Before the state of california
occupational safety and health
appeals board

In the matter of the appeal of:

Davey Tree Surgery Co.
P. O. Box 5015
Livermore, CA 95402

Employer

Docket Nos.
13-R2D3-1018 through 1021

Inspection No.
119920106

Decision After Reconsideration

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by Davey Tree Surgery Co. (Employer or Davey) matter under submission, renders the following decision after reconsideration.

Jurisdiction

Beginning on September 28, 2012 the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in a forested area near Chester, California maintained by Employer. On March 6, 2013 the Division issued four citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, title 8, and proposing civil penalties. 1

Citation 1 alleged a general violation of section 3203, subdivision (a)(4) [failure to identify and evaluate hazards]; Citation 2 alleged a serious violation of section 3421, subdivision (c) [failure to ensure employees trained in hazards related to work assignments]; Citation 3 alleged a serious violation of section 3427, subdivision (c)(2) [failure to notch and backcut tree]; and Citation 4 alleged a serious, accident related violation of section 3427, subdivision (c)(1) [failure to clear work area and plan an escape route].

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an administrative law judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a decision (Decision) on December 30, 2015. The Decision granted Employer’s appeal of Citation 3, and upheld the other citations and their classifications, and imposed civil penalties.

Employer timely filed a petition for reconsideration. The Division filed an answer to the petition.

1 Unless otherwise specified, all references are to California Code of Regulations, title 8.
2 Amended in Decision to subdivision (c)(3) due to typographical error in citation. (See Decision, p. 1.)

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The Board took Employer’s petition under submission by order of March 15, 2016.

ISSUE

Was the Decision correct in sustaining the violations alleged in Citations 1, 2, and 4?

FINDINGS OF FACT

1. Employer was hired by Pacific Gas and Electric (PG&E) to clear trees damaged in the “Chips” forest fire in the vicinity of PG&E’s electric transmission lines near Chester, California. Such work is part of Employer’s regular business operations.
2. Other contractors were also engaged in tree removal work in the same area.
3. Employer’s tree removal work related to the Chips fire began on September 11, 2012.
4. Employer inspected the area in which it was to work before commencing its operations in the Chips fire area.
5. On September 27, 2012, Rene Curiel (Curiel), one of Employer’s employees, was killed after being struck by a tree during the clearing operation.
6. Curiel’s accident occurred when a tree he had cut down (“felled”) struck another tree while falling, causing the second tree’s trunk to break at a point approximately 20 feet above ground, fall and strike Curiel.
7. Employer’s employees working to clear trees in the Chips fire area were properly trained and experienced.
8. Prior to Curiel’s accident, he and his foreman discussed and planned an escape route to use when the tree Curiel was cutting began to fall.
9. Curiel’s foreman was assisting in felling the tree by driving wedges into the cut as it progressed. The tree had already been properly back cut.

DISCUSSION

We are presented with the question of whether the evidence adduced at hearing and the language of the cited safety orders support the violations alleged by the Division and sustained by the ALJ. As will be explained, we hold the ALJ’s Decision to have been incorrect. We address each of the citations at issue individually below.

Citation 1 alleged a general violation of section 3203, subdivision (a)(4), failure to identify and evaluate hazards in the workplace. The safety order states:

(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:
(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: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.
(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.

The record shows that Employer had an Injury and Illness Prevention Program (IIPP) which complied with the requirements of subdivision (a)(4). The issue was whether Davey actually took the actions called for by its IIPP. The testimony was that Davey did inspect the work area before the work began. The evidence also established that Davey’s crew, including Curiel, was experienced in the work being done. There was no evidence that new processes, procedures, etc., were involved or that Davey was made aware of “new or previously unrecognized hazard[s],” including those associated with working in a burn area and cutting fire-damaged trees. The Division’s theory is that because Davey did not produce documents showing that the (a)(4) inspections were done, the inspections were not done. That theory is contradicted by the evidence. Moreover, the Division could have, and did not, cite Davey for violating section 3203, subdivision (b), which requires records of such inspections be maintained.

Board precedent pertinent to section 3202, subdivision (a)(4) holds that there is no requirement that the employer have a written procedure for each hazardous operation, but rather that it have procedures in place for identifying and evaluating workplace hazards, and making periodic inspections. (Brunton Enterprises, Inc., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) Although the Board has held that a lack of records of inspections can support an inference that required inspections were not made, here the uncontradicted evidence was that inspections were done, and such an inference is not proper. (See ABM Facility Services, Inc., dba ABM Building Value, Cal/OSHA App. 12-3496, Decision After Reconsideration (Dec. 24, 2015).)

Based on the record, therefore, Employer’s appeal of Citation 1 is granted and the citation dismissed.

