision, as amended in 2012, is consistent with the prior statutory affirmative defense, as it retains the language from the prior enactment describing the circumstances that the employer may show to defend against a serious classification. Therefore, rulings of the Appeals Board concerning this issue as it arose under the pre-2010 provisions remain applicable despite the amendment. In a recent decision, *Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013), the Board summarized the principals this way:

Lack of knowledge is an affirmative defense to the serious classification of a citation; when raised, it becomes the employer's burden to prove. An employer may defend through establishing that the violation occurred at a time and under circumstances which did not provide employer with a reasonable opportunity to detect it.

In a number of decisions issued over the years, the Board has repeatedly held that reasonable diligence, for the purpose of establishing a valid defense to a "serious" classification, includes the obligation to oversee the work site where safety hazards are present, if exposure to an unsafe condition exists

In *Bickerton Iron Works Inc.* Cal/OSHA App. 01-2978 (Feb. 25, 2004), the Board wrote;

The Board has recognized that each employer has an affirmative duty to anticipate hazards within a reasonable degree of foreseeability. (*Tri-Valley Growers, Inc.*, Cal/OSHA App. 81-1547, Decision After Reconsideration (July 25, 1985).) "...[A]dequate supervision of employees is an important consideration in determining whether an employer could have reasonably detected a violation, which must be determined in a case-by-case basis.[citation omitted]."

In *Irby Construction* Cal/OSHA App. 03-2728 (DAR) (Jun 8, 2007). The Board wrote:

[W]e have asserted that an employer must exercise reasonable diligence to ensure that safe work practices were actually followed in order to successfully defend against a serious violation classification. Bragg Crane & Rigging Co., Cal/OSHA App. 01-2428, Decision After Reconsideration (June 28, 2004). As discussed above, we believe that, had Employer used reasonable diligence to ensure that Aldrete followed safe work practices, this accident might have been prevented.

In its closing argument, Employer argued that it “did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation,” and therefore the violation cannot be classified as “serious,” but should instead be classified as “general.”

Employer did not know of Yanez’s decision to cut the particular tree that he chose to cut, nor did Employer know of its location. But, Employer could have, with the exercise of reasonable diligence, controlled the location of both of its cutters, Yanez and Lerma, to assure that the two cutters were not cutting trees within a dangerously close distance from each other. Employer did not exercise that diligence. Employer’s foreman Raul Yanez was not present at the beginning of the work day at a location close to where the two cutters began work. Although Raul Yanez testified for Employer, there is no evidence that he knew of either Yanez’s location or Lerma’s location at either the beginning of the day or later in the morning. There is no evidence that Employer’s foreman made any effort to learn, prior to the beginning of the work day, where the two cutters would be working, or that he gave them instructions as to how to locate themselves, or that either he or any other Employer supervisor made any effort, on the morning of the accident or an earlier day, to demarcate cutting areas that were a safe distance apart; or that Employer took any actions to assure that, even if the cutting locations were close to each other, the two cutters would not be working simultaneously near the dividing line between their areas

Employer’s failure to exercise reasonable diligence, and reasonable control of the locations of its tree cutters was the essence of the violation. Therefore, the evidence does not support Employer’s contention that the classification should be classified as “general” rather than “serious.”

As the “serious” classification is correct, the penalty calculations are reasonable and supported by the evidence. Exhibit 2 summarizes the Division’s penalty calculations for Citation 2, and Harrington provided additional testimony in explanation. Regulation § 336(c) calls for the initial base penalty for a “serious” violation to be \$18,000, subject

to additional adjustments. The Division then, following regulation 336, rated “extent” of the violation as low, and for that reason subtracted \$4,500 from \$18,000, reducing the penalty to \$13,550. Next, the Division subtracted an additional 30 per cent or \$4,050 based on Employer’s size and history ratings, bringing the tentative amount to \$9,450. This was reduced by an additional 50 per cent pursuant to § 336(d)(4)(B), for presumed abatement of the violation, bring the final amount to \$4,725. Employer presented no evidence to cast doubt on the accuracy of the ratings and reductions. The penalty is found to be reasonable.

