

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

In the Matter of the Appeal of:

**SYNERGY TREE TRIMMING, INC.
PO Box 276
Mira Loma, CA 91752**

Employer

DOCKET 15-R2D1-0828

**DECISION AFTER
HEARING**

Statement of the Case

Synergy Tree Trimming, Inc. (“Employer”) is a full service tree removal and tree trimming contractor licensed by the State of California. Beginning September 29, 2014, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Susan Pipes, conducted an accident inspection near 17377 Maybert Road, in Washington, California (the site). On February 10, 2015, the Division cited Employer for one violation of California Code of Regulations, title 8: failing to ensure that an employee was properly tied in or secured to the tree while performing work in the tree as required by section 3427, subdivision (a)(3)(A).¹

Employer filed a timely appeal contesting the existence of the violation of the safety order, the classification of the citation and the reasonableness of the proposed penalty. Employer pleaded the affirmative defense of Independent Employee Action Defense as indicated in Employer’s Appeal filed with the Occupational Safety and Health Appeals Board. (See Exhibit 1, Pages 1-5 and 1-6).

This matter was heard by J. Kevin Elmendorf, Administrative Law Judge for the California Occupational Safety and Health Appeals Board (OSHAB), at Sacramento, California on January 28, 2016. Kenneth Powell, Esq., of the law firm of Knudtson & Nutter, represented Employer. Jon Weiss, Division Manager, represented the Division. The parties were granted leave to file post-hearing briefs by March 14, 2016. The matter was submitted for decision on March 15, 2016. Both parties filed timely post-hearing briefs. On its own motion the Board of Appeals extended the submission date to May 15, 2016.

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

Issues

1. Did Employer fail to ensure that an employee was tied in or secured while ascending a tree and remained as such until the work was completed and the Employee returned to the ground?
2. Did the Division establish a rebuttable presumption that the violation was serious?
3. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?
4. Did Employer present sufficient evidence to establish the Independent Employee Action Defense?
5. Was the proposed penalty reasonable?

Findings of Fact

1. On August 18, 2014, a workplace accident occurred located in and around 17377 Maybert Road, Washington, California, in which Ysidro Nieto (Nieto), an employee of Synergy Tree Trimming, Inc. (Employer), suffered injuries.²
2. Nieto had at least four years of experience as a Climber and was a Certified Line Clearance Trimmer at the time of the accident. On the day of the accident, Nieto climbed 10-12 trees without incident between 10 a.m. and noon in performing his job.
3. Nieto had been trained on the use of the climbing safety apparatus and the cutting tools. There was a realistic possibility that Nieto could suffer death or serious physical harm if he violated the subject safety regulation.
4. At the moment of the accident, Nieto was secured to the tree with two ropes, but upon cutting the tree crown to which he was tied, he was no longer properly secured to the tree.
5. As a result of Nieto cutting the portion of the tree to which he was tied, Nieto was pulled to the ground, a 30 foot fall.

² The parties stipulated to the facts set forth in paragraph 1.

6. As a result of the fall, Nieto was briefly knocked unconscious and he suffered two cracked ribs and bruised buttocks. Nieto was transported to a hospital where he stayed overnight and received treatment for his injuries.
7. Nieto sustained serious physical harm as defined in Labor Code section 6432, subdivision (e), as a result of the accident.
8. Nieto was trained in the proper and safe methods of falling trees.
9. Employer did not have a reasonable opportunity to prevent Nieto from cutting a limb that was connected to his climbing rope which pulled him to the ground
10. Nieto had more than four years of experience as a climber and was a Certified Tree Clearance Operator. As such, Nieto had performed the assigned task enough times to be reasonably proficient.
11. Employer effectively enforces its safety program as demonstrated by its training regarding tie-in policy; regular and weekly safety meetings; job briefings with crews; safety manuals; and stand-down meetings whenever an incident occurs.
12. Employer has a sanctions policy which it enforces against employees who violate the safety program as demonstrated by issuing to Nieto a one-day suspension for failing to adhere to a safety rule requiring Nieto to have fire gear out while performing work.
13. At the time Nieto made the cut of the branch to which he was tied, Nieto knew this constituted a violation of safety rules, but in the moment, he forgot that he had tied off to the branch he was cutting.
14. On the day of the accident, Nieto climbed and trimmed 10 to 12 trees without incident. Minutes before the incident, Nieto held a pre-cut meeting with his supervisor who then was walking away when Nieto cut the branch to which he was tied. Nothing in Nieto's conduct could have alerted Employer that he was about to cut the branch to which he was tied. As such, Employer could not, with the exercise of reasonable diligence, have known that Nieto would tie himself to the crown of a tree and then cut off the crown.

