

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

In the Matter of the Appeal of:

HHS CONSTRUCTION
2042 S. Grove Ave.
Ontario, CA 91761

Employer

Dockets. 12-R3D2-0492 through 0497

**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 HHS Construction (Employer) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on August 25, 2011, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in San Diego, California maintained by Employer. On February 3, 2012 the Division issued six citations to Employer alleging violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1, Item 1 alleged a General violation of section 2340.17(a) [unguarded live electrical wires]. Citation 1, Item 2 alleged a General violation of section 3203(a) [incomplete written Illness and Injury Prevention Plan (IIPP)]. Citation 1, Item 3 alleged a General violation of Section 3395(f)(1) [incomplete heat illness training]. Citation 1, Item 4 alleged a General violation of section 3395(f)(3) [incomplete written Heat Illness Prevention Plan].² Citation 2 alleged a Serious violation of section 3203(a)(4) [ineffective identification and evaluation of workplace hazards]. Citation 3 alleged a Serious violation of section 3203(a)(7) [incomplete training on job hazards]. Citation 4 alleged a Serious violation of section 3328(f) [improper vehicle modifications]. Citation 5 alleged a Serious violation of section 3380(f)(1) [failure to select and provide

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

² Employer's petition does not include Citation 1, Item 3 or Item 4.

personal protective equipment]. Citation 6 alleged a Serious violation of section 8610(c) [no roll-over protective structure].

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 on January 13, 2014. The Decision denied Employer's appeal and imposed total penalties of \$40,380.

Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division filed an answer to the petition.

ISSUES

Did the ALJ correctly uphold the Citations and penalty classifications at issue?

In Citation 6, is the all-terrain vehicle used by Employer a "construction vehicle" as defined by the cited provision of the safety order?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

On August 9, 2011, Employer's employee, Michael Cheney (Cheney), a lineman engaged in installation work to install fiber optic cable, was involved in an accident while driving a Polaris Ranger all-terrain vehicle ("ATV" or "Polaris"). Jason Carmody (Carmody), a foreman of Employer's, who had been a fellow lineman with Cheney at the time of the accident, testified regarding the work that their crew, which consisted of Cheney, foreman Joshua Nytes (Nytes), and another lineman, Justin Bradford (Bradford), had been engaged in on the day of Cheney's accident. Carmody explained that the crew was at a worksite where they would be attaching new fiber optic cable to existing telephone poles. During the course of their work the crew met multiple times to regroup and plan. At one point the crew met at the bottom of the hill by the first telephone pole where Carmody would be stringing the cable from one pole to another across the street. Carmody marked the pole where the group had gathered as pole '4', and his destination pole as '1', on Division exhibit 2.

Cheney was tasked with meeting Carmody at pole 1, in order to help Carmody once he had traveled to the other pole via the wires in an aerial device known as a cable car. During the tailgate meeting, Carmody and Nytes noted that there was an access road visible near pole 1, but no one was sure of how

to get to it. Carmody testified that he and Nytes were in agreement that the Polaris could not travel up the hill to pole 1. When Cheney left for his assigned task, to meet Carmody at pole 1, Cheney departed, driving the Polaris west on Lusk Boulevard. Carmody believed that Cheney was driving off to look for the entry to the access road. The crew members generally had personal smartphones with them, and would use a Google Maps app to map the access roads in remote areas.

When Carmody reached pole 1, Cheney was not there. At some point, the crew members became concerned, and began calling his cell phone, as well as searching for him with the truck and on foot. Cheney eventually picked up the phone, indicating that he was injured, and his general location. He was found half-way up a hill, between pole 1 and a ravine where the Polaris had landed. (Div. Ex. 4). Cheney was transported to the hospital by helicopter. He was admitted to the hospital on August 9 and was hospitalized through August 19, 2011 for a closed head injury and broken clavicle. (Div. Ex. 29). Cheney has little or no memory of the incident.

Associate Safety Engineer Darcy Murphine (Murphine) visited the Employer's worksite and the accident site. She met with Employer's Director of Safety, David Curry (Curry), who explained that the Polaris was generally used for hauling materials. The Employer treats the Polaris like any other work vehicle and does not provide specialized training on its use. Nytes, the crew foreman, also confirmed to Murphine that he did not have training on the Polaris and that there was no policy on its use.

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.

