BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
MOUNTAIN F. ENTERPRISES, INC.	**1633708**
Employer	**DECISION**

Mountain F. Enterprises, Inc. (MFE or Employer) operates a business which includes clearing brush and debris from the right of way. On November 8, 2022, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Martin Lapp (Lapp), conducted an inspection after a report of a serious injury on October 21, 2022.

On April 14, 2023, the Division issued five citations to Employer, alleging five violations of the California Code of Regulations, title 8.[1] Employer filed timely appeals of the citations. All five citations proceeded to hearing.[2] Citation 1, classified as General, alleges that Employer failed to ensure employees were trained in first aid and cardiopulmonary resuscitation (CPR) within 90 days of their hiring dates. Citation 2, classified as Serious, alleges that Employer failed to ensure an employee used a correct notch when felling a tree. Citation 3, classified as Serious, alleges that Employer failed to ensure an employee's back cut did not penetrate the predetermined hinge area while felling a tree. Citation 4, classified as Serious, alleges that Employer failed to ensure the duties were organized so that the actions of one employee did not create a hazard for other workers. Citation 5, classified as Serious Accident-Related, alleges that Employer failed to ensure that all non-involved personnel were safely out of range while an employee felled a tree.

The appeals of Citations 1 through 5 assert that the safety orders were not violated, the proposed penalties are unreasonable, and other affirmative defenses. Employer's appeals of Citations 2 through 5 also assert that the classifications are incorrect, and the affirmative defense of Independent Employee Action.[3]

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] The parties stipulated to the violations of Citations 2 and 3, subject to Employer's defenses. (See Exhibit J-5.)
[3] Affirmative defenses that are not pled in documents or presented during the hearing are deemed waived. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

This matter was heard by Weiru Wang, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board). ALJ Wang conducted the hearing from Sacramento County, California, on August 5 and 6, 2025, with the parties appearing remotely via the Zoom video platform. Matthew J. Durket, Attorney, of Law Office of Matthew J. Durket, APC, represented Employer. T. Michelle Henson, Staff Counsel, represented the Division. The parties stipulated that the transcript made from the Appeals Board's recording is the official record of the proceeding. The matter was submitted on August 3, 2026.

Issues

1. Did Employer fail to ensure its employees were trained in first aid and CPR within 90 days of their hiring dates?

2. Did Employer fail to ensure that Rios used a conventional notch, open-faced notch, or Humboldt notch when felling a tree which was 25 inches in diameter?

3. Did Employer fail to ensure that Rios' back cut did not penetrate the predetermined hinge area when he felled the tree?

4. Did Employer fail to ensure the brush crew's duties were organized so that Rios' actions did not create a hazard for any other workers?

5. Did Employer fail to ensure that all non-involved personnel were safely out of range before the tree fell?

6. Did Employer establish that it was not responsible for the violations based on the Unforeseeable Employee Action Defense?

7. Did the Division establish a rebuttable presumption that Citations 2 through 5 were properly classified as Serious?

8. Did Employer rebut the presumption that Citations 2 through 5 were properly classified as 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?

9. Did the Division establish that Citation 5 was properly characterized as Accident-Related?

10. Were the proposed penalties for Citations 1 through 5 reasonable?

Findings of Fact[4]

1. As of the date of the incident, Employee Jorge Castillo Enriquez (Jorge) had worked for Employer for over 90 days.

2. Jorge was not trained in first aid and CPR within 90 days of his hiring date.

3. On October 21, 2022, (the date of the incident) Employer assigned four of its brush crew to the jobsite to cut brush and clear debris from the right of way.

4. The brush crew, including Rios, was not trained to cut trees and it was not their job to cut trees.

5. The brush crew was trained to cut branches up to four inches in diameter.

6. On the date of the incident, the brush crew's job was to clear the brush and debris from the right of way near the transmission lines.

7. Another crew was assigned to fell trees after the brush crew had cleared the brush and debris.

8. Rios was the foreman of the brush crew and was performing the duties of a supervisor.

9. Rios directed the brush crew to cut a Douglas Fir tree (the tree) which was 113 feet tall and 25 inches in diameter.

10. Rios used a box notch cut to cut the tree.

11. When cutting the tree, Rios's back cut penetrated the predetermined hinge area, and there was insufficient holding wood for the workers to safely guide the tree to fall uphill, as they had intended.

12. Jorge was not involved in felling the tree.

13. The safe distance for Jorge to stand was at least 113 feet away from where the 113-foot-tall tree was being felled.

[4] Findings of Fact No. 2, 5, 7, 14, and 15 were stipulations by the parties in Exhibit J-5.