**Issue 3: Did Employer’s tree faller Salvador Yanez give a timely audible warning to another Employer faller, Juan Bautista Lerma, as required by section 6280(a) before cutting a redwood tree which fell on Lerma? (Citation 3)**

Section 6280(a) provides:

Warning cry. Fallers shall give timely audible warning to buckers and other persons in the vicinity of a tree to be felled, indicating the direction of fall and taking notice that such persons not only hear the warning cry and are out of reach of the tree, but also in the clear of logs, fallen trees, snags or other trees which may be struck by the falling tree. Fallers shall stop saw motors when giving such warning.

The factual allegations of the citation were:

On May 11, 2012, an employee was killed when he was struck by a redwood tree (approximately 80 feet tall and 16 inches in diameter). The faller did not take notice that his coworker heard the warning cry and was out of reach of the tree which was being felled.

There is no Appeals Board Decision After Reconsideration that decides an appeal of a citation issued for an alleged violation of section 6280(a). However, the Appeals Board made clear its view of the meaning of section 6280(a) in *Davey Tree Service*, Cal OSHA/App 08-2708 Denial of Petition for Reconsideration (Nov. 15, 2012). In *Davey Tree*, the Division cited the employer for violation of section 3427(c)(3), a section included within a sequence of safety standards applicable to “work performed and equipment used in tree and ornamental palm maintenance and removal.”<sup>11</sup> In *Davey Tree*, an employee who had been cutting a tree adjacent to overhead electric power lines failed to call out

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<sup>11</sup> This description appears in section 3420.

to warn another worker immediately before he made the final cut to a tree, as the tree was ready to fall. Employer compared section 3427(c) with section 6280(a), the section at issue here, and argued that the two sections should be interpreted similarly. The Board rejected that comparison with this statement:

Given its wording (“tree to be felled”) and context, section 6280 requires the warning to be given before starting to cut the tree, while section 3427(c)(3) plainly requires a warning be given “just before” a tree actually starts to fall.<sup>12</sup>

The Board’s clear statement, construing section 6280(a) and comparing its requirement to the different requirement in section 3427(c)(3), will be applied here. That is, the obligation of the person “falling” (cutting) a tree is to give a timely audible warning, before starting to cut the tree, to other people who may be nearby, including other workers, indicating the direction of the fall and “taking notice that such person not only hears the warning cry and are out of reach of the tree”

But section 6280 does not require the faller to give a similar warning and to receive confirmation that it has been heard “just before a tree actually starts to fall.” The phrase “just before the tree or trunk is ready to fall” appears in section 3427(c)(3), but does not appear in section 6280(a). Therefore, the requirement that the faller receive confirmation that his call has been heard at that specific time - immediately before the tree is ready to fall - applies in circumstances covered by section 3427(c), but does not apply in circumstances covered by section 6280(a).

This construction of section 6280(a) is supported by the language of the section, which requires the faller to stop his saw motor, to call to any other persons in the vicinity, and to indicate the direction of the fall, and then to receive a confirmation that all nearby persons are out of reach of the tree. This combination of required steps – which is likely to take some time to complete – is consistent with imposing that requirement when the faller is about to begin the cutting, not moments before the final cut, which will topple the tree.

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<sup>12</sup> Although this passage refers to section 6280 rather than to section 6280(a) it is clear from the context that the Board’s analysis refers to section 6280(a). Immediately before this passage, the decision notes that the employer in that case drew the analogy to section 6280(a). Section 6280 has a paragraph (b), but it is not relevant here. Paragraph (a) is the only provision of section 6280 that is relevant.

Applying that analysis, the evidence supports a finding that Employer's faller Salvador Yanez complied with the requirement of section 6280(a). Yanez did issue a timely warning to Lerma, telling him (and anybody who might be in hearing distance) that he was about to begin cutting trees that would be falling in Lerma's direction. Yanez heard Lerma's response: Lerma responded that he, Lerma, would be able to move away from the direction from which the trees would be coming, and therefore would not be within the reach of the tree or of anything else it might dislodge. That exchange satisfied the requirement of section 6280(a). Therefore, the Division did not establish a violation of section 6280(a).

