BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1224802**
RANCH OF THE GOLDEN HAWK **1663 AMHERST AVENUE** **LOS ANGELES, CA 90025**	**DECISION**
Employer	

Ranch of the Golden Hawk (ROTGH or Employer) is a company involved in the growing and selling of flowers. Additionally, ROTGH is involved in the care and maintenance of property owned by the Parcel 47 Partnership, including a house located on that property. On April 11, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Terry Hammer, commenced an accident investigation of Employer's work site located at 47 Hollister Ranch Road, Goleta, California (jobsite).

On September 28, 2017, the Division issued seven citations, consisting of 11 items, to Employer. The citations allege: Employer failed to report to the Division the death of an employee that occurred in a place of employment or in connection with employment; Employer failed to establish, implement, and maintain an effective written Injury and Illness Prevention Program; Employer failed to establish, implement, and maintain an effective written Heat Illness Prevention Plan; Employer failed to make available at least two persons trained in first aid and cardiopulmonary resuscitation while field work involving two or more employees was being performed; Employer failed to provide at least one employee trained in administering first aid at a remote jobsite; Employer failed to train employees and supervisors on a Heat Illness Prevention Plan; Employer failed to provide training and instructions in hazards involved in the job, proper and safe use of all equipment, and other topics; Employer failed to ensure that a qualified tree worker conducted a job briefing before tree work commenced; Employer failed to establish rescue procedures and provide training in emergency response; Employer failed to ensure that tree work was done under the direction of a qualified tree worker; and, Employer failed to establish a method of communication for tree workers and failed to establish a drop zone prior to beginning tree work.

Employer filed a timely appeal of the citations. Employer contested the existence of the violation for each item of each citation. Employer contested the classification for Citations 2 through 7. Employer contested the reasonableness of the abatement requirements for Citation 1, Items 1, 2, 4, and 5, and Citations 2 through 7. Employer contested the reasonableness of the penalties for Citation 1, Item 1, and Citations 2 through 7. On its appeal forms, Employer also

asserted that an independent employee action caused the violation for Citation 1, Items 1 and 4, and Citations 3 through 7. Employer also contended that the tree workers involved in the accident at issue in the case were household domestic workers and, therefore, the Division lacked jurisdiction to issue citations.[1]

This matter was heard by Sam E. Lucas, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board). ALJ Lucas conducted the hearing from Los Angeles, California, on April 8 and 9, 2021, with the parties and witnesses appearing remotely via the Zoom video platform. Mark B. Solomon, Esq., of the law firm Schochet Solomon, represented Employer. William Cregar, Staff Counsel, represented the Division. This matter was submitted on November 19, 2021.

Issues

1. Did the Division have jurisdiction to issue citations pertaining to tree work?

2. Did Employer fail to ensure that the work location where tree work was to be done was under the direction of a qualified tree worker?

3. Did Employer fail to establish a method of communication for the tree workers and fail to establish a drop zone prior to beginning tree work?

4. Did Employer fail to ensure that a job briefing was conducted by a qualified tree worker before tree work began?

5. Did Employer fail to establish rescue procedures and provide training in emergency response?

6. Did Employer fail to provide training and instruction in hazards involved in the job, proper and safe use of all equipment, and other topics?

7. Did Employer fail to provide training on a Heat Illness Prevention Plan?

8. Did Employer fail to establish, implement, and maintain an effective written Heat Illness Prevention Plan?

9. Did Employer fail to establish, implement, and maintain an effective written Injury and Illness Prevention Program?

[1] Except where discussed in this Decision, Employer did not present evidence in support of other affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition For Reconsideration (May 26, 2017).)

10. Did Employer fail to make available at least two persons trained in first aid and cardiopulmonary resuscitation while field work involving two or more employees was being performed?

11. Did Employer fail to provide at least one employee trained in administering first aid at a remote jobsite?

12. Did Employer fail to report to the Division the death of an employee occurring in a place of employment or in connection with employment?

13. Did the Division establish that Citations 3 through 7 were properly classified as Serious?

14. Did the Division establish that Citation 2 was properly classified as Serious?

15. Did Employer rebut the presumptions that the violations in Citations 3 through 7 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

16. Did the Division establish that Citations 6 and 7 were properly characterized as Accident-Related?

17. Are the proposed penalties reasonable?

Findings of Fact[2]

1. On April 10, 2017, Marcelino Gorostieta Nova (Nova) and Adolfo Campuzano (Campuzano) were engaged by ROTGH to perform tree work at the jobsite. As a result of the tree work, Nova suffered a fatal injury.

2. The jobsite was located at a property owned by the Parcel 47 Partnership, a general partnership. The jobsite was a remotely situated work location.

3. Employer operated a business on the property that grew and sold flowers. Employer was also responsible for ensuring the care and maintenance of the property, including a house located on the property.

[2] Finding of fact numbers 23 and 24 are pursuant to stipulations by the parties.

4. Although there was a house located on the property in question, no one resided or dwelled there.

5. Larry Jones (Jones) visited the house on the property as a retreat or getaway, but not as a residence.

6. A caretaker was employed to care for the property at the jobsite because Jones was not present at the property in a manner that would allow him to take care of the house.

7. Hugh Sutherland (Sutherland) was the supervisor of Antonio Rubi (Rubi). Rubi was the caretaker present at the property. Rubi also participated in the operation of the flower business and had two assistants in this endeavor. Rubi and the two assistants were employees of Employer.

8. Sutherland supervised Rubi remotely and was not present at the property. Sutherland was responsible for ensuring that the house on the property was in good condition and to oversee the operation of the flower business.

9. Sutherland had familiarity with the California Occupational Safety and Health Administration (Cal/OSHA) general requirements for operation of a business. Sutherland was also generally familiar with the requirements for a qualified tree worker.

10. The tree work on the property was recommended by Rubi to Sutherland and Rubi also suggested that Employer use Campuzano to perform the work. Sutherland approved the work suggested by Rubi.

11. Jones had no knowledge of and was not involved in the tree work at issue herein until after the fatal accident.

12. Jones' main responsibility, in service to Employer, was to deposit the money required to cover Employer's expenses. The money deposited by Jones was used to maintain the house and operate the flower business.

13. ROTGH had natural persons in service for it, including Nova, Campuzano, Rubi, and Rubi's two assistants.

14. The tree workers, Nova and Campuzano, were engaged and directed to perform tree work at the jobsite by ROTGH. Neither tree worker was a licensed contractor, nor were they qualified tree workers.

15. Nova and Campuzano were the only tree workers involved in the tree work that resulted in the accident.

16. The tree workers received no training from Employer and were set to work without training. Employer did not have the tree workers demonstrate familiarity with the techniques and hazards of tree maintenance, removal, and the equipment used in the specific operations involved therein.