14. Rios directed Jorge to stand approximately 40 feet away from where Rios was cutting the tree.

15. Jorge suffered a serious injury when he was hit by the tree that Rios felled.

16. The proposed civil penalties were calculated in accordance with the applicable provisions of the Labor Code and Title 8 of the California Code of Regulations.

Analysis

1. Did Employer fail to ensure its employees were trained in first aid and CPR within 90 days of their hiring dates?

Section 3421, subdivision (m), provides, in relevant part:

> The employer shall provide training in first aid and cardiopulmonary resuscitation (CPR). […] All new employees shall be trained in first aid and CPR within 90 days of their hiring dates. [„„]

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, 11/8/23, the Employer failed to ensure Employees were trained in first aid and CPR within 90 days of their hiring dates.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc*., Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted 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. (*Nolte Sheet Metal, Inc*., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

Lapp requested that Employer provide the first aid and CPR training certifications for the four employees in the brush crew. Employer provided Lapp with training certifications for three of the employees, but did not provide one for Jorge.

Evidence Code section 413 states:

> In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

Here, Lapp's testimony was that Jorge did not receive first aid and CPR training and that he had worked for Employer for longer than 90 days. No facts or evidence were presented to contradict Lapp's testimony.

Accordingly, the Division established that Employer failed to ensure that Jorge was trained in first aid and CPR within 90 days of his hiring date. Citation 1, Item 1, is affirmed.

2. Did Employer fail to ensure that Rios used a conventional notch, open-faced notch, or Humboldt notch when felling a tree which was 25 inches in diameter?

Section 3427, subdivision (c)(3)(B), provides:

> (c) Felling.
>
> > (3) A notch and back cut shall be used to establish a hinge when felling trees over 5 inches in diameter.
> >
> > […]
> >
> > > (B) The notch cut used shall be a conventional notch, an open-faced notch, or a Humboldt notch as defined in Section 3420(b).

In Citation 2, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, 10/21/2022, the Employer failed to ensure an Employee felling a 25 inch in diameter Douglas Fir used a conventional notch, an open-faced notch or a Humboldt notch as defined in Section 3420(b).

On October 21, 2022, Jorge was working on a four-person brush crew clearing brush and debris in the area along the SMUD Jay Bird Powerhouse to Camino Powerhouse in Pollock Pines, California (worksite). Jorge's brother Sergio Castillo Enriquez (Sergio) also worked on the same brush crew as Jorge, along with Rios and Ayden Bruscino (Bruscino). Rios was the general foreman on the crew.

The parties stipulated that the felled tree was 25 inches in diameter and 113 feet tall. Since the tree was more than five inches in diameter, the three notch cuts that should have been used to cut the tree were a conventional notch, an open-faced notch, or a Humboldt notch.[5] Rios and other witnesses testified that Rios used a box cut to fell the tree rather than one of the three approved notch cuts. The parties also stipulated to the violation of the regulation for Citation 2, subject to Employer's defenses.[6]

Accordingly, it is found that Employer failed to ensure that Rios used a conventional notch, open-faced notch, or Humboldt notch when felling a tree which was over five inches in diameter. The violation asserted in Citation 2 is established.

3. Did Employer fail to ensure that Rios' back cut did not penetrate the predetermined hinge area when he felled the tree?

Section 3427, subdivision (c)(3)(D), provides:

> (c) Felling.
> […]
>
> (3) A notch and back cut shall be used to establish a hinge when felling trees over 5 inches in diameter.
> […]
>
> (D) The back cut shall not penetrate into the predetermined hinge area.

In Citation 3, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, 10/21/22, the Employer failed to ensure an Employees [sic] back cut did not penetrate the predetermined hinge area as he was felling a 25 inch in diameter Douglas Fir.

Uncontroverted testimonial and photo evidence presented by Lapp at the hearing indicated that Rios' back cut penetrated the predetermined hinge area, leaving almost no holding wood to stabilize the tree. Consequently, instead of falling uphill as the brush crew intended, the tree fell

[5] The three types of notch cuts are defined in section 3420, subdivision (b).
[6] The stipulations were read into the record on August 5, 2025, and admitted into the record as items 8, 9 and 11 in Exhibit J-5.

uncontrollably downhill. The parties stipulated to the violation of the regulation for Citation 3, subject to Employer's defenses.

Accordingly, it is found that the violation asserted in Citation 3 is established because Rios's back cut penetrated the predetermined hinge area.