Analysis

1. On August 18, 2014, did Employer fail to ensure that Nieto was tied in or secured while ascending a tree and that he remained tied in or secured until the work was completed and Nieto returned to the ground?

California Code of Regulations, title 8, section 3427, subdivision (a)(3)(A) provides:

(a) Climbing and Access.

(3)(A) Employees shall be tied in or secured while ascending the tree and remain tied in or secured until the work is completed and they have returned to the ground.

The Division alleged:

On August 18, 2014, an employee of Synergy Tree Trimming, Inc. was engaged in the removal (felling) of a tree, at a worksite located near 17377 Maybert Road, in Washington, CA. While working aloft, the employee executed a cut on a section of the tree main below the point where his climbing rope was positioned, resulting in the employee falling with the tree section to the ground, an estimated distance of approximately 30 feet. The employee was not properly secured to the tree while working aloft.

The Division has the burden of proving every element of its case, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Cambrio Manufacturing Co.*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

It is undisputed that on August 18, 2014, Ysidro Nieto (Nieto), an employee of Employer, was injured when he fell out of a tree he was charged with removing. This workplace accident occurred in and around 17377 Maybert Road, Washington, California.

Nieto's uncontroverted testimony establishes that he was approximately 30 feet up in the 45 foot tree when he used his chain saw to cut the trunk of the tree to remove its crown.³ At the moment before he made the cut that severed the crown of the tree from its base trunk, Nieto was secured to the tree with two separate ropes.

³ The "crown" of the tree is the uppermost branches and foliage of a tree.

Nieto had a short rope that had one end tied to the metal loop attached to the left side of his climbing belt. This rope was then wrapped around the tree at his waist level and the other end was tied off to the metal loop attached to the right side of his climbing belt.

Nieto had a second separate rope referred to as his “climbing rope” that was approximately 75 feet long. One end of Nieto’s climbing rope⁴ was tied to the metal loop attached to the left side of his climbing belt and the other end was wrapped around a branch above him in the crown⁵ of the tree.

Unfortunately, Nieto’s climbing rope was attached to the crown of the tree which was the portion of the tree that Nieto was cutting off the main trunk base and when it fell to the ground it pulled Nieto to the ground with it. At the same time, the short rope at Nieto’s waist moved up several inches and off the tree base to which Nieto had been connected at the waist. Thus, at the moment Nieto completed his cut severing the crown from the tree main, Nieto was no longer secured to the tree prior to his completion of his work and his safe return to the ground. Accordingly, the Division established by a preponderance of the evidence that Employer violated section 3427, subdivision (a)(3)(A) in that the Employer did not ensure that Employee remained tied in or secured until the work was completed and he returned to the ground.

2. Did the Division establish a rebuttable presumption that the violation in Citation 2 was serious?

Section 334, subdivision (c) states in relevant part:

(c) Serious Violation.

(1) There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious.

(2) For purposes of a serious violation, the “actual hazard” may consist of, among other things:

* * *

⁴ The “climbing rope” is typically approximately 75-150+ feet long and is used by the climber to tie off to the tree in a location away from the location of the cut.

⁵ The “crown” of the tree is the top of the tree which in this operation was to be cut off from the base of the tree so as to keep the tree clear of the high voltage lines in the vicinity.