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

Citation 1, Item 1

The Division cited Employer for a violation of section 2340.17(a), which requires energized parts of electric equipment operating at 50 volts or greater to be guarded against accidental contact. The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Howard White Construction, Inc., Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) “Preponderance of the evidence” is generally defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal. App. 4th 472, 483, review denied.)

During the course of her inspection, Murphine visited the Employer’s shop where the damaged Polaris was being housed. Murphine noticed a junction box on the wall in the back of shop behind the ATV which had the panel slightly ajar. (Div. Ex. 12). She moved the panel about ½ an inch and tested the wire with a voltage meter light pen, which indicated that the wires were live at 50 volts or greater. She took a photograph of the pen while lit. (Div. Ex. 18). Murphine testified that the room was a warehouse-like area where employees would regularly meet in the space and pick up their equipment and tools before going out on jobs. There was also a supervisor office located right off of the area.

Employer argues that employee exposure to the hazard was not demonstrated. As the ALJ correctly found, actual exposure to the hazard is not required for the Division to prove a violation. In this instance, the Division inspector’s uncontroverted testimony provides circumstantial evidence demonstrating that employee exposure was more likely than not. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) The Division was able to show employee exposure to this exposed, energized electrical equipment. (See, *Steve P. Rados, Inc.*, Cal/OSHA App. 80-822 Decision After Reconsideration (Jul. 29, 1981).) The citation and penalty are upheld.

Citation 1, Item 2

Citation 1, Item 2 alleges a general violation of section 3203(a) which requires each employer to establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP). The citation alleges Employer had

not established a written IIPP which included all of the elements required by the safety order:

The following elements were missing from the Program:

1. A system of communication with employees as required under (a)(3), including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal;
2. Procedures for identifying and evaluating work place hazards under (a)(4)(B) and (C), for new hazards and procedures; and
3. Procedures to correct hazards under (a)(6)(B) when an imminent hazard exists.

The Division entered portions of the Employer's IIPP into evidence. (Div. Ex. 19). Murphine testified to reviewing the entirety of Employer's IIPP, as well as other documents provided by the Employer. She concluded from her review that Employer was lacking a system of communicating with employees on matters of safety and health, including a required provision that employees have an ability to communicate worksite hazards without fear of reprisal.

Murphine also found that the Employer did not have all the required elements for identifying workplace hazards. Murphine explained that she was looking for procedures that the Employer engages in when new processes, procedures, or new equipment come online, or the Employer becomes aware of a new hazard. She also was examining the documents for the Employer's procedure for correcting imminent hazards. Murphine testified that she did not find those in the written program.

The Employer's IIPP requires training and instruction for new substances, processes, procedures, or equipment, as well as for when the employer receives notification of a new hazard. (Div. Ex. 19, p. 10). The language used by Employer in its IIPP appears to track section 3203(a)(4)(B) and (C) closely. However, the documents provided do not address how the Employer will correct new hazards in the workplace, or the Employer's communication system. Employer provided no testimony or documentation to rebut the Division's evidence on this point. The Division may establish a violation of section 3203(a) by demonstrating that the IIPP lacks *any* of the required elements. Here, the Division has shown at least two key elements are absent from Employer's IIPP. (*Tomlinson Construction, Inc.*, Cal/OSHA App. 95-2268, Decision After Reconsideration (Feb. 18, 1998).) A violation is proven.

As this citation is classified as general, rather than serious, the ALJ's discussion of the probable consequences of an accident caused by the omission of the IIPP sections is irrelevant. (See, *W.F. Scott & Co.*, Cal/OSHA App. 95-2623, Decision After Reconsideration (Oct. 29, 1999) [To uphold a serious

citation for a 3203(a) violation, Division must show “substantial probability that death or serious physical harm could result from the failure to have a safety program.”)]

The Board sustains the citation and penalty.

Citation 2

Citation 2 alleges a serious violation of section 3203(a)(4):

- (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.