4. Did Employer fail to ensure the brush crew's duties were organized so that Rios' actions did not create a hazard for any other workers?

Section 3427, subdivision (b)(2), provides:

> (b) Pruning, Trimming and Tree Removal Operations.
> […]
>
> (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.

In Citation 4, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, 10/21/2022, the Employer failed to ensure the duties were so organized so that the actions of one employee did not create a hazard for any other workers.

The brush crew was neither trained nor assigned to cut trees. They were assigned to clear brush and debris. Initially, Rios assigned Jorge to help Rios in felling the tree. Later, Rios determined he did not need Jorge to assist in felling the tree. Rios told Jorge to stand approximately 40 feet away from where Rios was cutting the tree. Jorge complied with Rios' directive. The other members of the brush crew were standing approximately three hundred feet away, uphill, holding the lines that were placed around the tree.

Lapp testified that the safe distance is at least the length of the tree, which was 113 feet tall. Jorge was not directly involved in the removal operation and was required to be positioned in the safe distance, outside of the drop zone, 113 feet away from the tree. Rios' actions of felling the

113-foot tree, the involvement of the brush crew in assisting to fell the tree, and Jorge standing within the drop zone, created a hazard for everyone in the brush crew.

Accordingly, it is found that Employer failed to ensure that the brush crew's duties were organized so that Rios' actions did not create a hazard for the other workers in the brush crew. The violation set forth in Citation 4 is established.

5. Did Employer fail to ensure that all non-involved personnel were safely out of range before the tree fell?

Section 3427, subdivision (c)(4), provides:

> (c) Felling.
> […]
>
> (4) Just before the tree or trunk is ready to fall, an audible warning shall be given to those in the area. […] All non-involved personnel in the vicinity shall be safely out of range before the tree or trunk falls.

In Citation 5, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, 10/21/2022, the Employer failed to ensure that during felling a 25 inch diameter Douglas Fir all non-involved personnel were safely out of range before the tree fell.

Rios testified that, since it was the only tree standing at the location, he wanted to cut down the tree because he did not want to wait for the tree cutting crew to cut the tree before the brush crew returned to the location to clear the remnants of the tree. Rios told Jorge to move 40 feet away from where he was cutting the tree.

Lapp testified that the safe distance to be from a tree is equal to the height of the tree. The tree was 113 feet tall. Therefore, Jorge should have been at least 113 feet from the tree before it was felled.

Accordingly, it is found that Employer failed to ensure that all non-involved personnel were safely out of range before the tree fell. The Division established the violation set forth in Citation 5.

6. Did Employer establish that it was not responsible for the violations based on the Unforeseeable Employee Action Defense?

The judicially-created affirmative defense that allows an employer to avoid liability for a violation based on an unforeseeable act by its employee was first established in *Newbery Electric Corporation v. Occupational Safety and Health Appeals Board* (1981) 123 Cal.App.3d 641. In order to successfully assert the *Newbery* defense, an employer must prove that none of the following four criteria exist:

(1) the employer knew or should have known of the potential danger to employees;
(2) the employer failed to exercise supervision adequate to assure safety;
(3) the employer failed to ensure employee compliance with its safety rules; and
(4) the violation was foreseeable.

(*Gaewhiler v. Occupational Safety and Health Appeals Board* (1983) 141 Cal.App.3d 1041, 1045.)

This defense is not available to an employer if the employee involved in the violation was a supervisor. (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) The Appeals Board has previously considered this issue and denied the *Newbery* defense when a supervisor committed the violation. (*Hollander Home Fashions*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 13, 2012), citing *MCI Worldcom, Inc.*, Cal/OSHA App. 00-440, Decision After Reconsideration (Feb. 13, 2008) [*Newbery* defense fails since supervisor's knowledge is imputed to i].)

Rios's job was foreman of the brush crew. He directed the brush crew in their duties and activities, and the brush crew followed his orders. On the date of the incident, Rios told the brush crew that they were going to cut down the tree, and he initially directed Jorge to assist in cutting down the tree. After Rios determined that he did not need Jorge's assistance in cutting down the tree, he directed Jorge to stand 40 feet from where the tree was being felled. Jorge and the brush crew complied with Rios' instructions. There was no evidence supporting a finding that Rios was not a supervisor. Accordingly, the affirmative defense is not available.