17. Employer did not have a job briefing conducted for the tree workers by a qualified tree worker before tree work began. Employer did not have a drop zone established by a qualified tree worker at the jobsite. Employer did not have a qualified tree worker review a method of communication to be used by the tree workers at a job briefing before tree work began.

18. Sutherland and Rubi discussed climate conditions in connection with flower harvesting for sales on a weekly basis.

19. The temperature at the jobsite was known to exceed 90 degrees, and Rubi and Sutherland discussed weather when it was very hot. When Rubi and Sutherland discussed hot weather, Sutherland instructed Rubi to be careful, drink water, take breaks, and go into the shade as needed.

20. During the period of the accident, Employer did not have a written Heat Illness Prevention Plan or a written Injury and Illness Prevention Plan. Rubi, Rubi's assistants, Nova, and Campuzano were not trained on a Heat Illness Prevention Plan by Employer.

21. Rubi was not trained in first aid or cardiopulmonary resuscitation prior to the accident. Rubi received training in first aid after the accident. Employer did not have two employees at the jobsite trained in first aid and cardiopulmonary resuscitation prior to commencing the tree work.

22. The accident was never reported to the Division.

23. The proposed penalties were calculated in accordance with applicable laws and regulations.

24. Abatement credit is appropriate to apply for Citations 2 through 5.

Analysis

1. Did the Division have jurisdiction to issue citations pertaining to tree work?

a. Was the tree work in question household domestic service?

Employer contends that Nova and Campuzano were in household domestic service, and therefore the Division lacked jurisdiction to issue citations related to their tree trimming work. The Division's jurisdiction is limited to employment as defined within the scope of Labor Code section 6303. Labor Code section 6303, subdivision (b), defines employment to include:

> The carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, *except household domestic service*. [emphasis added]

Labor Code section 6307 provides that:

> The division has the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary adequately to enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment.

In *Fernandez v. Lawson* (2003) 31 Cal.4th 31, 37 (*Fernandez)*, the California Supreme Court addressed the term "household domestic service." In that case, the Court explained "the term 'household domestic service' implies duties that are personal to the homeowner, not those which relate to a commercial or business activity on the homeowner's part." (*Id.*) In *Cortez v. Abich* (2011) 51 Cal.4th 285, 293-294, the Court explained "that 'overwhelming public policy and practical considerations' make it unlikely the Legislature intended Cal-OSHA's complex regulatory scheme to apply to a homeowner hiring a tree trimmer for a personal, noncommercial purpose." Pursuant to the foregoing, in order for work to qualify as household domestic service, as exempted from the definition of employment in Labor Code section 6303, the work must be (1) personal to the homeowner and (2) not related to a commercial or business purpose on the homeowner's part.

To further examine what may be considered as personal to the homeowner, as contemplated in *Fernandez, supra*, 31 Cal.4th 31, it is necessary to examine the definition of the phrase household domestic service. As noted in *Fernandez, id.* at p. 36, household domestic service is not defined by the relevant portion of the Labor Code or title 8 of the California Code of Regulations. As such, it is necessary to turn to dictionary definitions to derive the common meaning of the terms.

The term "household" is defined as "those who dwell under the same roof and compose a family," and "a social unit composed of those living together in the same dwelling." (www.merriam-webster.com <accessed 9-14-2021>.) As the term "household" also includes the term dwell, it is notable that "dwell" is defined as "to remain for a time," and "to live as a resident." (www.merriam-webster.com <accessed 9-14-2021>.) Additionally, the term "domestic" is defined as "of or relating to the household or the family," and "devoted to home duties and pleasures." (www.merriam-webster.com <accessed 9-14-2021>.) From these definitions it is necessary to conclude that, within the context of *Fernandez, supra*, 31 Cal.4th 31, "personal to the homeowner" refers to those services for the benefit of persons who dwell or reside at a house.

In the instant matter, documents submitted to the record by Employer after the hearing show that, during the period in question, the property was owned by the Parcel 47 Partnership (the Partnership), a general partnership, therefore the Partnership is the "homeowner." (Employer's Brief dated June 29, 2021.) While Employer admits there was a business growing and selling flowers on the property, Employer asserts that the care of the house was separate from that endeavor. For the purposes of this decision, it is not necessary to contemplate further the entanglement of the business with the residence, but it is noted that the evidence adduced suggests that the Partnership operated for the purpose of running the flower business and maintaining the property, including the house, and such an enterprise is not blatantly noncommercial. It is apparent that the Partnership was the homeowner and it cannot reasonably be said that the partnership, a business entity, is able to have work performed that is "personal" to it as contemplated under *Fernandez, supra*, 31 Cal.4th 31. Further, the evidence adduced at hearing indicated that no one resided or dwelled at the house on the property in question. Rather, Jones testified that he visited the house on the property as a retreat or getaway, explaining it would be very hard to live at the property full time. Jones testified that his main responsibility was depositing money in the bank to make sure Employer's expenses were covered. Jones explained that the money he deposited was used "to maintain the house as well as the flower business." Jones further explained that it was necessary to employ a caretaker for the property because he was not present at the property to take care of the house. Rubi was identified as the caretaker of the property and Sutherland was identified as Rubi's supervisor. Jones testified that Sutherland was charged with making sure the house was "in good shape" and to "make sure the flower business was running." Notably, Sutherland testified that he was familiar with the

Cal/OSHA general requirements for operation of a business. Sutherland also testified that he was familiar with the requirements for a qualified tree worker generally.

The next question is whether Jones had a sufficient relationship to the tree work that it was personal to him within the context of *Fernandez, supra*, 31 Cal.4th 31. Jones testified that he was not involved in the hiring of the tree workers, that he did not know anyone was going to be hired, and that he did not know that the trees were going to be removed. Both Sutherland and Rubi testified that Rubi recommended the tree work to Sutherland and recommended Campuzano for the work. They further testified that Sutherland agreed to use Campuzano for the job. Sutherland testified that he made arrangements for Campuzano and a helper, Nova, to work on the property. Rubi testified that, on the day of the accident, Campuzano arrived on the property and Rubi informed Campuzano what trees needed to be cut. Rubi then left Campuzano to take care of the work. The evidence does not support that Jones had any involvement in this process.

As set forth above, the tree work was not personal to Jones within the sense contemplated under *Fernandez, supra*, 31 Cal.4th 31. Jones not only did not reside at the house on the property, but he did not have notable connection to the work taking place there because Sutherland and Rubi were responsible for the care and maintenance of the house. This is further compounded by Jones' testimony that he had absolutely no knowledge about the tree work being performed.