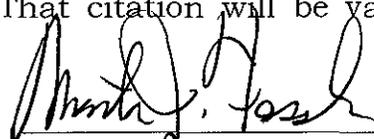
### **Conclusions**

The evidence supports the allegation set out in citation 2, that Employer failed to locate two tree fallers so that they would not endanger other employees, as required by section 6275(a). In addition, the evidence supports the "serious" classification; and Employer failed to present sufficient evidence to support its contention that it could not, with the exercise of reasonable diligence, have known of the presence of the violation. With respect to Citation 3, the evidence shows that Salvador Yanez took the steps required by section 6280(a), and therefore Employer did not violate that section.

### **Order**

Citation 1 is sustained as a regulatory violation. Citation 2 is sustained, the classification is sustained, and the penalty, as set forth in the attached summary table, is found to be reasonable. Employer's appeal of Citation 3 is granted. That citation will be vacated and no penalty imposed.

Dated: June 17, 2014

  
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MARTIN J. FASSLER  
Presiding Administrative Law Judge

**AMENDED**

**APPENDIX A – SHUSTER’S LOGGING INC.**

**DOCKET NO. 12-R1D5-2498 THROUGH 2500**

**Witnesses**

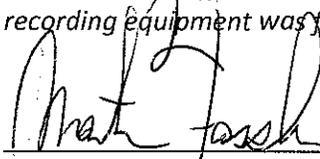
1. Salvador Yanez (July 9, 2013)
2. Jesus Renteria (through interpreter Charles Legier)
3. Mark Harrington
4. Raul Yanez (Sept. 25, 2013)
5. Don Milani

**Exhibits**

1. Jurisdictional documents
2. Penalty calculations
3. Typed statement – Salvador Yanez
4. Typed statement – Renteria
5. Photo- tree- tape measure
6. Photo- tree with shoe
7. Photo- tree with branches
8. Photo- horizontal
9. Photo- horizontal
10. Photo- vertical
11. Photo
12. Photo
13. Sheriff’s report
14. Letter – July 31, 2012 – 1By
15. Document Request sheet
  - A. Drawing by Yanez
  - B. Drawing by Yanez
  - C. Sept. 5, 2012 – Letter
  - D. Subpoena duces tecum
  - E. Don Milani C. V.

**CERTIFICATION OF RECORDING**

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

  
\_\_\_\_\_

Signature

6/23/14  
\_\_\_\_\_

Date

## SUMMARY TABLE DECISION

<p><i>In the Matter of the Appeal of:</i></p> <p><b>SHUSTER'S LOGGING INC.</b>  <b>DOCKET NO. 12-R1D5-2498 through 2500</b></p>	<p>Abbreviation Key:</p> <p>Reg=Regulatory      W=Willful  G=General            R=Repeat  S=Serious            Er=Employer  DOSH=Division</p>
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IMIS No. 125483743

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T I O N	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R1D5-2498	1	1	3203(a)	G	Failure to maintain records of inspections/ <b>DOSH re-classified as regulatory</b>	X		\$260	\$260	<b>\$260</b>
12-R1D5-2499	2	1	6275(a)	S	Failure to locate tree fallers so they will not endanger other employees	X		\$4,725	\$4,725	<b>\$4,725</b>
12-R1D5-2500	3	1	6280(a)	S	Failure to give timely audible warning and to receive confirmation it was heard/ Appeal granted by ALJ		X	\$10,800	\$14,400	<b>\$0</b>
<b>Sub-Total</b>								\$15,785	\$19,385	<b>\$4,985</b>
<b>Total Amount Due*</b>										<b>\$4,985</b>

<p>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</p>	<p style="text-align: center;">(INCLUDES APPEALED CITATIONS ONLY)</p> <p>*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.</p>
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POS: MJF  
06/17/14