7. Did the Division establish a rebuttable presumption that Citations 2 through 5 were properly classified as Serious?

Labor Code section 6432, subdivision (a), provides, in relevant part:

(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 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.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) "Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, "inpatient hospitalization for purposes other than medical observation." (Lab. Code §6432, subd. (e).)

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.

Lapp testified that he is current on his Division-mandated training. Lapp testified that there is a realistic possibility that an employee exposed to the violations could suffer broken bones, blunt force trauma, internal hemorrhaging and death as a result of the hazard created by the violation. Furthermore, the parties stipulated that Jorge suffered significant injuries which include a traumatic brain injury and various fractures, requiring inpatient hospitalization for 16 days as a result of the incident. As such, not only is there a realistic possibility of serious physical harm, but it was an actuality in this case.

Accordingly, the Division met its burden to establish a rebuttable presumption that the violations cited in Citations 2 through 5 were properly classified as Serious.

8. **Did Employer rebut the presumption that Citations 2 through 5 were properly classified as 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, in relevant part:

> (c) 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.

The violations in Citations 2 through 5 all involved Rios, the brush crew supervisor. Despite the fact that three of Rios's own supervisors directed him not to cut the tree when he asked for permission to cut it, a supervisor's knowledge of a hazard is imputed to the employer. (*Levy Premium Foodservice Limited Partnership dba Levy Restaurants*, Cal/OSHA App. 12-2714, Denial of Petition for Reconsideration (Aug. 25, 2014).)

Accordingly, Employer cannot rebut the presumption that Citations 2 through 5 were properly classified as Serious.

9. Did the Division establish that Citation 5 was properly characterized as Accident-Related?

The Appeals Board has held the Division has the burden of establishing that a citation was properly characterized as Accident-Related. In *United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018), the Appeals Board held:

> In order to sustain an accident-related classification, the Division must demonstrate a "causal nexus between the violation and the serious injury." (*Sherwood Mechanical, Inc*., Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012) [other citations omitted].) In other words, where the evidence indicates

> that a serious violation caused a serious injury the violation is properly characterized as accident-related. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb 26, 2015); *MCM Construction*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb 22, 2016).) The Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Ibid*.) But the Division need not show that the violation was the only cause of the injury. (*Ibid*.)

Citation 5 involved section 3427, subdivision (c)(4), which requires all non-involved personnel in the vicinity to be safely out of range before the tree falls. Jorge was not involved in the tree cutting and was not safely out of range when the tree fell. Due to his close proximity to the tree when it fell, he was hit by the tree and suffered serious injuries. There was a direct nexus between the violation and Jorge's serious injuries. His injuries resulted from the violation.

Accordingly, the Division established that Citation 5 was properly characterized as Accident-Related.

10. Were the proposed penalties for Citations 1 through 5 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. (*Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The parties stipulated that, if the violations are proven, the proposed civil penalties were properly calculated.

Accordingly, the proposed penalties for all of the citations are found to be reasonable.

Conclusions

For Citation 1, the Division established that Employer violated section 3421, subdivision (m). The penalty is reasonable.

For Citation 2, the Division established that Employer violated section 3427, subdivision (c)(3)(B). The citation was properly classified as Serious. The penalty is reasonable.

For Citation 3, the Division established that Employer violated section 3427, subdivision (c)(3)(D). The citation was properly classified as Serious. The penalty is reasonable.

For Citation 4, the Division established that Employer violated section 3427, subdivision (b)(2). The citation was properly classified as Serious. The penalty is reasonable.

For Citation 5, the Division established that Employer violated section 3427, subdivision (c)(4). The citation was properly classified as Serious, with an Accident-Related characterization. The penalty is reasonable.

Order

It is hereby ordered that Citation 1 is affirmed as a General violation and the penalty of $475 is assessed.

It is hereby ordered that Citation 2 is affirmed as a Serious violation and the penalty of $9,560 is assessed.

It is hereby ordered that Citation 3 is affirmed as a Serious violation and the penalty of $9,560 is assessed.

It is hereby ordered that Citation 4 is affirmed as a Serious violation and the penalty of $7,650 is assessed.

It is hereby ordered that Citation 5 is affirmed as a Serious, Accident-Related violation and the penalty of $22,500.00 is assessed.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

/s/ Weiru Wang

Dated: 09/01/2026

Weiru Wang
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.**

If no petition is filed, the penalty amount set forth in the Summary Table is due and payable 30 days after the Order or Decision is issued. If the Appeals Board approved a payment plan, all payments are due in accordance with the dates indicated in the Summary Table. If a Petition for Reconsideration is filed, no payment should be made until the final outcome of the appeal.