Further, the public policy contemplated in *Fernandez, supra*, 31 Cal.4th at p. 37 of not applying the Cal/OSHA Act (Labor Code sections 6300 et seq.) to homeowners due to the complexity and lack of familiarity with the Cal/OSHA Act is not supported by the facts here, because Sutherland indicated that he was familiar with the Cal/OSHA Act's requirements for the general operation of a business and for a qualified tree worker. Further, where an agent is hired for the purpose of retaining workers and supervising the running of a business, such as Sutherland, it is not comparable to a homeowner who is reasonably unfamiliar with particular nuances of the Cal/OSHA Act. The situation at hand does not reflect the public policy discussed in *Fernandez, supra*, 31 Cal.4th at p. 37.

Accordingly, the tree workers were not household domestic workers within the meaning of Labor Code section 6303 because the work was not personal to the business that engaged the services, and it was not personal to Jones who had no knowledge, involvement, or other notable connection to the services performed.

b. *Was Ranch of the Golden Hawk an employer of the tree workers involved in the tree work?*

As noted above, Labor Code section 6303, subdivision (b), defines employment to include:

> The carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, except household domestic service.

As the tree work involved in this matter constitutes the carrying on of a trade, enterprise, project, occupation, or work or is a process or operation related thereto, there was employment within the meaning of Labor Code section 6303. As such, the questions that follow are whether ROTGH is an employer within the meaning of Labor Code section 6304 and whether the tree workers are employees under the meaning of Labor Code section 6304.1.

Labor Code section 6304 specifies that "employer" has the same meaning as it has pursuant to Labor Code section 3300, subdivision (c), which provides that an employer is "every person ... which has any natural person in service." The evidence adduced at hearing demonstrates that ROTGH sought the services of the tree workers. As discussed above, Rubi and Sutherland arranged for the tree workers, Campuzano and Nova, to come to the jobsite to perform tree work. Therefore, ROTGH was an employer.

Labor Code section 6304.1, subdivision (a), defines "employee" to mean "every person who is required or directed by any employer to engage in any employment or to go to work or be at any time in any place of employment." As noted above, ROTGH was an employer and ROTGH, through Rubi and Sutherland, directed the tree workers to perform tree work at the jobsite by indicating what trees to remove. Therefore, Campuzano and Nova were employees as they were engaged to work by an employer. As such, the final question remains as to whether Campuzano and Nova were employees of ROTGH.

Argument advanced by briefing of ROTGH appears to both concede that the tree workers were employees of ROTGH under Labor Code section 2750.5 and to argue that the tree workers were not employees of ROTGH. However, at hearing, Employer's counsel, Mark B. Solomon, conceded that the tree workers were employees of ROTGH and not independent contractors. While this issue is viewed as conceded by ROTGH, it is discussed below for completeness as ROTGH's post-hearing brief dated May 13, 2021, raises the issue again. Labor Code section 2750.5 provides, in relevant part:

> There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions

> Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor.

The Business and Professions Code governs the types of projects that require a contractor's license. Business and Professions Code section 7026.1, subdivision (a)(4), provides:

> Any person not otherwise exempt by this chapter, who performs tree removal, tree pruning, stump removal, or engages in tree or limb cabling or guying. The term contractor does not include a person performing the activities of a nurseryperson who in the normal course of routine work performs incidental pruning of trees, or guying of planted trees and their limbs. The term contractor does not include a gardener who in the normal course of routine work performs incidental pruning of trees measuring less than 15 feet in height after planting.

There is no dispute that Campuzano and Nova were engaged to perform, and did perform, tree work at the jobsite. Jones testified that Sutherland informed him that Campuzano was not a licensed contractor. Further, Terry Hammer (Hammer), associate safety engineer for the Division, testified that she searched for a license for Campuzano and found no results with the Contractors State License Board. It was not alleged at any time by either party that Nova was a licensed contractor and the evidence adduced does not support the conclusion that Nova held a contractor's license. It is therefore inferred that Nova did not hold a contractor's license.

Because the work being performed required a license pursuant to the Business and Professions Code and neither Campuzano nor Nova held such a license, the presumption of employment pursuant to Labor Code section 2750.5 applies. ROTGH failed to rebut the presumption that the tree workers were employees rather than independent contractors.

Accordingly, the Division has established jurisdiction over the employment in dispute because the tree workers, Campuzano and Nova, were employees of Employer.

2. Did Employer fail to ensure that the work location where tree work was to be done was under the direction of a qualified tree worker?

California Code of Regulations, title 8,[3] section 3420, subdivision (b), defines a qualified tree worker as an "employee who, through related training and on-the-job experience, has demonstrated familiarity with the techniques and hazards of tree maintenance, removal, and the equipment used in the specific operations involved."

[3] All references are to California Code of Regulations, title 8, unless otherwise indicated.

Section 3421, subdivision (b), provides "[e]ach work location where tree trimming, tree repairing or removal is to be done, shall be under the direction of a qualified tree worker."

The Alleged Violation Description (AVD) for Citation 6 provides:

> Prior to and during the course of the investigation, Ranch of the Golden Hawk did not ensure that the removal of dead pine trees at the ranch was done under the direction of a qualified tree worker. As a result, on or about April 10, 2017[,] a groundsman suffered a fatal injury when a large chunk of tree trunk fell on his head.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Wal-Mart Stores, Inc. Store # 1692*, Cal/OSHA App. 1195264, Decision After Reconsideration (Nov. 4, 2019).) "'Preponderance of the evidence' is usually 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 with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) Full consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

A violation of section 3421, subdivision (b), requires that the Division establish that, at a work location where tree trimming, tree repairing or removal is to be done, an employer failed to ensure the work was done under the direction of a qualified tree worker. As noted above, a qualified tree worker (1) must have training and on-the-job experience and (2) demonstrate familiarity with the techniques and hazards of tree maintenance, removal, and the equipment used in the specific operations involved.

As to the first element, Employer advances that it sought to hire the tree workers as independent contractors, which supports the conclusion that no training was provided, nor any on the job-experience provided. Additionally, Rubi testified that, on the day of the accident, he told Campuzano what trees needed to be cut and then left Campuzano to do the work. Therefore, it is inferred that no training was provided for Nova or Campuzano.

As to demonstrated familiarity, the evidence adduced also supports the inference that Campuzano and Nova did not demonstrate familiarity with the techniques and hazards of tree maintenance, removal, and the equipment used in the specific operations involved because there was no testimony supporting that the tree workers performed such a demonstration before commencing work. Employer advances that it sought to hire the tree workers as independent

contractors. Further, Rubi's testimony supports the conclusion that the tree workers were set to work without providing the required demonstration. Rubi testified that, on the day of the accident, he told Campuzano what trees needed to be cut and then left Campuzano to do the work. It is also inferred that Campuzano and Nova were the only tree workers involved in the tree work because the witnesses consistently referred Campuzano and Nova as the only tree workers. Therefore, neither Campuzano nor Nova were qualified tree workers and there was no qualified tree worker present.