(B) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.⁶

A rebuttable presumption of a serious violation exists when the Division establishes that there is “a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.” (Labor Code section 6432(a).)

The Appeals Board has defined "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*International Paper Co.*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015), citing *Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015); *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001).)

Labor Code Section 6432, subdivision (e), in relevant part, provides as follows:

“Serious physical harm” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following:

(1) Inpatient hospitalization for purposes other than medical observation. ***”

The violation involved failing to ensure Nieto remained secured to the tree while performing work until he returned to the ground. Susan Pipes, an Associate Safety Engineer,⁷ testified that, in her opinion, the violation created a realistic possibility of serious physical harm or death that would result from a fall from a distance of 30 feet. In this case, Nieto suffered cracked ribs and was hospitalized overnight where he received treatment and was given intravenous fluids and pain medications. As such, Nieto suffered serious physical harm as defined by Labor Code Section 6432, subdivision (e)(1) in that he was hospitalized overnight for purposes other than for medical observation.

Based on the foregoing, the Division met its burden of establishing a rebuttable presumption that there is a realistic possibility that a violation of section 3427, subdivision (a)(3)(A) will result in serious physical harm and that

⁶ See analogous Labor Code section 6432, subdivision (a).

⁷ Ms. Pipes demonstrated that her training was current and therefore she is deemed competent to offer testimony to establish each element of a serious violation.

this violation is correctly classified as serious.

3. Did Employer successfully rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?

“If the Division establishes a presumption pursuant to subdivision (c)(1) that a violation is serious, 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.” (Cal. Code Regs., tit. 8, § 334, subd. (c)(3); see Labor Code § 6432, subd. (c).)

The uncontroverted testimony of Nieto established that he was an experienced climber with substantial training. Nieto was a Certified Line Clearance Operator climber at the time of the incident and had been working as a climber for more than 4 years. Nieto participated in weekly safety and training meetings during this time. Additionally, Nieto had successfully climbed 10-12 trees in the morning before the incident.

In his testimony, Nieto acknowledged that he was required to remain tied into the tree while working in it and that if he violated that rule he would be disciplined. Just before the incident, Nieto examined the tree with his supervisor and discussed the procedure to fell the tree. After concluding the meeting at the tree to be felled, the supervisor moved away from Nieto and Nieto then climbed the tree. Very little time elapsed between the time the supervisor started walking from the tree and the time Nieto threw his climbing line into the tree crown and then cut the crown from the main trunk. In that Nieto worked as a climber for more than four years; had received regular trainings; participated in weekly safety meetings; and had attained the status of a Certified Tree Clearance Operator; the evidence supports the reasonable inference that the supervisor recognized Nieto as an experienced climber who would not make the obvious mistake of tying himself to a part of the tree he was sending to the ground and then completing the cut that would pull him to the ground with the fallen tree crown.

Nieto’s testimony established that his only excuse for cutting the tree crown he had just tied into was that it was a “mistake”. There is no evidence in the record that would support the assertion that there was something more that Employer could have done that would have alerted Employer to the possibility that Nieto would make such a basic and obvious mistake.⁸ Here, the Employer established that Employer did not know and could not, with the exercise of

⁸ Division asserts that Employer should have been monitoring Nieto’s actions more closely and had such monitoring been in place, the accident could have been prevented. In this case, such monitoring would have required the supervisor to stay with Nieto virtually every minute of every day. Such a requirement would be extreme and is not feasible.

reasonable diligence, have known of the presence of the violation or have taken action to prevent it. As such, Employer rebutted the presumption that the violation was serious.

4. Did Employer present sufficient evidence to establish the Independent Employee Action Defense?

Employer asserted the independent employee action defense (IEAD). Employer must establish all five of the elements set forth in *Mercury Service, Inc.*⁹ The IEAD is premised upon an employer's compliance with non-delegable statutory and regulatory duties. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (March 20, 2002).) An employer must show it has taken all reasonable steps to avoid employee exposure to a hazard, but the employee's actions serve to circumvent or frustrate the employer's best efforts. (*Paramount Farms, King Facility*, Cal/OSHA App. 09-864, Decision After Reconsideration (March 27, 2014); *Lights of America*, Cal/OSHA App. 89-400, Decision After Reconsideration (Feb. 19, 1991).)

