

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

In the Matter of the Appeal of:

SYNERGY TREE TRIMMING, INC.

Employer

Docket No.
15-R2D1-0828

Inspection No.
317253953

**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 ordered reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on September 29, 2014, the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment in Anaheim, California maintained by Synergy Tree Trimming, Inc. (Employer). On February 10, 2015, the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1 alleges a serious, accident-related violation of section 3427(a)(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]. Employer filed timely appeals of the violations and the classifications.

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 on June 3, 2016. The decision granted Employer's appeal.

The Board ordered reconsideration of the ALJ's decision. The Division timely filed a petition for reconsideration of the ALJ's decision. The Employer filed an answer to the Board's order and the division's petition.

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

ISSUES

1. Did the ALJ correctly weigh the five elements of the Employer's affirmative Independent Employee Action Defense (IEAD)?
2. Did the ALJ correctly find that the Employer rebutted the presumption of a serious classification pursuant to Labor Code section 6432?

FINDINGS OF FACT

1. On August 18, 2014, an accident occurred at a worksite in and around 17377 Maybert Road, Washington, California, in which Ysidro Nieto (Nieto), an employee of Employer, suffered injuries.
2. Nieto was a certified line clearance tree trimmer on the date of the injury. He had been employed with Employer for about four years.
3. Nieto was engaged in work with crew foreman David Huerta (Huerta) and crew groundsman Gerra. Nieto cut about 10 to 12 trees from 10am until his lunch break.
4. The tree that Nieto fell from was 40 feet tall. Nieto was working 5 to 6 feet away from 12,000 volt power lines.
5. Nieto was engaged in felling the 40 foot tall tree. His first step was cutting off the crown.
6. Nieto's climbing rope was tied to the portion of the tree, the crown, above the cut he made, so that when the crown fell Nieto was pulled to the ground with it, suffering a fall of 30 feet, cracked ribs and losing consciousness.
7. Nieto was treated in the hospital for his injuries.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration and the Division's answer to it.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

The Division petitioned for reconsideration on the basis of Labor Code section 6617 subdivisions (a), (c) and (e).

Did the ALJ correctly weigh the five elements of the Employer’s affirmative Independent Employee Action Defense (IEAD)?

Neither party challenges the ALJ’s finding that section 3427, subdivision (a)(3)(A) was violated, and we will not disturb that aspect of the Decision. (Decision, p. 5.) Instead, Employer has asserted the affirmative defense of Independent Employee Action (IEA Defense or IEAD). There are five elements to the IEAD, all of which must be shown by an employer in order for the defense to succeed: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions which it enforces against employees who violate the safety program; and (5) the employee caused the safety violation which he knew was contra to employer's safety rules. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980); *Cal Pac Sheet Metal, Inc.*, Cal/OSHA App. 13-0547, Denial of Petition for Reconsideration (Oct. 8, 2014).)

As a threshold matter, the Division questions whether the IEAD is available to the Employer in any set of circumstances where a management employee was present at the accident. To the extent that any prior Board Decisions After Reconsideration may be read to stand for the proposition that the IEAD cannot be applied at any time when a management official was present, the Board hereby declines to follow such a rule. Rather, whether an appropriate degree of supervision was provided is best considered within the context of the five factors enumerated above, and particularly within element three, as the Board has stated in prior Decisions After Reconsideration. (*D. A. Whitacre Construction*, Cal/OSHA App. 90-775, Decision After Reconsideration (Aug. 8, 1991) [Employer failed to enforce tie-off rule at worksite; failure to enforce safety rule, therefore IEAD not met].) The inquiry into whether on-site supervision is appropriate must be fact specific to each situation.

As to the Employer’s affirmative defense here, the first element of the defense requires a showing that the employee was experienced in the job being performed. The Division did not dispute that Nieto was a qualified line clearance tree trimmer pursuant to section 2700 of the electrical safety orders, with many hours of tree cutting experience. Nieto testified that he had worked as a climber for four years, and he had cut on average 20 or more trees per day. The ALJ’s finding that Nieto was experienced as a qualified line clearance tree trimmer is supported by the record.

The second element of the IEA defense requires the employer to demonstrate that it has a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments. (*Chevron U.S.A., Inc.* Cal/OSHA App. 89-283, Decision After Reconsideration (Feb. 8, 1991).) The Board has analyzed this element by looking at the written policies and procedures of the employer, as well as taking testimony as to what constitutes the day-to-day safety practices of the employer. (See, *Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010).) Indeed, demonstration of an extant and effective Illness and Injury Prevention Program, as well as relevant training records and information regarding what constitutes Employer’s training program for impacted employees, are typically the showings an employer must make to meet this element.