Accordingly, Employer failed to ensure that the tree work was done under the direction of a qualified tree worker. The Division has met its burden of proof to establish a violation of section 3421, subdivision (b). Therefore, Citation 6 is affirmed.

3. Did Employer fail to establish a method of communication for the tree workers and to establish a drop zone prior to beginning tree work?

Section 3427, subdivision (b), in relevant part, provides:

(b) Pruning, Trimming and Tree Removal Operations.

(1) The employer shall establish a method of verbal or visual communication which shall be reviewed during the job briefing, prior to the start of pruning or removal operations. The verbal or visual communication system shall use an established command and response system or pre-arranged, two-way hand signals. The communication method shall be clearly understood and used during all rigging operations. The command "stand clear" from aloft and the response "all clear" from the ground are some terms that may be used for verbal communication.

(2) A drop zone shall be established prior to the start of pruning or removal operations. Employees not directly involved in the pruning or removal operation shall stay out of the pre-established drop zone until it has been communicated by a qualified tree worker directly involved in the operation that it is safe to enter the drop zone. Employees shall be positioned and their duties organized so that the actions of one employee will not create a hazard for any other worker.

Section 3421, subdivision (f), provides in relevant part: "A job briefing shall be conducted by a qualified tree worker before each work assignment is begun."

Section 3420, subdivision (b), defines a drop zone as the "area established by a qualified tree worker beneath employees aloft involved in tree work operations and/or where the potential exists for struck-by injuries from objects dropped or lowered from above."

The AVD for Citation 7 provides:

Instance 1:

> Prior to and during the course of the investigation, a clearly understood communication system was not established and used prior to starting the removal of dead pine trees. As a result, on or about April 10, 2017[,] a groundsman suffered a fatal injury when a large chunk of tree trunk fell on his head.

Instance 2:

> Prior to and during the course of the investigation, a drop zone was not established prior to starting the removal of dead pine trees. As a result, on or about April 10, 2017[,] a groundsman suffered a fatal injury when a large chunk of tree trunk fell on his head.

Section 3427, subdivision (b)(1), requires that an employer establish a method of communication that is reviewed during a job briefing prior to beginning tree work. Section 3421, subdivision (f), indicates that the job briefing required before beginning tree work must be conducted by a qualified tree worker. As discussed above, a qualified tree worker was not present and, therefore, one did not conduct a job briefing in which a method of communication for the tree workers was reviewed as required by section 3427, subdivision (b)(1). As such, the Division has met its burden of proof to establish a violation of section 3427, subdivision (b)(1).

Section 3427, subdivision (b)(2), requires that an employer establish a drop zone before beginning tree work. Section 3420, subdivision (b), requires that a drop zone be established by a qualified tree worker. As noted above, no qualified tree worker was present. As Campuzano and Nova were not qualified tree workers, and were the only tree workers involved in the tree work, it is further inferred that no drop zone was established by a qualified tree worker. In further support of this conclusion, Hammer testified that Campuzano indicated to her that he was unfamiliar with the term drop zone. While this does not on its own support the conclusion that a drop zone did not exist, the mental state of Campuzano and his lack of awareness of drop zones provides further support of the inference that a drop zone had not been established by a qualified tree worker. As there was no drop zone established by a qualified tree worker, the Division has met its burden of proof to establish a violation of section 3427, subdivision (b)(2).

When a citation alleges more than one instance of a violation of a safety order, it is enough to sustain a violation if just one instance is proven. (*Petersen Builders Inc.*, Cal/OSHA App. 91-057, Decision After Reconsideration (Jan. 24, 1992), fn. 4.) Here, the evidence supports a finding of a violation of two instances of section 3427, subdivision (b). Accordingly, Citation 7 is affirmed.

4. Did Employer fail to ensure that a job briefing was conducted by a qualified tree worker before tree work began?

Section 3421, subdivision (f), provides:

> A job briefing shall be conducted by a qualified tree worker before each work assignment is begun. Such job briefing shall include the description of the hazards unique to the work assignment, the appropriate work procedures to be followed, the appropriate personal protective equipment needed, and any other items necessary to ensure that the work can be accomplished safely. Additional job briefings shall be held if significant changes which might affect the safety of the employees occur during the course of the work.

The AVD for Citation 4 provides:

> Prior to and during the course of the investigation, including, but not limited to April 11, 2017, Ranch of the Golden Hawk did not have a qualified tree worker conduct a job briefing before starting their work assignment consisting of removing dead pine trees.

Section 3421, subdivision (f), requires that, before tree work begins, a job briefing must be conducted by a qualified tree worker for the employees involved in the work. As noted above, it is found that neither Campuzano nor Nova were qualified tree workers, that they were the only tree workers present at the jobsite, and that there was no qualified tree worker present at the jobsite. Further, Campuzano and Nova were involved in tree work at the time of the accident. Therefore, the evidence adduced at hearing does not support the conclusion that a qualified tree worker conducted a job briefing addressing the descriptions of the unique hazards of the work, the appropriate work procedures to be followed, the appropriate personal protective equipment needed, and any other items necessary to ensure that the work would be done safely. As such, the Division has met its burden of proof to establish the violation and Citation 4 is affirmed.

5. Did Employer fail to establish rescue procedures and provide training in emergency response?

Section 3421, subdivision (l), provides:

> The employer shall establish rescue procedures and provide training in emergency response. Training in aerial rescue procedures shall be provided for employees whose job assignments may require them to perform aerial rescues.

The AVD for Citation 5 provides:

> Prior to and during the course of the investigation, including, but not limited to April 10, 2017, Ranch of the Golden Hawk had not established rescue procedures nor provided training for employees who were removing dead pine trees.

Section 3421, subdivision (l), requires employers must establish rescue procedures and provide training in emergency response. As discussed above, it is determined that Campuzano and Nova did not receive training from Employer. Rather, Campuzano and Nova arrived at the jobsite and were set to work without training. Accordingly, the tree workers did not receive the training required by section 3421, subdivision (l), and the Division met its burden of proof. Citation 5 is affirmed.

6. Did Employer fail to provide training and instruction in hazards involved in the job, proper and safe use of all equipment, and other topics?

Section 3421, subdivision (c), provides:

> (c) Employees shall be trained and instructed in areas that include, but are not limited to the following:
>
> (1) The hazards involved in their job assignments.
>
> (2) The proper and safe use of all equipment, including, but not limited to, safety equipment and personal protective equipment.
>
> (3) The identification of, and preventive measures relating to, common poisonous plants and harmful animals.
>
> (4) Operations that include pesticide and fertilizer applications for employers whose employees are exposed to, or engage in, such operations.

(5) The recognition and avoidance of electrical hazards applicable to employee job assignments including the instructions and training outlined in Section 3423 for tree work performed in proximity to energized power lines and conductors.