The first element requires that the employee be experienced in the job performed. This requires proof that the worker had done the specific task "enough times in the past to become reasonably proficient". (*Solar Turbines, Inc.*, Cal/ OSHA App. 90-1367, Decision After Reconsideration (July 13, 1992).) It is not contested that at the time of the incident Nieto was a Certified Line Clearance Operator and had worked as a climber in the tree trimming business for more than 4 years. Further, on the day of the accident Nieto climbed and trimmed approximately 10 to 12 trees without incident. With this experience, Nieto has performed this task enough times to be reasonably proficient. This first element was established.

The second element requires the employer to have a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, *supra.*) The well devised safety program must contain specific procedures. (*Blue Diamond Growers*, Cal/OSHA App. 10-1281, Decision After Reconsideration (July 30, 2012).)

Joe Garcia (Garcia), Employer's Safety Coordinator, testified that Employer's safety program included weekly safety meetings covering a variety of topics related to Employer's operations, including Employer's tie-in policy; stand down meetings in the event incidents occur; job briefing with crews; and

⁹ The five elements in *Mercury Service* Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980) are: 1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments; (3) the employer effectively enforces the safety program; (4) the employer has a sanctions policy which it enforces against employees who violate the safety program, and; (5) the employee caused a safety infraction which s/he knew was against employer's safety requirement.

traveling to various worksites to monitor and inspect the work being performed. Garcia specified that Employer has a 100% tie-in policy which is taught to its employees verbally, hands-on and emphasized during safety meetings. Employer's tie-in policy requires climbers to be tied in with their lanyard or safety strap prior to even leaving the ground and requires that Climbers be tied in by two methods prior to making the cut on a tree. Further, a complete policy manual which includes a discussion of tree climbing policies is presented to employees and also supplied in the work trucks used.¹⁰ The weight of the evidence supports a finding that the second element was met. The third element of the IEAD defense requires proof that Employer effectively enforces its safety program. Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement. (*Glass Pak*, Cal/OSHA App. 03-0750, Decision After Reconsideration (November 4, 2010) quoting *Tri-Valley Growers*, Cal/OSHA App. 94-3355, Decision After Reconsideration (September. 15, 1999).)

Employer established that it continually reinforces its policies and procedures through weekly company safety meetings, job safety meetings on every job and occasional stand-down meetings in the event an incident occurs. Further, such procedures are enforced through warnings and other discipline. This extensive program consisting of a variety of training methods and continuous reinforcement demonstrates a desire by Employer to have an effective safety program that is properly enforced in compliance with the Act. The weight of the evidence supports a finding that the third element was met.

As to Element 4 of the IEAD defense, Employer established that it has a policy of sanctions against employees who violate the safety program by showing that Nieto himself was penalized with a day off without pay for failing to have fire gear out when conducting work.¹¹ Further, Garcia, Employer's safety coordinator, provided credible, uncontroverted testimony that Employer has an established employee handbook and implements a progressive discipline policy, including the issuance of disciplinary notices, trainings and punishments up to and including termination when necessary to correct and prevent safety violations. The weight of the evidence supports a finding that the fourth element was met.

Regarding the fifth element of whether the employee caused a safety infraction which he or she knew was contra to the employer's safety requirements, there is substantial evidence to demonstrate Nieto was experienced and that he knew he was required to remain tied into the tree until he had completed his work and returned to the ground. The violation in this

¹⁰ Employer's Exhibit "A" bears the initials of Ysidro Nieto acknowledging receipt of Employer's policy manuals and Exhibit "B" bears Nieto's signature acknowledging his presence at a safety meeting that specifically addressed six key steps to follow in the process of "Tree Felling".