The citation specifically alleges that at the time of the inspection, the Employer had not implemented an IIPP to effectively identify and evaluate workplace hazards related to the ATV. Employees working on telephone lines used the modified Polaris vehicle in a variety of conditions and on various terrains. Employer failed to evaluate the impacts of vehicle modifications on the vehicle’s safety, or the various hazards which employees could be exposed to while operating the vehicle. The citation describes the hazards relevant to use of the vehicle as:

1. Procedures identified in the Owner’s manual for safe operation and maintenance
2. Use of appropriate PPE such as helmets and eye protection
3. Operation of the vehicle on steep terrain exceeding 15% grade
4. Prohibition of operating the vehicle on public roads
5. Use of seatbelts when operating the vehicle
6. Safety decals and warning labels
7. Proper riding techniques to avoid vehicle overturns on hills, rough terrain, slippery conditions, while reversing and in turns
8. Maintenance of the vehicle including use of the proper size and type of tires
9. Modification of the vehicle

The Division alleges that Employer failed to implement its IIPP. While an employer may have a comprehensive IIPP, the Division may still demonstrate an IIPP violation by showing that the employer failed to implement that plan—in this case, through failing to inspect, identify and evaluate the hazards

associated with the ATV. (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).)

The Polaris was modified by Employer to include a rack which was used for either hauling or installing telephone poles. Murphine explained that the modification, which added weight (mass) to the original cab cage, raised the Polaris' center of gravity, making it less stable and more prone to tipping. Employer also changed the tires on the vehicle from the manufacturer's recommended size, which affected the handling on the vehicle. The manual advises the owner to use the proper size and type of tires specified, and to never modify the vehicle through improper installation or use of accessories. (Div. Ex. 18, p. 11-12).³

The testimony and evidence demonstrate that the Employer failed to identify and evaluate the hazards of operating the Polaris, particularly in its uniquely modified condition. Employer had knowledge of the ATV tipping over several times, but failed to inspect or evaluate the hazards of the vehicle to prevent future accidents. (See, *Brunton Enterprises, Inc.*, Cal/OSH App. 08-3445, Decision After Reconsideration (Oct. 11, 2013). [Employer must have procedures to identify and evaluate workplace hazards.]

Employer knowingly made modifications to the ATV in contravention of the manufacturer's stated warnings, but failed to evaluate what hazards might be created by those modifications, such as increased risk of rollover.

Nor did Employer evaluate the hazards created by its employees driving the Polaris on public streets, which may "adversely affect handling and control" according to the manufacturer, and on terrain much steeper than the 15 degree maximum recommended by the manufacturer. Murphine testified that the accident occurred on a 30 to 50 degree slope. The Division established by a preponderance of the evidence that Employer failed to have procedures in place for identifying and evaluating workplace hazards related to the Polaris as required by section 3203(a)(4).

Classification of Citation 2

The Division classified the citation as serious. In its petition for reconsideration, Employer argues that the ALJ applied the incorrect legal standard, and that the section 334(c)(1) definition of "serious violation" rather than the Labor Code standard at section 6432, should have been applied.

³ Employer objects to the admission of the *2007 Polaris Ranger 4x4 700 EFI Ranger 6x6 EFI Owner's Manual for Maintenance and Safety*, as hearsay. Murphine testified to downloading the document from the Polaris website, as the original manual which she requested from Employer, had been lost in the vehicle accident. There is no dispute that the Polaris involved in the accident is a 2007 Polaris Ranger XP 700cc utility vehicle. The Board finds the document to be admissible under the section 1271 Business Records exception to the hearsay rule.

Employer's argument is without merit. As the Division correctly notes in its reply to Employer's petition, where an administrative regulation is in conflict with an applicable legislative provision, the legislative provision will prevail. (*Cal. Welfare Rights Org. v. Brian* (1974)11 Cal. 3d 237, 242). The legislature has demonstrated its intent to change the standard for a serious violation in its 2011 amendment to the Labor Code, and the Board will follow those more recent changes.

Under the Labor Code at section 6432:

- (a) 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 Board has interpreted "realistic possibility" to be a prediction that is clearly within the bounds of human reason, and not pure speculation. (*Levy Premium Foodservice Limited Partnership dba Levy Restaurants*, Cal/OSHA App. 12-2714, Denial of Petition for Reconsideration (Aug. 25, 2014).) Murphine testified that the actual hazard created by the violation was a vehicle accident due to the lack of inspections and evaluations of the hazards associated with the ATV. She testified that if an employee were to get in an accident there would be a realistic possibility that he or she could suffer injury, such as broken bones, concussion, or other injuries typical of vehicle crashes and require hospitalization. She also stated that death was a possibility. Murphine stated that she had completed about a dozen forklift accident investigations, as well as investigating accidents with construction equipment that resulted in death from rollover.