The AVD for Citation 3 provides:

Prior to and during the course of the investigation, including, but not limited to April 10, 2017, employees working at Ranch of the Golden Hawk had not been trained or instructed in the above required topics.

Section 3421, subdivision (c), requires employers must train employees on various topics including, but not limited to, the hazards involved in the job and the proper and safe use of all equipment. As discussed above, it is determined that Campuzano and Nova did not receive training from Employer and, therefore, Employer did not provide the required training. Accordingly, the Division met its burden of proof. Citation 3 is affirmed.

7. Did Employer fail to provide training on a Heat Illness Prevention Plan?

Section 3395, subdivision (h), provides:

(h) Training.

(1) Employee training. Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness:

(A) The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment.

(B) The employer's procedures for complying with the requirements of this standard, including, but not limited to, the employer's responsibility to provide water, shade, cool-down rests, and access to first aid as well as the employees' right to exercise their rights under this standard without retaliation.

(C) The importance of frequent consumption of small quantities of water, up to 4 cups per hour, when the work environment is hot

and employees are likely to be sweating more than usual in the performance of their duties.

(D) The concept, importance, and methods of acclimatization pursuant to the employer's procedures under subsection (i)(4).

(E) The different types of heat illness, the common signs and symptoms of heat illness, and appropriate first aid and/or emergency responses to the different types of heat illness, and in addition, that heat illness may progress quickly from mild symptoms and signs to serious and life threatening illness.

(F) The importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves, or in co-workers.

(G) The employer's procedures for responding to signs or symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.

(H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.

(I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

(2) Supervisor training. Prior to supervising employees performing work that should reasonably be anticipated to result in exposure to the risk of heat illness effective training on the following topics shall be provided to the supervisor:

(A) The information required to be provided by section (h)(1) above.

(B) The procedures the supervisor is to follow to implement the applicable provisions in this section.

(C) The procedures the supervisor is to follow when an employee exhibits signs or reports symptoms consistent with possible heat illness, including emergency response procedures.

(D) How to monitor weather reports and how to respond to hot weather advisories.

The AVD for Citation 2 provides:

Instance 1:

Prior to and during the course of the investigation, including, but not limited to, April 11, 2017, the employer did not provide heat illness prevention training meeting the requirements of this subsection for their employees exposed to the risk of heat illness while doing flower growing and tree trimming work at the ranch.

Instance 2:

Prior to and during the course of the investigation, including, but not limited to April 11, 2017, the employer did not provide heat illness prevention training meeting the requirements of this subsection for their supervisor prior to supervision employees being exposed to the risk of heat illness while doing flower growing and tree trimming work at the ranch.

Pursuant to section 3395, subdivision (h), employers are required to establish, implement, and maintain an effective written Heat Illness Prevention Program (HIPP) and to provide effective training on that program to its employees. Sutherland testified that he discussed climate conditions, in connection with harvesting for weekly sales, with Rubi on a weekly basis. However, Sutherland testified that, during the period of the incident, Employer did not have a written HIPP. Rubi testified that the temperature at the jobsite was known to get very hot and exceed 90 degrees. Rubi testified that he and Sutherland discussed the weather when it got very hot. Rubi testified that, when they spoke about hot weather, Sutherland told Rubi to be careful, drink water, take breaks, and go into the shade.

As such, a preponderance of the evidence supports an inference that Rubi was not trained on a HIPP by Employer. Additionally, Sutherland testified that Rubi had one to two helper employees during April of 2017. As it is inferred that Rubi was not trained on a HIPP by Employer, it is also inferred that Rubi's helpers were not trained for the same reasons. Finally, as noted above, it is also inferred that Nova and Campuzano did not receive any training from Employer and that would include a failure to provide training on a HIPP. Accordingly, the Division met its burden of proof to establish that Employer failed to provide the training required by section 3395, subdivision (h), and, therefore, Citation 2 is affirmed.

8. Did Employer fail to establish, implement, and maintain an effective written Heat Illness Prevention Plan?

Section 3395, subdivision (i), provides:

> (i) Heat Illness Prevention Plan. The employer shall establish, implement, and maintain, an effective heat illness prevention plan. The plan shall be in writing in both English and the language understood by the majority of the employees and shall be made available at the worksite to employees and to representatives of the Division upon request. The Heat Illness Prevention Plan may be included as part of the employer's Illness and Injury Prevention Program required by section 3203, and shall, at a minimum, contain:
>
> (1) Procedures for the provision of water and access to shade.
> (2) The high heat procedures referred to in subsection (e).
> (3) Emergency Response Procedures in accordance with subsection (f).
> (4) Acclimatization methods and procedures in accordance with subsection (g).

The AVD for Citation 1, Item 3, provides:

> Prior to and during the course of the investigation the employer, Ranch of the Golden Hawk[,] had not established, implemented[,] and maintained a written Heat Illness Prevention Plan.

Pursuant to section 3395, subdivision (i), employers are required to establish, implement, and maintain an effective written HIPP. Sutherland testified that, during the period of the incident, Employer did not have a written HIPP. As section 3395, subdivision (i), requires a written HIPP and Employer did not have one, the Division has met its burden of proof to establish a violation of section 3395, subdivision (i), and Citation 1, Item 3, is affirmed.

9. Did Employer fail to establish, implement, and maintain an effective written Injury and Illness Prevention Program?

Section 3203, subdivision (a), in relevant part, provides:

(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:

(1) Identify the person or persons with authority and responsibility for implementing the Program.

(2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.

(3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.

Exception: Employers having fewer than 10 employees shall be permitted to communicate to and instruct employees orally in general safe work practices with specific instructions with respect to hazards unique to the employees' job assignments as compliance with subsection (a)(3).

(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:

[…]

(5) Include a procedure to investigate occupational injury or occupational illness.

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:

[…]

(7) Provide training and instruction:

[…]

The AVD for Citation 1, Item 2, provides:

Prior to and during the course of the investigation the employer, Ranch of the Golden Hawk, did not establish, implement[, and] maintain a written Injury and Illness Prevention Program.

Pursuant to section 3203, subdivision (a), employers are required to establish, implement, and maintain an effective written Injury and Illness Prevention Program (IIPP). Sutherland testified that, during the period of the incident, Employer did not have a written IIPP. It is undisputed that Employer had employees and, as discussed above, that included Rubi, Rubi's two helpers, Campuzano, and Nova. As such, the Division met its burden of proof to establish that Employer failed to establish a written IIPP.