While Employer did provide several documents showing Nieto's attendance at certain training events and receipt of safety-related documents, Employer did not provide more than a mere sketch of what training is provided during its apprenticeship program. By failing to flesh out those details, Employer failed to effectively rebut the Division's testimony that questioned whether Nieto had received effective training during his two year apprenticeship period. Employer did not demonstrate that its safety program was well-devised and included training employees in matters of safety respective to their particular job assignments.

As to element three, the Employer must show that it effectively enforced its safety program. While the Division argues that foreman Huerta's presence at the site is enough to show a failure to enforce the safety program, the Board notes that Nieto's actions of throwing the rope and making the cut occurred quickly, and that even the most diligent supervisor cannot watch his or her employees at every minute of the workday. Nieto's act was not demonstrated to be an ongoing safety rule violation engaged in by Nieto, but by Nieto's account was an unusual and unintended mistake, and one may have occurred too quickly for Huerta to intervene in.

However, Nieto's error is not the only safety concern. Employer has the burden to show that it enforces the safety policies and procedures promulgated in its IIPP and training programs, and promotes a safe working environment. "Enforcement is accomplished not only by means of disciplining offenders but also by compliance with safety orders during work procedures." (*Martinez Steel Corp.*, Cal/OSHA App. 97-2228, Decision After Reconsideration (Aug. 7, 2001).) The Board has previously stated that where there is lax enforcement of safety policies an employer cannot be said to have effectively enforced its safety plan. (*Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010).) In this case, Employer has not met its burden of showing effective enforcement, as the evidence tends to show ongoing failures to follow basic safety policies promulgated by the Employer.

Although Employer has a written rule requiring an audible warning be made before cutting begins, Nieto testified that no audible warnings were made before cuts were started, and that he and his coworkers would simply listen for the sound of the chainsaw. (Ex. 8-7.) Another policy states "During all tree felling operations, all persons not directly involved with the work shall be kept clear, to a distance equal to 2 times the height of a tree." (Ex. 8-6.) However, testimony shows that employees were working in much closer proximity to one another, with Nieto's foreman, who was responsible for enforcement of the safety rules, in a tree ten feet away from Nieto. The failure to enforce these safety rules suggests a larger problem of safety program enforcement.

Element four requires a demonstration that the employer has a policy of sanctions which it enforces against employees who violate the safety program. Employers may show compliance with this element through producing records of disciplinary actions related to safety. (*Paramount Farms, King Facility*, Cal/OSHA App. 2009-864, Decision After Reconsideration Mar. 27, 2014.) Here, Employer introduced no records of employee discipline or other evidence to show that it actively enforces its disciplinary policy when employees violate safety rules. The Board recognizes that in some workplaces, a lack of employee disciplinary records may not indicate a failure to effectively enforce a safety program. An employer may be able to provide other

information that demonstrates the use of verbal coaching, retraining efforts, or positive recognition of employees who follow safe and healthful work practices to ensure compliance, rather than simple written discipline or other punitive measures. (See, section 3203, subdivision (a)(2).) However, as an affirmative defense, it is the employer who has the burden of entering this testimony and evidence, not the Division. Here, Employer's testimony regarding its efforts to ensure compliance was cursory, and included no records of sanctions, the progressive disciplinary policy itself, or any other program features. This is not enough to meet element four.

The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements. (*Mercury Services, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) In *Macco Constructors, Inc.* Cal/OSHA App. 83-147, Decision After Reconsideration (Oct. 2, 1987), the Board describes the purpose of the IEAD as follows:

The independent employee action defense is designed to relieve an employer from the consequences of willful or intentional violation of one of its safety rules by non-supervisory employees, when specified criteria are met. See *Mercury Service, Inc.*, OSHAB 77-1133, Decision After Reconsideration (Oct. 16, 1980).