Turning again to Labor Code at 6432(c), once the Division has established a presumption, as here, that a violation is serious, the employer may rebut that presumption. The statute describes how an employer may rebut, as follows:

If the division establishes a presumption pursuant to subdivision (a) 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. 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.

Employer argues in its petition for reconsideration that it did not, and could not, with the exercise of reasonable diligence, have known of the presence of the violation for failure to inspect and identify hazards. As an affirmative defense, Employer has the burden of presenting evidence on this point. Employer provided no testimony or evidence to rebut the Division's showing. Therefore, the serious classification is established and the penalty is upheld.

Citation 3

Citation 3 alleges a serious violation of section 3203(a)(7), which requires that the employer:

(7) Provide training and instruction:

(A) When the program is first established

EXCEPTION: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.

(B) To all new employees;

(C) To all employees given new job assignments for which training has not previously been received;

(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;

(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

In particular, the citation alleges:

- a) At the time of the inspection, the employer had a written Injury and Illness Prevention Program; however employees had not been adequately and effectively trained on all of the hazards and hazardous operations present in the workplace. Employees working on telephone communications lines routinely used a 2007 Polaris Ranger XP 700cc utility vehicle in remote, ungraded hillsides, mountains and canyons throughout San Diego county. The employer had not provided employees with training and instruction, either before or after it was modified, to adequately identify and evaluate the hazards to which the employees may be exposed while operating the vehicle. Hazards relevant to the use of the vehicle include but are not limited to:
 1. Procedures identified in the Owner's manual for safe operation and maintenance
 2. Use of appropriate PPE such as helmets and eye protection
 3. Operation of the vehicle on steep terrain exceeding 15% grade
 4. Prohibition of operating the vehicle on public roads
 5. Use of seat belts when operating the vehicle
 6. Safety decals and warning labels
 7. Proper riding techniques to avoid vehicle overturns on hills, rough terrain, slippery conditions, while reversing, and in turns
 8. Maintenance of the vehicle including use of the proper size and type of tires
 9. Modification of the vehicle
 10. Rollover risk while operating the vehicle

Murphine testified to the hazards outlined in the citation. She explained that she had measured the hill where the Polaris crashed, and found it to have a slope of 30 to 50 degrees. She pointed to the manufacturer's warning to never operate the vehicle on terrain exceeding 15 degrees. (Div. Ex. 21, p. 1). According to Murphine, the Employer needed to train employees on proper riding technique for the terrain, and communicating the information that is found in the manual, such as the instructions regarding driving on hills and slopes, proper turning and backing up, and how terrain can impact the stability of the vehicle. The employees operated the ATV on a variety of surfaces and terrains, including hills. Proper riding technique involved moderating the throttle and break for traction control, and would help employees to avoid tipping the vehicle. Murphine explained that this is a different skill set from driving a normal car and the potential hazards and driving techniques needed to be communicated to employees.

The manual warns also users to "ALWAYS WEAR YOUR SEAT BELT for maximum protection." (Div. Ex. 21, p. 6). The cab frame "is not designed or intended to provide rollover protection." (Div. Ex. 21, p. 6). Carmody testified

to having tipped the vehicle over once, and stated that he had not been driving fast, no more than 10 m.p.h. His supervisor at the time had helped him to right it, and had only told Carmody to be more careful in the future. Nytes had also tipped the vehicle once, and explained to Murphine that because of the propensity of the vehicle to tip, employees would wear their seatbelts on paved surfaces, but on bumpy ground would go without the belt, so that they would be able to jump from the ATV if necessary. Carmody affirmed that he would only wear the seatbelt on flat surfaces, so that he could jump in case of a rollover on rough terrain. Although the company's general policy was for employees to wear seatbelts in vehicles, employees routinely failed to wear seatbelts in the ATV, due to their perception that they would be safer without the belts. Employees were not trained on using seatbelts in the ATV.

Murphine also testified that because the Employer had modified the cab frame through addition of a tubular metal structure attached to the cab by metal brackets which was used for hauling phone poles or setting poles, it had potentially negatively impacted the stability, handling and overall safety characteristics of the ATV. These changes were made to the vehicle without providing employees any training on the new hazard. Similar changes were made to the tires, which were changed to a non-standard size without employees being provided any instruction as to the impact of that change. Cheney recalled the Polaris handling differently due to the new tires.