Employer's post-hearing brief dated May 13, 2021, alleges that section 3203, subdivision (a)(3), does not require a written IIPP when an employer has fewer than 10 employees. The Appeals Board has contemplated this reasoning in *Josh and Carrie Salazar dba CJ Manufacturing,* Cal/OSHA App. 09-1710, Decision After Reconsideration (Mar. 27, 2014).) In that case the Appeals Board explained:

Based on the language of section 3203(a)(3), the ALJ found that employers with fewer than 10 employees are not required to have a written IIPP, but may communicate the IIPP orally. […] This is an incorrect reading of the safety order. Viewing the regulation in its entirety, it becomes clear that this "exception" is applicable only to section 3203(a)(3). The language specifically states that those employers with less than 10 employees may forgo designing multiple routes to

employee communication related to occupational health and simply engage in face to face discussions, "as compliance with subsection (a)(3)."

The language of section 3203(a) has no exception, and calls for an IIPP program to be established by every employer, which shall be in writing. Further provisions for small employers with less than 10 employees are found in section 3203 at 3203(b)(1) [Employers with fewer than 10 employees may elect to maintain the inspection records only until the hazard is corrected], and section 3203(b)(2) [Employers with fewer than 10 employees can substantially comply with the documentation provision by maintaining a log of instructions provided to the employee with respect to the hazards unique to the employees' job assignment when first hired or assigned new duties]. The exceptions would make little sense in the overall scheme of section 3203 if employers with less than 10 employees were not required to maintain a written IIPP, per section 3203(a).

(*Id.*)

Pursuant *Josh and Carrie Salazar dba CJ Manufacturing, supra*, Cal/OSHA App. 09-1710, Employer's contention that a written IIPP is not required by section 3203, subdivision (a), is found to be without merit. As Employer failed to have a written IIPP, the Division has met its burden of proof to establish a violation of section 3203, subdivision (a), and Citation 1, Item 2, is affirmed.

10. Did Employer fail to make available at least two persons trained in first aid and cardiopulmonary resuscitation while field work involving two or more employees was being performed?

Section 3421, subdivision (m), provides:

(c) The employer shall provide training in first aid and cardiopulmonary resuscitation (CPR). For field work involving two or more employees at a work location at least two trained persons in first aid and CPR shall be available. All new employees shall be trained in first aid and CPR within 90 days of their hiring dates. First aid and CPR training shall be performed by a certified instructor and shall be equal to that of the American Red Cross or the Mine Safety and Health Administration.

The AVD for Citation 1, Item 4, provides:

> Prior to and during the course of the investigation, including, but not limited to April 11, 2017, Ranch of the Golden Hawk did not have first aid and cardiopulmonary resuscitation (CPR) trained persons available for the 2 employees who were removing dead pine trees at the ranch.

Section 3421, subdivision (m), requires, along with training requirements, that where there is field work involving two or more employees, employers must make available at least two persons trained in first aid and CPR.

As discussed above, it is determined that Campuzano and Nova did not receive training from Employer. Further, Rubi testified that he received training in first aid after the accident and it is inferred that he did not have the training prior to the accident. Further supporting the inference, Employer's post-hearing brief dated May 13, 2021, states plainly:

> ***Citation 1, Item 4:*** Relates to the two employees that were removing dead pine trees at the Ranch. Defendant denies these two individuals were employees. Furthermore, subsequent to this accident, defendant had Antonio attend and complete First Aid and Cardiopulmonary Resuscitation Training on a formal basis.

This inference is further supplemented or explained by the testimony of Hammer, who testified that Rubi told her that he did not have first aid training. There is no evidence supporting that, at the time of the accident, Campuzano, Nova, or Rubi, were trained in first aid or CPR. It is also inferred that Employer did not ensure that any of the workers had received such training before work began at the jobsite. As such Employer failed to make available at least two persons trained in first aid and CPR while the tree work was being performed. Accordingly, the Division has met its burden of proof and Citation 1, Item 4, is affirmed.

11. Did Employer fail to provide at least one employee trained in administering first aid at a remote jobsite?

Section 3439, subdivision (b), provides:

> (b) At remote locations, provisions must be made in advance for prompt medical attention in case of serious injuries. This may be accomplished by on-the-site facilities or proper equipment for prompt transportation of the injured person to a physician or communication system for contacting a doctor or combinations of these that will avoid unnecessary delay in treatment. There shall be at least 1 employee for every 20 employees at any remote location with training for the administering of emergency first aid.

The AVD for Citation 1, Item 5, provides:

> Prior to and during the course of the investigation, including, but not limited to April 11, 2017, Ranch of the Golden Hawk had not made provisions for prompt medical attention in case of serious injuries at their remote ranch location. There was not an employee trained in first aid on the ranch.

Section 3439, subdivision (b), requires, among other things, that employers shall provide at least one employee for every 20 employees trained in administering emergency first aid at remote work locations.

As discussed above, it is determined that Campuzano and Nova did not receive training from Employer. Further, as discussed above, Rubi testified that he received training in first aid after the accident and it is inferred that he did not have the training prior to the accident. There is no evidence supporting that, at the time of the accident, Campuzano, Nova, or Rubi, were trained in first aid. It is also inferred that Employer did not ensure that any of the workers had received such training before work began at the jobsite. Employer's post-hearing brief dated May 13, 2021, acknowledges that the jobsite is a "remote property."

As such Employer failed to ensure that one employee at the remote jobsite was trained in administering first aid before commencing work. Accordingly, the Division has met its burden of proof and Citation 1, Item 5, is affirmed.

12. Did Employer fail to report to the Division the death of an employee occurring in a place of employment or in connection with employment?

Section 342, subdivision (a),[4] provides in relevant part:

> Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
>
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent

[4] Section 342, subdivision (a), was amended January 28, 2020, but the version contemplated herein reflects the regulation in effect at the time of the citation was issued in 2017.

> circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

Citation 1, Item 1, alleges:

> Ranch of the Golden Hawk failed to report to the Division a workplace fatality suffered by an employee removing a dead tree on the ranch on April 10, 2017.

In order to establish a violation of section 342, subdivision (a), the Division must first establish that an employee suffered a serious injury or illness, or death, in a place of employment or in connection with employment. The Division must also establish that Employer failed to report that injury, illness, or death to the Division in a timely manner.

In the instant matter, there is no dispute that Nova died in connection with the work being performed at the jobsite. Hammer testified that the accident was never reported to the Division.

Employer asserts that it was unaware that Nova was an employee and, therefore, it was unfair to require reporting. Employer's post-hearing brief dated May 13, 2021, sets forth in relevant part:

> Defendants learned of the death but had no idea or clue that the deceased was an employee of the Ranch and not an independent contractor. … How is it reasonable or equitable to cite defendant for its notification responsibilities for the death of an employee when it had no knowledge or reasonable basis to know it had such an employee within 24 hours of the accident?