Citation 2 alleged a violation of section 3421, subdivision (c), which applies to tree trimming and removal work (among others), and stated:

(c) Employees shall be trained and instructed in the hazards involved in their job assignments, including the proper use of all equipment utilized in tree work, maintenance or removal operations. Such training shall be documented by the employer to certify that the employee has satisfactorily completed the training program prior to performing the job assignment.

The evidence was that all of Davey’s personnel involved in Chips work had completed Davey’s eighteen month training program on tree removal and maintenance.

In addition to having an experienced crew assigned to this project and having trained each of the crew members, Davey conducted what it maintains was training on the specific work on the Chips fire area. Before the crew went to the worksite, they participated in what the Division considers a “safety meeting” and Davey maintains was a training event in the parking lot of the hotel where the crew was housed. That meeting or training then continued at the worksite itself,

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3 Section 3421 was amended on September 25, 2012, which amendment was operative on October 27, 2012. Because the amendment was not yet operative, we apply the regulation as in effect on the day of the accident, September 27, 2012.
where the details of the situation were examined and explained, and various work assignments given.

The Division inspector’s view was that to satisfy section 3421, subdivision (c) the training sessions at the hotel and in the forest must have included visual aids and some means of testing to assure that the information transmitted was understood. He further maintained that since the sessions held at the hotel and at the worksite did not involve visual aids or testing, they could not be considered training.

There are two problems with that theory. First, the safety order does not require there be visual aids or testing of employees to evaluate their understanding and retention of the information presented. The Division would have the Board read such a requirement into the safety order, which the Board may not do. (Stanislaus Food Products Company, Cal/OSHA App. 13-572, Decision After Reconsideration (Apr. 23, 2015).) Second, the two sessions prior to beginning work at the Chips site were not the totality of the training given the employees, but instead were used to present information specific to the Chips area work, and were based or built on the prior training already given the employees. The inspector further testified that to qualify as training, in addition to visual aids and testing, the session(s) must discuss everything in an employer’s safety manual and “address every tree, every thickness of every tree[.]” There is no language in the safety order embodying that requirement, and we may not insert such. (Ibid.) We hold that Employer was not shown to be in violation of section 3421, subdivision (c) and grant its appeal of Citation 2.

As noted earlier Citation 3 is not at issue.

Citation 4 alleged a serious violation of section 3427, subdivision (c)(1), which states: “(c) Felling. (1) The work area shall be cleared to permit safe working conditions and an escape route shall be planned before any cutting is started.”4 The Division maintained that Davey failed to “clear” an escape route, which requirement is not in the text of the safety order, which says the route must be “planned.” Thus Citation 4 seeks to impose the Division’s view that Employer failed to “clear” an escape route and would read a requirement into the safety order, one which is not required by either subdivision (c)(1). Doing so violates the principles of statutory interpretation. (See Key Energy Services, LLC, Cal/OSHA App. 13-2239, Denial of Petition for Reconsideration (Dec. 24, 2014), supra.)

The evidence established that the crew planned an escape route for both men (foreman and decedent), albeit perhaps one not cleared of all obstructions. In any event the evidence shows the foreman successfully used the planned escape route when the felled tree began to fall. The record also established that the foreman gave a verbal warning for decedent to move away from the stump of the felled tree when it began to fall. Tragically, decedent “froze” in place rather than moving, allowing the second tree to strike him. (It appears that had the felled tree not hit the second tree, Curiel would not have been hurt even though he did not use the planned escape route.) Given the evidence that an escape route was planned and used, we cannot find either that the work area was not cleared so as to provide “safe working conditions” or that an escape route was not “planned” (subdivision (c)(1)). We therefore grant Employer’s appeal of Citation 4.

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4 Section 3427, subdivision (c) was amended on September 25, 2012, which amendment was operative on October 27, 2012. Because the amendment was not yet operative, we apply the regulation as in effect on the day of the accident, September 27, 2012.
While not necessary to resolve the issues before us, we make the following observations. First, Employer’s or its counsel’s tactics, while not improper, were aggressive to the point of causing us to question the motives behind them. Specifically, Employer reassigned some of the workers present when Curiel’s accident occurred with the result that they were not available to be interviewed by the Division’s inspector for several weeks. They were ultimately interviewed by telephone. Second, we note that the Division did not seek to use available procedures to obtain those interviews sooner. We comment that while counsel are entitled and ethically obligated to be vigorous in representing clients, there can be unintended consequences in how tactics or failure to use available procedures may be perceived.

DECISION AFTER RECONSIDERATION

Regarding Citations 1, 2 and 4 the ALJ’s Decision is reversed and Employer’s appeals are granted.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Art R. Carter, Chairman
Ed Lowry, Board Member
Judith S. Freyman, Board Member

FILED ON: 05/15/2017