Cheney told Murphine he had never seen the owner's manual for the vehicle. Nytes informed Murphine that he did not provide instructions or a policy to his crew for operation of the ATV, and there were no Employer rules regarding where the ATV could be used. Carmody recalled sitting in the ATV with his supervisor, who went over basic operation of the vehicle, but did not recall any particular training or policies related to it. The Division's testimony and evidence demonstrates that employees were not provided training or instruction on use of this workplace equipment as required by 3203(a)(7).

Classification of Citation 3

The Division cited citation 3 as serious. Murphine testified that the actual hazard of the violation would be if an employee operating the ATV was not trained to operate it safely, there is a possibility that that employee would operate the vehicle in an unsafe manner and likely cause a serious injury to him or herself. She explained that the Polaris is capable of going 50 m.p.h., and at that speed, if someone in the vehicle were to get into an accident—for instance, run into a tree, flip over, or be thrown out of the vehicle—the operator would likely suffer multiple injuries, possibly death, broken bones, a paralyzing injury, a permanent disabling injury, or possibly amputation. If the employee were operating on the road in contravention of the manufacturer's stated warnings, and another vehicle were to hit the Polaris, because of the type of restraint system and bumpers the ATV has, should it be hit by larger vehicle on

a road, without doors, windows or a rollover protection system (ROPS), an employee could get thrown from the vehicle, or the ATV could rollover, and the operator suffer crushing injuries, including broken bones, concussion or death.

As in Citation 2, while Employer raises in its petition the affirmative defense of lack of knowledge, Employer failed to provide testimony or evidence on this point. The Division was able to show that there was a realistic possibility of death or serious physical harm created by the actual hazard of an ATV crash, due to the failure to provide training and instruction to employees under section 3203(a)(7). The serious classification is established and the penalty is upheld.

Citation 4

The Division issued citation 4 alleging a serious violation of 3328(f): Any modifications shall be in accordance with (a) and with good engineering practice. The referenced subsection requires: Machinery and equipment shall be of adequate design and shall not be used or operated under conditions of speeds, stresses, or loads which endanger employees. In *Tutor-Saliba-Perini*, Cal/OSHA App. 97-3209, Decision After Reconsideration (Apr. 24, 2003), the Board interpreted section 3328(f):

Notably, section 3328(f) incorporates the requirement in section 3328(a) which, when read together, requires that any modification shall be of adequate design, not be used or operated under conditions of speeds, stresses, or loads which endanger employees, and be in accordance with good engineering practice. Since the requirements are indicated in the conjunctive by the use of "and," an employer must comply with each and all of the stated requirements for any modification of machinery and equipment. Thus, at a minimum, the Division need only establish that Employer failed to comply with any of the three stated requirements in order to establish a violation of the safety order.

Murphine testified to the modifications to the Polaris, as described in Citation 2. (Div. Ex.s 12-14 [12, 13 modified Polaris, 14, unmodified Polaris]). She pointed out provisions in the owner's manual which warned against equipment modifications, as they can "create a substantial safety hazard and increase the risk of bodily injury." (Div. Ex. 21, p. 13). She explained that the modifications shown in the Division's exhibits had raised the Polaris' center of gravity, making it more prone to rolling over. The manual also notes that racks may change the handling characteristics of the vehicle and recommends only using Polaris-approved accessories. Murphine visited several Polaris dealerships, and ATV websites, but was unable to locate the origin of Employer's rack modification. She concluded the rack had been designed and built for Employer's specific needs. The modification was contrary to manufacturer's

warnings and according to Murphine's unrebutted testimony, created an increased hazard of the vehicle tipping over.

The ALJ's finding of a violation of section 3328(f) is affirmed.

Classification of Citation 4

The Division classified the violation as serious, and accident-related. Murphine testified that there was a realistic probability of an employee suffering an accident that could result in a serious injury as a result of the improper modifications which had been made to the vehicle. As discussed in Citation 2, while Employer raises the affirmative defense of lack of knowledge in its petition, its defense fails. The Division demonstrated Employer knowledge of the use of the Polaris in its modified state through a foreman and safety director.