¹¹ Although the safety rule violated was not directly related to tree felling activities, the one day suspension for a safety violation demonstrates that Employer's safety rules cannot be disregarded without consequences being imposed.

case is Nieto's act of severing the crown from the main trunk which resulted in him not being secured to the tree. In Nieto's testimony, he acknowledged that cutting the crown while being tied into it was a mistake and would result in a safety violation and likely injury. Even though at the very moment that he cut the trunk Nieto may not have been consciously thinking to himself that he was violating a safety rule, the evidence established that he did know better, but simply "forgot" and made a "mistake". The weight of the evidence supports a finding that the fifth element was met.

In conclusion, the weight of the evidence establishes that Employer took all reasonable steps to avoid employee exposure to the hazard posed by not being properly secured to the tree, but the unpredictable actions of the employee served to circumvent and frustrate the employer's best efforts.

For the foregoing reasons, the IEAD is established.

Conclusion

The Division established by a preponderance of the evidence that Employer violated section 3427, subdivision (a)(3)(A) in that the Employer did not ensure that Employee remained tied in or secured until the work was completed and he returned to the ground.

However, Employer established that Nieto's conduct met all five elements of IEAD. Thus, Employer's appeal from Citation 1, item 1, is granted and the proposed penalty is dismissed.

In that the citation and proposed penalty are dismissed, the reasonableness of the proposed penalty is moot.

Orders

It is hereby ordered that Citation 1, Item 1 is dismissed, as indicated above and as set forth in the attached Summary Table.

Dated: June 3, 2016

JKE:sp

J. KEVIN ELMENDORF
Administrative Law Judge

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

SYNERGY TREE TRIMMING, INC.

DOCKET 15-R2D1-0828

Date of Hearing: January 28, 2016

Exhibit Description

Exhibit No.	<u>Division's Exhibits</u>	<u>Status</u>
1	Jurisdictional documents	ADMITTED
2	Proposed Penalty Worksheet	ADMITTED
3	Photo of Work Site	ADMITTED
4	Letter confirming Susan Pipes is current on Division-mandated training.	ADMITTED
5	Cal/OSHA Document Request	ADMITTED
6	Employer letter to Division – Documents	ADMITTED
7	IIPP Document	ADMITTED
8	Employer Document Response	ADMITTED
9	1BY letter to Employer	ADMITTED

Employer's Exhibits

A	Policy Manual Checklist (in Spanish)	ADMITTED
B	Records of Attendance – Safety Meetings	ADMITTED
C	Documentation Worksheet	ADMITTED
D	Synergy Tree Trimming, Inc. Tree-Climbing Policy	ADMITTED

Witnesses Testifying at Hearing

Ysidro Nieto
Susan Pipes
Jose Garcia

CERTIFICATION OF RECORDING

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

Signature

June 3, 2016
Date

SUMMARY TABLE ORDER

In the Matter of the Appeal of:

**SYNERGY TREE TRIMMING, INC.
DOCKET 15-R2D1-0828**

Abbreviation Key:

G=General	Reg=Regulatory
S=Serious	W=Willful
Er=Employer	R=Repeat
Ee=Employee	DOSH=Division
A/R=Accident Related	

Inspection No. 317253953

Site: Near 17377 Maybert Rd., Washington, CA 95986

Date of Inspection: 09/29/14 – 02/10/15 Date of Citation: 02/10/15

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL	AFFIRMED	VIOLATION	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE-HEARING or STATUS CONF.	FINAL PENALTY ASSESSED BY BOARD
15-R2D1-0828	1	1	3427(a)(3)(A)	S	[Employer failed to ensure Employee was properly secured to the tree while working aloft.] Employer established all elements of Independent Employee Action Defense. Employer appeal granted by ALJ.		X	\$4,385	\$4,385	\$0
Sub-Total								\$4,385	\$4,385	\$0
Total Amount Due*										\$0

Please do not send payments to the Appeals Board.

All penalty payments must be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142
(415) 703-4291, (415) 703-4308 (payment plans)

*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:JKE
POS: 06/3 /16**