The parties dispute whether Nieto acted with such knowledge at the time of the violation, but the Board has no reason to discount the testimony of Nieto, and declines to do so. Nieto testified that he made the cut "Because I didn't remember the climbing rope was up the tree, and I didn't remember it was attached to the tree." He testified that throwing the rope into the crown of the tree was "instinct". In *Macco Constructors, Inc.* Cal/OSHA App. 83-147, Decision After Reconsideration (Oct. 2, 1987), the Board describes the purpose of the IEAD as follows:

The independent employee action defense is designed to relieve an employer from the consequences of willful or intentional violation of one of its safety rules by non-supervisory employees, when specified criteria are met. See *Mercury Service, Inc.*, OSHAB 77-1133, Decision After Reconsideration (Oct. 16, 1980).

In a more recent case, *Sheedy Drayage*, Cal/OSHA App. 06-3054, Denial of Petition for Reconsideration (Jun. 12, 2013) the Board stated:

Employer also argues that the crane operator engaged in an extreme departure from his assigned work. We disagree. The crane operator made a mistake in over booming the load, but there is no convincing evidence that his doing so was other than an inadvertence or an error in judgment while attempting to perform the lift.

Whether an action was inadvertent or constituted a conscious disregard of a safety rule is a question that must be examined in each case, in light of all facts and circumstances. In the case at issue, the Employer is unable to demonstrate that Nieto's actions were anything less than an unfortunate one-time error. Put another way, the Employer has not shown that Nieto's actions

were intentional and knowing, as opposed to inadvertent, or that Nieto was conscious of the fact that his actions constituted a violation of a safety regulation or rule at the time of the incident. Indeed, the evidence preponderates to a finding that Nieto acted inadvertently.

The Board also notes that a separate affirmative defense, known as the Newbery defense, may be applicable in cases such as this, and can be asserted and argued concurrently with the IEAD. (*Gaehwiler v. Occupational Safety and Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045 [“[T]he violation is deemed unforeseeable, therefore not punishable, if *none* of the following four criteria exist: (1) that the employer knew or should have known of the potential danger to employee. (2), that the employer failed to exercise supervision adequate to assure safety; (3) that the employer failed to ensure employee compliance with its safety rules; and (4) that the violation was foreseeable.”].) However, Newberry defense was not raised here.

Finding that the IEAD is not met, the violation of the citation is upheld.

Serious Classification

The Division, in its petition for reconsideration, challenges the ALJ’s analysis of the serious classification of the citation; the Division argues that the Employer did not specifically raise the rebuttal argument and it is therefore waived. Under amended section 6432, subsection (c), an employer has a statutory right to rebut the presumption and need not specifically raise the issue in its appeal. (See, *Orange County Sanitation District*, Cal/OSHA App. 13-0287, Decision After Reconsideration (May 29, 2015).) [“An employer need not raise this statutory defense in its initial appeal (or through appropriate amendment of the appeal), as it is provided within the Labor Code and is automatically available to the employer once the classification is appealed.”]

Pursuant to the Labor Code, an employer may demonstrate that it “did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.” (Labor Code section 6432, subsection (c).) Subsection (c) provides:

The employer may accomplish this by demonstrating both of the following:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Notably, both subsection (1) and (2) must be demonstrated, as the Board reiterates in *International Paper Company*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).

As a rebuttable presumption, the burden is on the employer to show that it meets the elements. The first prong of the rebuttable presumption requires the employer to demonstrate it “took all the steps a reasonable and responsible employer in like circumstances should be expected to take,” with the factors listed in subdivision (b) as a guide.² In this case, Employer presented brief evidence regarding its 15 minute safety meetings, but no evidence was produced on its initial apprenticeship program. The testimony did not describe how employees are first brought on board as climbers, how long the training program lasts, what work apprentices are allowed to do or with what level of supervision. Garcia’s testimony provides limited insight into Employer’s actual training practices beyond the 15 minute tailgate meetings and the documents Garcia testified are placed in field vehicles. It cannot be said that Employer presented information meeting its burden of rebuttal under section 6432, subdivision (c)(1). Nor did Employer present any information that addressed its efforts to eliminate the hazard, the subdivision (c)(2) factor.

²The subdivision (b) factors are: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.

(B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.

(C) Supervision of employees exposed or potentially exposed to the hazard.

(D) Procedures for communicating to employees about the employer’s health and safety rules and programs.

(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:

(i) The employer’s explanation of the circumstances surrounding the alleged violative events.

(ii) Why the employer believes a serious violation does not exist.

(iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).

(iv) Any other information that the employer wishes to provide.

Having failed to rebut the presumption of a serious citation, the citation is properly classified as serious. The proposed penalty of \$4385 is reinstated.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 05/15/2017