The Division also classified the citation as "accident-related". Labor Code section 6319(d), states:

Notwithstanding subdivision (c), if serious injury, illness, exposure, or death is caused by any serious, willful, or repeated violation, or by any failure to correct a serious violation within the time permitted for its correction, the penalty shall not be reduced for any reason other than the size of the business of the employer being charged. Whenever the division issues a citation for a violation covered by this subdivision, it shall notify the employer of its determination that serious injury, illness, exposure or death was caused by the violation and shall, upon request, provide the employer with a copy of the inspection report.

The Board requires a showing of a "causal nexus between the violation and the serious injury" to sustain the classification of accident-related. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012) citing *Obayashi Corp.*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) In other words, "where, as here, the evidence establishes that a serious violation caused a serious injury, the violation is properly characterized as "accident-related." (*Duke Pacific, Inc.*, Cal/OSHA App. 06-5175, Decision After Reconsideration (Mar. 14, 2012), citing *K.V. Mart Company dba Valu Plus Food Warehouse*, Cal/OSHA App. 01-638, Decision After Reconsideration (Nov. 1, 2002).)

While there were no eyewitnesses to the accident, the Division was able to show through evidence and testimony that the serious violation of 3328(f) was a cause of the employee's serious accident. The nexus between the violation and injury was demonstrated through testimony establishing the

decrease in stability caused by the modifications to the vehicle. The vehicle had been involved in prior tipping accidents, even at relatively low speeds, lending further credence to the conclusion that the ATV was not stable due to the after-market modifications. Murphine testified that the addition of the bars at the top and front changed the center of gravity, leading to the instability in the vehicle. The vehicle had a propensity to tip due to the added weight and height modifications, and in fact, the ATV had done so at least twice before to the knowledge of this crew of employees.

While these modifications may not have been the sole cause of the accident, and a number of factors may have ultimately led to the ATV crash, the Division's evidence demonstrates a nexus between the violation and the injuries suffered by the employee. The serious, accident-related classification is sustained.

Citation 5

Citation 5 alleges a violation of section 3380(f)(1), which states:

(f) Hazard assessment and equipment selection.

(1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

(A) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;

(B) Communicate selection decisions to each affected employee; and,

(C) Select PPE that properly fits each affected employee.

Note: Non-mandatory Appendix A contains an example of procedures that would comply with the requirement for a hazard assessment.

Murphine testified that the Employer had failed to assess the ATV to determine what hazards, and what PPE, if any, would be appropriate. According to the Polaris manual, the operator should always wear eye protection, although employees of Employer were not issued eye protection, and generally only wore their own personal sunglasses when operating the Polaris. (Div. Ex. 21, p. I). There is no dispute that the vehicle does not have a windshield and was driven off-road. Eye protection to keep debris out of the eye of the operator, as the manual suggests, would be appropriate PPE in operating this equipment.

She also noted that the manual recommends helmets when driving “in an aggressive manner”, which Murphine characterized as driving on steep and difficult terrain. (Div. Ex. 21, p. 10). She testified that later versions of the owner’s manual recommend helmets to be worn at all times, and that she believed that a DOT-approved helmet would be appropriate when operating the Polaris, as it did not have a ROPS. Murphine compared operating the ATV to driving a motorcycle, and stated that the purpose of the helmet would be to protect the operator from a head injury if thrown from the vehicle or in a roll-over, and that a driver with a helmet may be able to walk away unscathed from certain accidents, while a driver without a helmet may suffer serious injuries. She explained that a hard hat, such as the kind Cheney may have been wearing, would not suffice, as the hat would easily be dislodged in an accident and was not designed to protect employees from vehicular accidents of this kind.

The Division established a violation of section 3380(f)(1) by a preponderance of the evidence.

Classification of Citation 5

The Division classified Citation 5 as serious, and accident-related. Murphine testified that the actual hazard created by the Employer’s failure to assess the need for PPE and provide appropriate PPE was a head injury. She stated that if a person hits their head while riding a vehicle there is a realistic probability that the person will suffer a serious injury. She was aware of ATV accidents where deaths had occurred from head injury, and stated that death was the more likely than not result when an operator hits her or his head on asphalt, concrete curb, or possibly even dirt. Concussion and injury are also possible.

Employer’s lack of knowledge defense fails, as Employer was aware of prior accidents involving its ATV, the lack of a windshield and doors, the warnings in the operator manual, and the terrain of job assignments to which it sent its employees with the ATV.