The Appeals Board has contemplated ignorance of the law as an excuse for non-performance within the context of section 342, subdivision (a). In *Geo Plastics* Cal/OSHA App. 13-0810, Denial of Petition for Reconsideration (Mar. 24, 2014), the Appeals Board explained:

> First, ignorance of the law, including this reporting requirement, is no excuse for non-compliance. [Citations.] Employers are presumed to know the safety orders applicable to their operations. [Citation.] Persons who avail themselves of the privilege of doing business in California are held to knowledge of the law's requirements. [Citations.]

As such, Employer's position that it was unaware of its duty to report Nova's death does not present a defense. The evidence adduced at hearing demonstrates that Nova died in connection with his employment and Employer failed to report that injury pursuant to section 342, subdivision (a). Accordingly, Citation 1, Item 1, is affirmed.

13. Did the Division establish that Citations 3 through 7 were properly classified as Serious?

Labor Code section 6432, subdivision (a),[5] in relevant part states:

> 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. The actual hazard may consist of, among other things:
>
> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

Nova was fatally injured while performing tree work. As discussed above, Employer failed to ensure that the tree workers received training on topics including the hazards involved in the job assignments, the proper and safe use of all equipment, and emergency response procedures. Employer failed to ensure that a qualified tree worker was involved in the tree work. Employer failed to ensure that a job briefing was conducted by a qualified tree worker before tree work was performed. Employer failed to ensure that both a method of communication and a drop zone were established and reviewed with the tree workers by a qualified tree worker before work began. For each of these deficiencies, a hazard was created that resulted in a fatal injury. Therefore, a fatal injury was not merely a realistic possibility, but an actuality. Accordingly, the Division established a rebuttable presumption that Citations 3 through 7 were properly classified as Serious.

14. Did the Division establish that Citation 2 was properly classified as Serious?

As noted above Labor Code section 6432, subdivision (a), in relevant part states that "[t]he demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The Division must establish "that death or serious physical harm could result from the actual hazard created by the violation." (Lab. Code §6432, subd. (a).)

[5] Labor Code section 6432 was amended effective January 1, 2021, however, the portions discussed reflect the Labor Code section 6432 as it was in effect at the time of issuance of the citations.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

Further, Labor Code section 6432, subdivision (g), provides:

> A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932.) However, the Appeals Board has held it does "not assume facts that are not in evidence, or take official notice on our own initiative in order to satisfy the Division's initial burden of proof on a serious violation." (*MDB Management Inc.*, Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016) citing *California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009).) In *MDB Management Inc., supra*, Cal/OSHA App. 14-2373, the Appeals Board noted:

> It may well be that a realistic possibility of death or serious physical harm exists when an employee is exposed to a fall of 12 feet, but the Board will not make such a finding unless the Division introduces evidence meeting its burden of proof on the subject. […]
>
> We observe that the Division's initial burden to establish a rebuttable presumption of a serious violation could have been easily satisfied in this matter. Indeed,

provided Copelan's Division-mandated training was up to date, it would have been a relatively simple matter for Copelan to offer testimony as to the possible serious consequences of the observed violation in order to satisfy his initial burden of proof. The Division's Safety Engineers or Industrial Hygienists are deemed competent to establish each element of a serious violation if their training is up to date. (See, Labor Code section 6432, subdivision (g).)

The Division provided no evidence that Hammer was current on her Division-mandated training at the time of the hearing. Further, testimony was not offered demonstrating that Hammer had experience or expertise regarding the hazards of heat illness. As such, Labor Code section 6432, subdivision (g), cannot be used to deem Hammer presumptively competent to testify regarding the Serious classification of Citation 2 and Hammer cannot be relied upon as an expert to set forth the possibility of serious physical harm from a violation of section 3395. There was no evidence of actual heat-related injury or illness offered in this matter. Accordingly, the Division failed to meet its burden of proof to establish that Citation 2 was properly classified as Serious.

15. Did Employer rebut the presumptions that the violations in Citations 3 through 7 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists 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. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

(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) [; and]

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

In the instant matter, Employer failed to ensure training of employees and the involvement of a qualified tree worker in the tree work. The primary defense advanced by Employer is a lack of knowledge that the tree workers were employees. However, although

Employer indicates that it believed that the tree workers were independent contractors, evidence was not submitted supporting that Employer took efforts to verify that the tree workers were operating under an appropriate license, had appropriate training, and had appropriate experience. Indeed, the evidence adduced at hearing indicates that Employer did not take steps to verify that the tree workers had any of the above. Therefore, it cannot be said that Employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violations occurred, to anticipate and prevent the violations. Employer failed to rebut the presumption that Citations 3 through 7 were properly classified as Serious.

16. Did the Division establish that Citations 6 and 7 were properly characterized as Accident-Related?

Section 336, subdivisions (c)(2) and (d)(7), and Labor Code section 6319, subdivision (d), provide the basis for the Accident-Related characterization. (See *HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015) and *National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) Labor Code section 6319, subdivision (d), provides, in relevant part:

> Notwithstanding subdivision (c), if serious injury, illness, exposure, or death is caused by a serious, willful, or repeated violation, or by a failure to correct a serious violation within the time permitted for its correction, the penalty shall not be reduced for a reason other than the size of the business of the employer being charged.

Section 336 provides in relevant part:

(c) Serious Violation
[…]

> (2) Serious Violation Causing Death or Serious Injury, Illness or Exposure - If the employer commits a Serious violation and the Division has determined that the violation caused death or serious injury, illness or exposure as defined pursuant to Labor Code section 6302, the penalty shall not be reduced pursuant to this subsection, except the penalty may be reduced for Size as set forth in subsection (d)(1) of this section. The penalty shall not exceed $25,000.

[…]

(d) Further Adjustment of Regulatory, General, and Serious Violations - Subject to the provisions of parts (5) through (9) of this subsection, the Gravity-based Penalty established under either subsection (a), (b) or (c) of this section, shall be appropriately adjusted by giving due consideration to the following factors:

[…]

(7) Serious Violations Causing Death or Serious Injury, Illness or Exposure - Subject to the provisions of subsection (c)(3) of this section, the penalty for any Serious violation determined by the Division to have caused death or serious injury, illness or exposure as defined pursuant to Labor Code section 6302, shall not be adjusted pursuant to this subsection, except for Size set forth in part (1) of this subsection.

The Appeals Board has commonly stated that in order for a citation to be properly characterized as Accident-Related "there must be a showing by the Division of a 'causal nexus between the violation and the serious injury.'" (*Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra,* Cal/OSHA App. 1092600.) However, the plain language of section 336, subdivisions (c)(2) and (d)(7), and Labor Code section 6319, also clearly contemplate serious violations causing death and the Accident-Related characterization has been found by the Appeals Board in citations involving death. (See *Hill Crane Service, Inc.,* Cal/OSHA App. 1135350, Decision After Reconsideration (Sept. 24, 2021).) As such, the Division must establish that there is a causal nexus between the violation and the serious injury or death. The Appeals Board has explained that the Division may do this by showing that the violation is more likely than not the cause of the accident, resulting in the injury or death, but that the violation need not be the only cause of the accident. (*Id*., and *Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932.)