Citation 5 is also classified as accident-related by the Division. As discussed above, to meet the accident-related standard, the Division’s evidence must establish that there is a causal nexus between the serious violation and the serious injury that resulted. (*Duke Pacific, Inc.*, Cal/OSHA App. 06-5175, Decision After Reconsideration (Mar. 14, 2012), citing *K.V. Mart Company dba Valu Plus Food Warehouse*, Cal/OSHA App. 01-638, Decision After Reconsideration (Nov. 1, 2002).)

Regarding the nexus between the violation and the serious accident, Murphine was able to provide testimony, based on her experience with the Division as well as her personal education and training as a motorcyclist who

has been educated on the importance of using a DOT-approved helmet. Murphine testified to the purpose of a DOT-approved helmet, and the difference such a helmet can make in accidents, even at slow speeds. Cheney suffered a closed-head injury due to being thrown from, or possibly from jumping from, the ATV. Murphine's un rebutted testimony, again making a comparison to motorcycles, was that in instances where an accident occurred, 70 percent of fatalities were with riders that didn't wear helmets. She explained that this data was before the passage of laws requiring helmets, when many fatalities involved head injuries. She also explained that helmets are not required in other vehicles that the Division regulates, such as forklifts and agricultural tractors, because they have both ROPS and seatbelts.

The un rebutted testimony of the Division's investigator established that there is a causal nexus between the violation of the cited safety order, section 3380(f)(1), and the serious injury sustained by the employee. A serious, accident-related classification is found to exist.

Citation 6

The Division cites Employer for a violation of 8610(c), a telecommunications safety order which reads as follows:

(d) All rubber-tired, self-propelled scrapers, rubber-tired front-end loaders, rubber-tired dozers, agricultural and industrial tractors, crawler tractors, crawler-type loaders, and motor graders, with or without attachments, that are used in telecommunications work shall have roll-over protective structures, when required, in accordance with Article 25 of the General Industry Safety Orders or Section 1596 of the Construction Safety Orders as applicable.⁴

Here, the Division showed that the engine of the Polaris was more than 20 horsepower. The parties do not dispute that the Polaris runs on rubber tires. Employer's employees were engaged in telecommunications work. Thus, section 8601(c) is applicable. Under the cited section 1596 of the Construction Safety Orders, all industrial tractors used in construction (and, by extension, telecommunications) are required to have ROPS; should the ATV be found to be an "industrial tractor", section 1596(h)(1) mandates that the vehicle be equipped with the roll-over protection.

The Division argues that the ATV driven by Cheney was an industrial tractor, as defined in section 3649 of the general industry safety orders:

⁴ A new subsection (c) was added to section 8610 and the section was renumbered operative July 1, 2014; we apply the safety order as in effect on February 3, 2012, when the citation was issued to Employer.

Industrial Tractor. A wheel or track-type vehicle of more than 20 engine horsepower used in operations such as landscaping, construction services, loading, digging, grounds keeping, and highway maintenance.

In another case, the Board found a common riding mower to constitute an industrial tractor under the expansive definition provided by the General Industry Safety Orders (GISOs). (*Ironwood Country Club*, Cal/OSHA App. 84-139, Decision After Reconsideration (Sep. 20, 1985).) Certainly the ATV shares characteristics of an industrial tractor as defined by the safety order—it has wheels, an engine, and can be used in a variety of settings for various purposes. Where, as here, the plain language of the regulation is unambiguous, the Appeals Board will presume that the Standards Board meant what it said, and will apply the language as written. (See, *Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal. App. 4th 914, 934; see also, *DaFonte v. Up-Right, Inc.* (1992) 2 Cal. 4th 593, 601.)

The Board sustains the citation.

Classification of Citation 6

The Division has demonstrated a serious violation through testimony and evidence, including photographs showing the ATV in its altered state, not including a ROPS. Murphine credibly testified that the vehicle did not have a ROPS in accordance with the applicable safety order, but was altered in a manner that increased the likelihood of the vehicle tipping due to the higher center of gravity. According to Murphine's testimony, Employer was aware that the vehicle did not have this safety protection. She also testified regarding the actual hazard of the violative condition, described as the potential for the employee to be crushed by the vehicle, thrown out of the vehicle, or suffer bone fractures, head injuries, or death. Employer provided no rebuttal.

The violation is properly classified as serious.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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