Additionally, the Appeals Board has held that percipient witness testimony is not essential to establishing a casual nexus. Rather, in *HHS Construction, supra,* Cal/OSHA App. 12-0492, the Appeals Board held:

> 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. […]

> 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.

In the instant matter, percipient witness testimony was not offered. However, it has herein been found that Employer failed to ensure that a qualified tree worker was involved in the tree work and that Employer failed to ensure that both a method of communication and a drop zone were established and reviewed with the tree workers by a qualified tree worker before work began. Employer's brief dated April 7, 2021, admits "Mr. Gorosteita tragically died when he was hit by a branch cut down by Mr. Vences."[6] It is inferred that, because Nova was struck by part of the tree, resulting in his death, that there is a substantial connection between the accident and the failure to ensure the involvement of a qualified tree worker in the tree work. It is also inferred that there is a substantial connection between the accident and the failure to ensure that a qualified tree worker established and reviewed both a drop zone and a method of communication with the tree workers before work began. While the violations in Citations 6 and 7 may not be the sole cause of Nova's death, there is a causal nexus between the violations and Nova's death because it is more likely than not that the violations caused the accident. Accordingly, Citations 6 and 7 are properly characterized as Accident-Related.

17. Are the proposed penalties reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra*, Cal/OSHA App. 1092600.)

The parties stipulated that the penalties were calculated in accordance with applicable laws and regulations. Additionally, the parties stipulated that Citations 2 through 5 should be subject to an abatement credit. Section 336, subdivision (e), provides that an abatement credit reflects a 50 percent reduction to the Adjusted Penalty.

Citation 1, Item 1,[7] and Citations 6 and 7 are all affirmed without change to the classification. Because the parties stipulated that the calculations were in accordance with applicable laws and regulations, and no additional evidence was presented regarding the penalty calculations to call them into question, the proposed penalties are affirmed.

[6] Employer's brief dated May 13, 2021, indicates that Campuzano's name is Adolfo Vences Campuzano.
[7] It is noted that Employer did not appeal Citation 1, Items 2 through 5, on the grounds that the penalty was unreasonable and therefore the penalty of Citation 1, Items 2 through 5, are not discussed herein.

Citations 3, 4, 5, are all affirmed without change to the classification. The parties stipulated that the calculations were in accordance with applicable laws and regulations and that an abatement credit was appropriate. No additional evidence was presented regarding the penalty calculations to call them into question. Therefore, the penalties which were proposed to be $10,800 for each citation are modified to $5,400 each.

a. Citation 2—Reclassified as General

As the Division did not meet its burden of proof to establish that Citation 2 was properly classified as Serious, the penalty must be re-evaluated. When determining the base penalty for a General violation, section 336, subdivision (b), requires an analysis of the Severity of the alleged violation to establish a penalty amount. Because the Division had classified the violation as Serious, it was automatically determined to have a High Severity, but there was no evidence presented that would require a finding that the proper base penalty for a General violation would be High.

The Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to justify its proposed penalty. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).) Section 336, subdivision (b), provides that where the Severity is rated as Low, the base penalty shall be $1,000.

Because the parties stipulated that the calculations, which involve the application of adjustment factors, were in accordance with applicable laws and regulations, those factors are applied to the base penalty of $1,000. Applying the factors set forth in the Division's Proposed Penalty Worksheet (Ex. 3) results in a reduction of 65 percent for Size, Good Faith, and History, for a Gravity-based penalty of $350. The Gravity-based penalty is further reduced by 50 percent for the abatement credit as stipulated by the parties and section 336, subdivision (e), resulting in a final Adjusted Penalty of $175, which is found to be reasonable.

Conclusion

The evidence supports a finding that Employer violated section 342, subdivision (a), by failing to report a serious injury or illness suffered by an employee to the Division. The proposed penalty is reasonable.

The evidence supports a finding that Employer violated section 3203, subdivision (a), by failing to establish, implement, and maintain an effective written IIPP. The proposed penalty was not under appeal and is, therefore, presumptively reasonable.

The evidence supports a finding that Employer violated section 3395, subdivision (i), by failing to establish, implement and maintain an effective written HIPP. The proposed penalty was not under appeal and is, therefore, presumptively reasonable.

The evidence supports a finding that Employer violated section 3421, subdivision (m), by failing to make available at least two persons trained in first aid and CPR while field work involving two or more employees was being performed. The proposed penalty was not under appeal and is, therefore, presumptively reasonable.

The evidence supports a finding that Employer violated section 3439, subdivision (b), by failing to provide at least one employee trained in administering first aid at a remote jobsite. The proposed penalty was not under appeal and is, therefore, presumptively reasonable.

The evidence supports a finding that Employer violated section 3395, subdivision (h), by failing to provide training on a HIPP. The evidence did not support a finding that the violation was properly classified as Serious. The citation is reclassified as a General violation. The proposed penalty, as modified herein, is reasonable.

The evidence supports a finding that Employer violated section 3421, subdivision (c), by failing to provide training and instruction to the tree workers in the hazards involved in the job, proper and safe use of all equipment, and other topics. The evidence further supports a finding that the violation was properly classified as Serious. The proposed penalty, as modified herein, is reasonable.

The evidence supports a finding that Employer violated section 3421, subdivision (f), by failing to ensure that a job briefing was conducted by a qualified tree worker before tree work began. The evidence further supports a finding that the violation was properly classified as Serious. The proposed penalty, as modified herein, is reasonable.

The evidence supports a finding that Employer violated section 3421, subdivision (l), by failing to establish rescue procedures and train the tree workers on emergency response procedures. The evidence further supports a finding that the violation was properly classified as Serious. The proposed penalty, as modified herein, is reasonable.

The evidence supports a finding that Employer violated section 3421, subdivision (b), by failing to ensure that the work location where tree work was being done was under the direction of a qualified tree worker. The evidence further supports a finding that the violation was properly classified as Serious. The evidence also supports a finding that the violation was properly characterized as Accident-Related. The proposed penalty is reasonable.

The evidence supports a finding that Employer violated section 3427, subdivision (b), by failing to establish and review a method of communication for the tree workers and failing to establish a drop zone. The evidence further supports a finding that the violation was properly classified as Serious. The evidence also supports a finding that the violation was properly characterized as Accident-Related. The proposed penalty is reasonable.

Order

It is hereby ordered that Citation 1, Items 1 through 5, and Citations 2 through 7 and the associated penalties are affirmed and assessed as set forth in the attached Summary Table.

Dated: 12/20/2021

SAM E. LUCAS
Presiding Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**